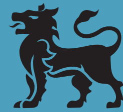
Birmingham City
School of Law



BIRMINGHAM CITY
University

# British Journal of American Legal Studies

**Volume 7 Issue 1**
Spring 2018

---

ARTICLES

Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause — *Robert G. Natelson*

Toward Natural Born Derivative Citizenship — *John Vlahoplus*

Felix Frankfurter and the Law — *Thomas Halper*

Fundamental Rights in Early American Case Law: 1789-1859 — *Nicholas P. Zinos*

The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth — *Jared Schroeder*

Acts of State, State Immunity, and Judicial Review in the United States — *Zia Akthar*

ISSN 2049-4092 (Print)

British Journal of American Legal Studies

**Editor-in-Chief:** Dr Anne Richardson Oakes, *Birmingham City University*.

**Associate Editors**
Dr. Sarah Cooper, *Birmingham City University*.
Dr. Haydn Davies, *Birmingham City University*.
Prof. Julian Killingley, *Birmingham City University*.
Prof. Jon Yorke, *Birmingham City University*.
Seth Barrett Tillman, *National University of Ireland, Maynooth.*

**Birmingham City University Student Editorial Assistants 2017-2018**
Mercedes Cooling

**Graduate Editorial Assistants 2017-2018**
Amna Nazir
Alice Storey

**Editorial Board**
Hon. Joseph A. Greenaway Jr., *Circuit Judge 3rd Circuit, U.S. Court of Appeals.*
Hon. Raymond J. McKoski, *Circuit Judge (retired), 19th Judicial Circuit Court, IL. Adjunct Professor of Law, The John Marshall Law School, Chicago, IL.*
Prof. Antonio Aunion, *University of Castille-la Mancha.*
Prof. Francine Banner, *Phoenix School of Law, AZ.*
Prof. Devon W. Carbado, *UCLA, CA.*
Dr. Damian Carney, *University of Portsmouth, UK.*
Dr. Simon Cooper, *Reader in Property Law, Oxford Brookes University.*
Prof. Randall T. Coyne, *Frank Elkouri and Edna Asper Elkouri Professor, College of Law, University of Oklahoma, Norman OK.*
Mark George QC, *Garden Court Chambers, Manchester, UK.*
Prof. Larry Hammond, *Osborne Maledon PA, Phoenix AZ.*
Prof. Carolyn Hoyle, *Professor of Criminology, University of Oxford, UK.*
Prof. James Kousouros, *CALS Visiting Professor, NY.*
Prof. Ian Loveland, *City University London, UK.*
Prof. James Maxeiner, *Center for International & Comparative Law, University of Baltimore School of Law, Baltimore, MD.*
Prof. Ruth Miller, *University of Massachusetts, Boston, MA.*
Dr. Anne-Marie O'Connell, *University Toulouse 1 Capitole.*
Prof. Austin Sarat, *William Nelson Cromwell Professor of Jurisprudence & Political Science, Amherst College, MA.*
Dr. Stephen W. Smith, *Cardiff University, UK.*
Prof. Carrie Sperling, *University of Wisconsin Law School.*
Prof. Clive Stafford Smith, *Reprieve.*
Dr. Timothy Stanley, *Rothermere American Institute, University of Oxford, UK.*
Prof. Adam N. Steinman, *Professor of Law & Frank M. Johnson Faculty Scholar, University of Alabama, Tuscaloosa, AL.*
Prof. Russell Wheeler, *The Brookings Institution, Washington DC.*

School
of Law

BIRMINGHAM CITY
University

# British Journal of American Legal Studies

Volume 7 Issue 1
*Spring 2018*

## CONTENTS

Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause
*Robert G. Natelson* .......... 1

Toward Natural Born Derivative Citizenship
*John Vlahoplus* .......... 71

Felix Frankfurter and the Law
*Thomas Halper* .......... 115

Fundamental Rights in Early American Case Law: 1789-1859
*Nicholas P. Zinos* .......... 137

The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth
*Jared Schroeder* .......... 169

Acts of State, State Immunity, and Judicial Review in the United States
*Zia Akthar* .......... 205

Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0001

DE GRUYTER OPEN

# Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause

Robert G. Natelson*

## ABSTRACT

*The Constitution's Postal Clause granted Congress power to "establish Post Offices and post Roads." This Article examines founding-era legal and historical materials to determine the original meaning and scope of the Postal Clause. It concludes that the Clause authorized Congress to pass all legislation necessary to create, operate, and regulate a unified transportation, freight, and courier system, although it also limited congressional authority in some respects. The founding-era reasons for the postal system were revenue, promotion of commerce, and political control. The Article also corrects some inaccurate claims about the Clause previously advanced by commentators.*

## KEYWORDS

*Postal Clause; Post Roads; Original Meaning U.S. Constitution; Benjamin Franklin; British Royal Post Office.*

## CONTENTS

Introduction .......... 5

A. The Anomalous Character of the Postal Clause .......... 5

B. This Article's Structure and Method .......... 6

I. Background History: The British Imperial Postage System .......... 7

A. Why British Practice is Relevant .......... 7

B. The English Beginnings .......... 8

C. Vocabulary and Operations of the British Postal System .......... 9

* Professor of Law (ret.), The University of Montana; Senior Fellow in Constitutional Jurisprudence, the Independence Institute, Denver, Colorado; Senior Fellow in Constitutional Jurisprudence, Montana Policy Institute, Bozeman, Montana. Some of the author's observations about business practices derive from his private sector experience.

The author acknowledges these individuals who helped make this article possible: Jonathan Miceli, Sturm College of Law, University of Denver (J.D. 2018), for research assistance; Virginia Dunn, Archives and Library Reference Service Manager, and Cassandra Farrell, Senior Map Archivist, both at the Library of Virginia; Professor David Kopel, Sturm College of Law, the University of Denver and Research Director of the Independence Institute, for his continued support; Dr. Anne Richardson Oakes for helpful editing and support; and Elizabeth J. Natelson, for her careful editing.

(cc) BY-NC-ND © 2018 Robert G. Natelson, published by De Gruyter Open.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

D. Purposes of the British Postal System .......................................... 14

E. The British Post Office Becomes Imperial: The Statute of 1711 ... 18

F. Motifs in the Development of the Imperial Postal System ............ 20

II. Background History: The Colonial American Postal System .......... 24

A. The American Post Office as the Successor to the British Imperial Post Office .......................................................................... 24

B. American Colonial Operations and Ben Franklin .......................... 26

C. The American Postal System in the Sunset of British Rule ........... 27

III. The Continental Post Office in the Sunrise of Independence ......... 31

A. The Vocabulary of the Continental Post Office ............................. 31

B. The Purposes of the Continental Post Office ................................ 33

C. Congress Decides to Emulate the British ...................................... 35

D. Regularizing Postal Law Under the Articles of Confederation ..... 36

E. The Woes of a State-Owned Enterprise .......................................... 38

1. Problems Inherited from the British Model ............................. 38

2. Other Problems .......................................................................... 41

IV. The Drafting of the Postal Clause .................................................. 43

A. Why Adopt a Postal Clause? ......................................................... 43

B. The Constitutional Convention ...................................................... 45

V. The Ratification Era: 1787-90 ........................................................... 47

A. Ratification-Era Evidence ............................................................. 47

B. The Ratification Debates in State Conventions and in Public ........ 47

C. Ratification-Era Proceedings in the Confederation Congress ........ 52

D. Ratification Era Proceedings in the First Federal Congress .......... 53

VI. The Original Meaning of the Postal Clause .................................... 55

A. Questions Raised ........................................................................... 55

B. What Was A “Post Road?” ............................................................ 56

C. What Did “Establish” Mean, and Did the Power to “Establish” a Postal System Include Defining and Punishing Postal Crimes? 56

D. Did the Postal Clause Permit the Post Office to Pursue Entrepreneurial Opportunities? If So, Which Ones?....57
E. Did the Clause Authorize Constructing New Roads and Facilities or Merely Designating Existing Ones?....58
F. Did the Grant of Power to Establish Post Roads Include an Incidental Grant of Eminent Domain Authority?....59
VII. Three Views Forward....65
A. Limitations Imposed by the Bill of Rights....65
B. The Federal Congress's Postal Act of 1792—and Implications for the Nondelegation Principle....66
C. The Commendable Future of Ebenezer Hazard[1]....70

[1] *Bibliographical Footnote*. Following are the sources referred to in this article more than once:

**Statutory Material and Primary Sources**

1 Annals of Cong. (1789) (Joseph Gales ed., 1834) [hereinafter Annals of Cong.]
Documentary History of the First Federal Congress of the United States of America, March 4, 1789-March 3, 1791 (Charlene Bangs Bickford, Kenneth R. Bowling, William Charles diGiacomantonio, and Helen E. Veit eds. 1972-2012) [hereinafter First Congress]
The Documentary History of the Ratification of the Constitution (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976-2013) [hereinafter Documentary History]
9 Encyclopaedia Britannica (J. Balbour & Co., 2d ed. 1778) [hereinafter Encyclopaedia Britannica]
9 English Historical Documents: American Colonial Documents to 1776 (Merrill Jensen ed. 1955) [hereinafter EHD]
Journals of the Continental Congress 1774-1789 (Government Printing Office 1904-37) [hereinafter J. Cont. Cong.]
Letters of Delegates to Congress, 1774-1789 (Library of Congress, 1976-2000), https://memory.loc.gov/ammem/amlaw/lwdglink.html [hereinafter Delegate Letters]
Records of the Federal Convention of 1787 (Max Farrand ed., 2d ed. 1937) [hereinafter Farrand]
Adam Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (C.J. Bullock ed., F.P. Collier 1909) (1776) [hereinafter Smith, Wealth]

**History, Commentary and Poetry**

Joseph M. Adelman, *"A Constitutional Conveyance of Intelligence. Public and Private": The Post Office, the Business of Printing, and the American Revolution.*, 11 Enterprise & Soc'y 711 (2010) [hereinafter *Adelman*]
William Baude, *Re-thinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738 (2013) [hereinafter *Baude*]
William Blackstone, Commentaries (1765)
Colonial and State Records of North Carolina (1895) (multiple volumes) [hereinafter N.C. Records]

6 The Life and Works of William Cowper (Robert Southey ed., Henry G. Bohn 1854) [hereinafter *Cowper*]
David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 Nw. U. L. Rev. 606 (1996) [hereinafter *Currie*]
Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 Hastings L.J. 671 (2007) [hereinafter *Desai*]
Kenneth Ellis, The Post Office in the Eighteenth Century: A Study in Administrative History (1958) [hereinafter Ellis]
Hugh Finlay, Journal Kept by Hugh Finlay (Frank H. Norton ed. 1867) (1774) [hereinafter Finlay]
J. C. Hemmeon, The History of the British Post Office (1912) [hereinafter Hemmeon]
Alexander Hamilton, James Madison & John Jay, The Federalist (George W. Carey & James McClellan eds. 2001) [hereinafter The Federalist]
Stewart H. Holbrook, The Old Post Road (1962) [hereinafter Holbrook]
Giles Jacob, Lex Constitutionis: or the Gentleman's Law (Eliz. Nutt & R. Gosling 1719) [hereinafter Jacob]
Eric Jaffe, The King's Best Highway: The Lost History of the Boston Post Road, the Route That Made America (2010) [hereinafter Jaffe]
Richard R. John, Spreading the News: The Ameican Postal System from Franklin to Morse (1995) [hereinafter John, Spreading]
Herbert A. Johnson, Imported Eighteenth-Century Law Treatises in American Libraries 1700–1799 (1978) [Johnson, Imported Treatises]
Herbert Joyce, The History of the Post Office from Its Establishment Down to 1836 (1893) [hereinafter Joyce]
Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, The Origins of the Necessary and Proper Clause (2010) [hereinafter Lawson, et al.]
D. D. T. Leech, History of the Post Office Department. 1789-1879 (1879) [hereinafter Leech]
William Lewins, Her Majesty's Mails: A History of the Post-Office, and an Industrial Account of its Present Condition (2d ed. 1865) [hereinafter Lewins]
Jerry L. Mashaw, *Recovering Administrative Law: Federalist Foundations, 1787-1801*, 15 Yale L.J. 1256 (2006) [hereinafter *Mashaw*]
Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments*," 65 Fla. L. Rev. 615 (2013) [hereinafter *Natelson, Conventions*]
Robert G. Natelson, *The Enumerated Powers of States*, 3 Nev. L.J. 469 (2003) [hereinafter *Natelson, Enumerated*]
A.M. Ogilvie, *The Rise of the English Post Office*, 3 The Econ. J. 443 (1893) [hereinafter *Ogilvie*]
George Pilcher, *Ebenezer Hazard and the Promotion of Historical Scholarship in the Early Republic*, 56 Penn. History 3 (1989) [hereinafter *Pilcher*]
Wesley Everett Rich, The History of the United States Post Office to the Year 1829 (1924) [hereinafter Rich]
Lindsay Rogers, The Postal Power of Congress: A Study in Constitutional Expansion (1915) [hereinafter Rogers]
Daniel P. Roper, The United States Post Office (1917) [hereinafter Roper]
Robert J. Shapiro, The Basis and Extent of the Monopoly Rights and Subsidies Claimed by the United States Postal Service (2015) [hereinafter Shapiro]
Howard Robinson, The British Post Office: A History (Princeton Univ. Press 1948) [hereinafter Robinson]
Robert J. Shapiro, The Basis and Extent of the Monopoly Rights and Subsidies Claimed by the United States Postal Service (2015), http://www.sonecon.com/docs/

> The Congress shall have Power . . . To establish Post Offices and post Roads.
>
> U.S. Const. art. I, § 8, cl. 7

> *socialism*, n. . . . 2. . . . A theory or system of social organization based on state or collective ownership and regulation of the means of production, distribution, and exchange for the common benefit of all members of society . . .
>
> Oxford English Dictionary (2016)

> The post office is . . . perhaps the only mercantile project which has been successfully managed by, I believe, every sort of government.
>
> Adam Smith, The Wealth of Nations (1776)[2]

## Introduction

### *A. The Anomalous Character of the Postal Clause*

In December, 1772 the British government designated Hugh Finlay, as "Surveyor [inspector] of the Post roads in the Continent of North America."[3] He was ordered to evaluate the postal system in the thirteen North American colonies south of Canada.[4]

Finlay was a diligent officer.[5] Beginning in September, 1773, he made his way from Quebec City to Falmouth, Massachusetts (now Portland, Maine), led by Indian guides, traveling through the wilderness by foot and canoe.

Falmouth was the northern terminus of the 13-colony post road. From there Finlay followed the road though Boston, Providence, New Haven and New York, and then sailed to Philadelphia, Pennsylvania and to Charles Town, South Carolina. From Charles Town he proceeded overland to the southern post road terminus at Savannah, Georgia, and thence north to Virginia.

---

studies/Study_of_USPS_Subsidies-Shapiro-Sonecon-March_25_2015.pdf [hereinafter Shapiro]

Fred Shelley, *Ebenezer Hazard: America's First Historical Editor*, 12 Wm. & Mary Q. 44 (1955) [hereinafter *Shelley*]

William Smith, *The Colonial Post-Office*, 21 Am. Hist. Rev. 258 (1916) [hereinafter *Smith*]

I.K. Steele, *Finlay, Hugh*, 5 Dictionary of Canadian Biography (1983), available at http://www.biographi.ca/en/bio/finlay_hugh_5E.html (last visited Feb. 28, 2018) [hereinafter *Steele, Finlay*]

William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972) [hereinafter *Stoebuck*]

Mary E. Wooley, *Early History of the Colonial Post Office* in Proceedings of the Rhode Island Historical Society 1892-93 (1893) [hereinafter *Wooley*]

[2] Smith, Wealth, *supra* note 2, at 469.

[3] Finlay, *supra* note 1, at 1. The formal appointment apparently was on January 5, 1773. *Steele, Finlay*, *supra* note 1.

[4] Finlay, *supra* note 1, at 1.

[5] *Steele, Finlay*, *supra* note 1 (noting "the diligence that marked his entire career").

Finlay interviewed postmasters and assessed conditions in every major city and town he visited. His journal, which is still extant,[6] reports both the strengths and deficiencies of the colonial postal service.[7] The deficiencies were many: Some local postmasters did not fully understand their jobs. Some had never submitted their accounts. Facilities were frequently poor. The mail was often late, and might be lost or damaged. Post riders disregarded instructions and accepted personal jobs that lined their pockets, but delayed their rounds. Finlay also found outright corruption, as when letter carriers extorted money from recipients for delivering items for which postage had been pre-paid.

One reason for the deficiencies may have been prolonged administrative neglect. Two postmasters general were supposed to oversee the northern half of the system, but one of the two had been Europe for nearly ten years. While largely ignoring his postal responsibilities, he served personal clients and continued to collect his postal salary. The truant's name was Benjamin Franklin.

This narrative of fault in an otherwise-revered American Founder is but one illustration of how inquiry into the Postal Clause offers unusual perspectives on the Constitution, on the framers who wrote it, and on the ratifiers who adopted it.

The Postal Clause itself is distinctive in several ways. It appears to convey two powers: establishing post offices and establishing post roads. Inquiry reveals that it created a single sweeping power: erecting and operating a national transportation, freight, and communication monopoly. Nearly all the Constitution's other enumerated powers—national defense, taxation, regulation of inter-jurisdictional commerce, protection of intellectual property, and so forth—address functions inherently governmental. Delivery of letters and parcels is not quite in the same category. As the modern history of the United Parcel Service and Federal Express demonstrate, private companies in competitive environments can provide nearly universal service.[8]

History before the founding had demonstrated serious defects in the British postal model. Nonetheless, the Founders sought to copy that model in almost all respects, along with its defects; indeed the wording of the Clause follows closely the language of certain British postal statutes. Our justly-celebrated Founders generally favored private enterprise,[9] but they opted for a government-owned postal system. They railed against monopolies, but they instituted one. They sought to learn from history, but they replicated in America the flawed British postal system.

These decisions seem dysfunctional if we think of the postal system as primarily designed to serve the general public[10] However, the "public service" rationale for the post office—as way to facilitate democracy and empower citizens—is primarily a product of the nineteenth century, not of the eighteenth. As explained below, the

---

6 Finlay, *supra* note 1.

7 *See infra* notes 220-230 and accompanying text for a description of the deficiencies.

8 Serving expensive marginal locations can create a "network advantage" that more than compensates for the additional cost of service. *Cf*. Shapiro, *supra* note 1, at 2; *Metcalf's Law*, Business Dictionary, at http://www.businessdictionary.com/definition/Metcalfe-s-Law.html (last visited Feb. 28, 2018).

9 *E.g*., The Federalist No. 24, *supra* note 1, at 121 (Alexander Hamilton); *id*. No. 34, at 164 (Alexander Hamilton) (both assuming that Americans had the goal of being "a commercial people").

10 Roper, *supra* note 1, at p. xv ("The mightiest implement of human democracy is postal service. Good postal facilities prompt and encourage the spirit and service of that world democracy which makes for the freedom and happiness of mankind.").

initial goals of the postal system were to strengthen the federal government, and those in control of the federal government.

### *B. This Article's Structure and Method*

Part I of this Article examines the prior history of the British imperial postal system, the institution from which the American post office evolved. Part II examines the North American colonial branch of the imperial post, and Part III discusses the American system between Independence and the commencement of operations under the new Constitution. Part IV addresses the debates over the Postal Clause at the Constitutional Convention, and Part V addresses the ratification debates. Part VI contains my conclusions as to the original meaning of the Clause. Part VII offers a glance ahead toward post-ratification history: the effect of the Bill of Rights on the Postal Clause, the significance of the 1792 Post Office Act (including its implications for what later became known as the "non-delegation doctrine"),[11] and the ignominious dismissal—and subsequent glory—of the last Confederation postmaster, Ebenezer Hazard.

A word about method: When discussing the original meaning of constitutional provisions, legal writers commonly enlist as evidence material arising years, even decades, after the ratification.[12] This exemplifies the methodological error of *anachronism*—or, less formally, "reading history backward." The error lies in imputing reliance by the ratifiers on events that hadn't happened yet.

This Article seeks to avoid anachronistic readings by relying almost exclusively on evidence arising before the thirteenth state, Rhode Island, ratified the Constitution on May 29, 1790. Nothing in the Part VII "glance ahead" alters conclusions reached in Part VI.

## I. Background History: The British Imperial Postage System

### *A. Why British Practice is Relevant*

British, and especially English, historical background is always useful in constitutional interpretation. For re-creating the meaning and scope of the Postal Clause, it is compelling.

In 1692, the British government appointed a postmaster general for the colonies,[13] and from that date the North American post office was a branch of the royal post.[14] The integration became complete in 1711—during the reign of Queen

---

[11] Act. of Feb. 20, 1792, ch. 7, 1 Stat. 232.

[12] *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 606-19 (2008) (relying on nineteenth-century materials in determining the public meaning of the Second Amendment); *Baude, supra* note 1, at 1751 (relying on "seventy-five years of subsequent practice and precedent" as tending to demonstrate original meaning).

[13] Joyce, *supra* note 1, at 110.

[14] Robinson, *supra* note 1, at viii ("The Post Office of the United States originated as a colonial extension of the British Post Office . . . ").

Anne—when Parliament enacted legislation "establishing a general Post Office for all Her Majesty's Dominions."[15] The North American postal system became and remained a division of a network that served England, Scotland, Wales, Ireland, the West Indies, and other parts of the British Empire.[16] The British government thus exercised far more control over the post office in the colonies than it did over most facets of colonial governance.

From 1775, when the Revolutionary War began, until 1790, when the thirteenth state ratified the Constitution, American ideas of what it meant to "establish Post Offices and post Roads"[17] remained thoroughly products of British experience. Benjamin Franklin, who more than any other individual was responsible for creating the United States post office, relied on 37 years of personal experience serving the royal post.[18] Not only did Franklin follow the British model closely, but so did Congress, the Constitution's framers, and the three postmasters general who succeeded Franklin.[19] Indeed, the very phrase "establish Post Offices and post Roads" was lifted verbatim from a British postal statute.[20]

Independence changed many things, but it did not immediately alter American ideas about the purposes and characteristics of a postal service.

### *B. The English Beginnings*

The royal post evolved from a network erected in England during the sixteenth century.[21] Its purposes were not limited to mail delivery ("the poste for the

---

15 9 Ann., c. 10 (1711). The British Statutes at Large show the measure as adopted by the parliament called into session on November 25, 1710, 4 Statutes at Large 404 & 417 (1786), but the measure did not pass the House of Lords until May 16, 1711. 19 Lords J. 298-99 (May 16, 1711).

16 Frustrated by a lack of service from the royal post, the North Carolina colonial assembly authorized a state service on a year to year basis. 5 N.C. Records, *supra* note 1, at 555 (Oct. 13, 1755); *id.* at 684 (Oct. 23, 1756); *id.* at 1101 (Dec. 23, 1758). However, the colonial assembly rejected a permanent establishment, 6 *id*. at 950 (Dec. 8, 1762), in favor of inducing the royal post to serve the colony. *E.g.*, 4 *id*. at 1341 (Apr. 10, 1752) (reporting bill to "encourage the Postmaster-General to establish a Post Office in this Province"); 6 *id.* at 1242 (Nov. 20, 1764) (reporting a bill for payment of the postmaster general if he provide service in North Carolina); 7 *id.* at 41 (May 2, 1765) (reporting speech by the lieutenant governor calling for the legislature to defray the expense for expansion of the royal post); *id.* at 54-55 (May 16, 1765) (legislative committee formed to negotiate with the postmaster general); 8 *id.* at 365 (Jan. 17, 1771) ("A Bill to encourage and support the establishment of a Post Office in this Province").
The royal post had arrived in North Carolina by January, 1771. 8 *Id.* at 430-41 (Jan. 16, 1771) (reproducing a letter from the governor noting extension of service to the state).

17 *See infra* notes 67-70 and accompanying text for subsequent use in the postal context of the term "establish."

18 Franklin became Philadelphia postmaster in 1737 and colonial postmaster in 1753. He served until his dismissal in 1774. Roper, *supra* note 1, at 26-27 & 35.

19 *Infra* Parts III & V.

20 *Infra* Part I.C.

21 Robinson, *supra* note 1, at 7-22; Lewins, *supra* note 1, at 20-21; Hemmeon, *supra* note 1, at 4-7; *Ogilvie*, *supra* note 1, at 443 (all outlining sixteenth century development)

pacquet").[22] At least as important was the transportation of persons ("the thorough [through] poste").[23] During the reign of Queen Elizabeth (1558-1603), there were six great post roads, together serving as the veins and arteries of the system.[24]

In Elizabeth's time private persons could travel over the post roads, but the message-courier service was formally closed to them. Royal agents and couriers delivered letters only on official state business. Foreigners and merchants relied on private networks.[25] Others sent correspondence however they could. If they knew a royal courier was headed in a particular direction, they might ask him to carry their own letters and packages, either for free or for pay. The government tolerated the practice unofficially,[26] since it preferred that citizens not resort to private alternatives.

Eventually officials recognized that formally opening the network to private letters and parcels might benefit the government, and during the 1630s, a postmaster general named Thomas Witherings, did so.[27] Today, Witherings is recognized as a great innovator, but at the time, some saw him as a troublemaker. He was fired as domestic postmaster in 1637 and as head of the Foreign Letter Office three years later.[28]

From being a system that no correspondent outside the government could use, the royal post became the system correspondents were required to use: After 1637, it was a mail-carrying monopoly.[29] Only if the royal post did not serve a town could

---

22 Joyce, *supra* note 1, at 5.

23 *Id.* at 5 ("But long after the public had been admitted to the free use of the post, the two objects of providing for letters and providing for travelers continued to be treated as inseparable.").

24 The initial six were (1) the Great North Road, from London to Edinburgh, the capital of Scotland, (2) its extension west from Newcastle to Carlyle, both in northern England, (3) the road from London to Plymouth, which extended west into Cornwall, (4) the road from London to Dover, by which travelers went to the continent, (5) the way from London to Milford in southern Wales, and (6) the way from London to Holyhead in northern Wales. The latter two were the principal routes to Ireland. Robinson, *supra* note 1, at 16-21.
For expansion of the postal road network in the seventeenth and eighteenth centuries, see Robinson, *supra* note 1, at 61 (as of 1675) & 104 (as of 1756). *See also* William Owen, Owen's Book of Roads 40-85 (1777) (listing towns and mileages in England, with post towns in italics); *id.* at 122-3 (listing certain post roads with mileage between posts).

25 Lewins, *supra* note 1, at 32; Hemmeon, *supra* note 1, at 6-7.

26 Robinson, *supra* note 1, at 11-12 (stating that carriage of private letters had begun, at least informally, by 1590); Joyce, *supra* note 1, at 4 ("even in the reign of Elizabeth letters other than State letters had begun to be sent to the posthouses, and that such letters, if barely recognised, were yet not excluded"); Lewins, *supra* note 1, at 34 ("During the reign of James none but the despatches of ambassadors were allowed to jostle the Government letters in the leather bags, 'lined with baize or cotton' of 'the post for the packet;' and it was not till towards the end of the reign of his unfortunate son that this post came to be used, under certain conditions, by merchants and private persons.").

27 Robinson, *id*. at. at 27-33; Lewins, *supra* note 1, at 38; Joyce, *supra* note 1, at 18; Hemmeon, *supra* note 1, at 11-18; *Ogilvie*, *supra* note 1, at 444 (all outlining Witherings' reforms). However, Blackstone gave primary credit for the then-existing system to Edmond Prideaux. 1 William Blackstone, Commentaries *311. Prideaux became postmaster general in 1644. Hemmeon, *supra* note 1, at 20.

28 Robinson, *supra* note 1, at 33 & 37; Joyce, *supra* note 1, at 21-22.

29 Lewins, *supra* note 1, at 39. Because this was a time when monopolies were seen as violating natural liberty, there apparently was some public resistance. *Id*. at 40 & 43; *Ogilvie*, *supra* note 1, at 445.

private couriers carry letters and packages to and from that town—and only from the nearest post office. Once the government established service in a place, private carriage to and from that place was banned.[30]

### *C. Vocabulary and Operations of the British Postal System*

When Elizabeth died in 1603, James VI of Scotland became James I of England as well. In 1707 the two countries submitted to a single Parliament. When speaking of the eighteenth century, therefore, it is appropriate to refer to *British* rather than English postal institutions.

The British system was based principally on a network of *great post roads* connecting major cities and towns. During the eighteenth century there were still only six, all radiating from London. The "Great North Road" extended to Edinburgh, the capital of Scotland and the hub of the Scottish post office.[31] A post road did not derive its name from the mail that traveled over it. A post road derived its name from the fact that it was punctuated by *posts*.

A *post* was a station where correspondence and packages were picked up and delivered, tired horses exchanged for fresh ones, tolls collected, and vehicles and guides hired. Either the post itself or the stretch of road between posts could be called a *stage*.[32] As the century progressed, officials increasingly supplemented the great post roads with side routes called *cross posts* or *cross stages*. They served towns located away from the principal highways.[33]

Each post was overseen by a *post-master* or *post-mistress*[34] who operated a *post office*.[35] The government might employ a local postmaster/mistress directly or contract out ("farm") the position. He or she collected tolls, operated a facility for leasing horses and carriages, and often operated an inn[36] and/or published a newspaper. Evidence of the consanguinity of posts and newspapers still survives in the names of many British and American journals: the *Daily Mail* and *Yorkshire*

---

30 9 Ann., c. 10, § 10 (1711) (imposing postage on letters sent by cross-stages once the stage is completed).

31 Joyce, *supra* note 1, at 52-53 & 117-18 (discussing the Scottish post office).

32 *Compare* Joyce, *supra* note 1, at 48 ("The post roads were then divided into sections or, as they were commonly called, stages") *with* Lewins, *supra* note 1, at 23 ("The route from London to Berwick is shown by the lists of posts (or stages)").
Robinson, *supra* note 1, uses the word in both senses. *Compare id*. at 7 ("the Master of the Posts would divide the road into stages of ten to fifteen or more miles) *with id*. at 16 ("In 1589 the stages on the road south from Berwick were Berwick, Belford, Alnwick" [and so on, listing stations]).

33 *Id.* at 65, defines *cross post* as a route "between post towns on different main roads," but that could be true only of Britain, because in America there was only one main post road. Routing determined whether correspondence was classified as "London letters, country letters, bye or way letters, and cross-post letters." Joyce, *supra* note 1, at 147. The 1711 statute used the term *cross stage*. 9 Ann., c. 10, § 10 (1711).

34 A significant number of women were so employed. Joyce, *supra* note 1, at 146 (referring to the postmistress at St. Columb); 159 (referring to the postmistress at Ferrybridge) & 161 (referring to the postmistress of Lancaster).

35 In 1788 there were 608 post offices in England. Joyce, *supra* note 1, at 254.

36 Lewins, *supra* note 1, at 73 & 141; Joyce, *supra* note 1, at 52.

*Post* in England, for example; and the *Charleston (S.C.) Gazette-Mail* and the *Washington Post* in America.

Riders picked up and delivered letters and parcels on a (supposedly) regular schedule. An ad hoc rider for delivering a particular letter or package was called an *express*.[37] Today we associate the word "express" with speed, but originally the term referred only to the ad hoc nature of the delivery.[38]

Any traveler using a post road—whether an official courier or a private individual—was said to *ride post*.[39] In the most popular English-language poem of the 1780s,[40] *The Diverting History of John Gilpin*, William Cowper described how Gilpin lost control of his horse, which tore along the post road from London to points north. Gilpin's wife watched helplessly, as she saw

> "Her husband posting down
> Into the country far away."[41]

A courier on horseback was called a *post rider*, a *post boy*[42] (although most were full-grown men),[43] or simply a *post*.[44] Grammatically, the noun *post* in the expression "post haste" is in the vocative case: The sender wrote the expression on the outside of a letter to communicate to the post (rider) the need to deliver the letter quickly.[45] Post riders had bad reputations for drinking, delays, and corruption,[46] so if the sender was a person of sufficient importance, he might include a threat: "Haste, post, haste—for your life!"[47]

The post boy carried letters in a chest called a portmanteau[48] or *portmantle*,[49] with the letters for each location collected in a bag. The bag was called a *mail*. This word did not, as today, serve as a synonym for letters in general. To say that

---

37 Joyce, *supra* note 1, at 63.

38 Sometimes a mail coach could outpace an express. Joyce, *supra* note 1, at 233.

39 *E.g.*, 9 Ann., c. 10 (1711), § 14 (using the term).

40 John D. Baird, *Cowper, William (1731-1800), poet and letter-writer*, Oxford Dictionary of Nat'l Biography (2004-16) (identifying *John Gilpin* as "the most popular poem of the decade"), *available at* http://www.oxforddnb.com.weblib.lib.umt.edu:8080/view/article/6513?docPos=5.

41 *Cowper, supra* note 1, at 194.

42 5 Geo. 3, c. 25 (1765), §§ 20 & 21 (using the term "post boy" to refer to a rider).

43 Lewins, *supra* note 1, at 65.

44 Giles Jacob, A New Law-Dictionary (10th ed. 1782) (unpaginated) (defining "post" as "A swift or speedy messenger to carry letters, &c."); Encyclopaedia Britannica, *supra* note 1, at 6441 (defining "post" as "a courier or letter-carrier; or one who frequently changes horses, posted or placed on the road, for quicker dispatch.").

45 Joyce, *supra* note 1, at 19-20.

46 Robinson, *supra* note 1, at 131 (describing post boys as idle and likely in league with mail robbers). *See also* Lewins, *supra* note 1, at 65 & 109 n.1 ("Some of these postboys were sad rogues, who took advantage of the confusion in the two posts in order to do business on their own account, carrying letters concealed upon them, of course for charges quite unorthodox."); Joyce, *supra* note 1, at 140 (describing systemic corruption, including but not limited to post boys).

47 Robinson, *supra* note 1, at 20 n.18 (setting forth examples of "post haste" endorsements).

48 John, Spreading, *supra* note 1, at 32 (using the term "portmanteau").

49 Joyce, *supra* note 1, at 16 (using the term "portmantle").

arrangements were made "for the transportation of the several mails"[50] was to say arrangements were made for delivering the various bags of letters and parcels. Generally each mail was destined for a different location.

In his long poem *The Task*, Cowper portrayed a post boy trudging his way, blowing his post horn upon arrival, and his indifference to the content of the letters he carried:

> Hark! 'tis the twanging horn o'er yonder bridge,
> That with its wearisome but needful length
> Bestrides the wintry flood, in which the moon
> Sees her unwrinkled face reflected bright;—
> He comes, the herald of a noisy world,
> With spatter'd boots, strapp'd waist, and frozen locks;
> News from all nations lumbering at his back.
> True to his charge, the close-pack'd load behind,
> Yet, careless what he brings, his one concern
> Is to conduct it to the destined inn,
> And, having dropp'd the expected bag, pass on.
> He whistles as he goes, light-hearted wretch,
> Cold and yet cheerful: messenger of grief
> Perhaps to thousands, and of joy to some;
> To him indifferent whether grief or joy.[51]

After 1660, and particularly in the eighteenth century, transport in horse-drawn coaches was increasingly available.[52] *Stage coaches* or *post coaches* traveled the post roads from stage to stage.[53] The *post-chaise* was a lighter vehicle for post-road travel, and a *stage wagon* was a heavy vehicle for conveying merchandise.[54] For service overseas or between British ports, the government commissioned a fleet of *packet boats*.[55]

The chief executive of the entire system was the *postmaster general*—the adjective "general" meaning "national" as opposed to "local," as in "general

---

50 *E.g.*, 28 J. Cont. Cong., *supra* note 1, at 289 (Jun. 30, 1785). *See also* 29 J. Cont. Cong., *supra* note 1, at 525 (Jul. 12, 1785) ("for the transportation of the mails in stage carriages").

51 These lines proceed:

> Houses in ashes, and the fall of stocks,
> Births, deaths, and marriages, epistles wet
> With tears, that trickled down the writer's cheeks
> Fast as the periods from his fluent quill,
> Or charged with amorous sighs of absent swains,
> Or nymphs responsive, equally affect
> His horse and him, unconscious of them all.

*Cowper, supra* note 1, at 75-76 (*The Task*: Book IV, The Winter Evening, lines 1-22).

52 Robinson, *supra* note 1, at 68. A kind of stage coach first appeared in London about 1608. Lewins, *supra* note 1, at 74.

53 Joyce, *supra* note 1, at 214.

54 Lewins, *supra* note 1, at 77.

55 9 Ann., c. 10, § 9 (1711); Lewins, *supra* note 1, at 94-96; Joyce, *supra* note 1, at 72-109 & 246-49 (describing the packet service).

welfare"[56] and "general convention."[57] There were two postmasters general for the Empire,[58] and they exercised authority jointly.[59] They "divided their patronage, nominating to vacancies during alternate months, sharing new places, and signing together all appointments."[60] Working below them were the "clerks of the road,"[61] one deputy postmaster for the American and West Indian colonies from the Carolinas southward, and two deputies for the American colonies from Virginia northward. When Hugh Finlay made his survey in 1773 and 1774, Franklin was one of the latter.

The post road's status as an intercity highway dotted with stations for lodging, eating, renting, and refueling rendered it the founding-era analogue to the modern interstate highway. In Britain, however, the transportation component of the royal post enjoyed monopoly privileges absent from modern interstate highways. For many years it was illegal to rent a horse or carriage for use on a British post road from anyone but the local postmaster or postmistress. Only if he or she could not provide a horse or carriage within a half hour of demand was the traveler free to make his own arrangements.[62] Moreover when renting a horse or vehicle, travelers were required to hire a postal guide.[63]

The monopoly was weakened in 1749 when certain chaises and calashes, both light vehicles, were exempted from the rental restrictions.[64] The monopoly was entirely abolished in 1779, when it was replaced by an expansion of turnpike tolls and licensing.[65]

Thus in 1782, Cowper's John Gilpin was permitted to ride onto the post road mounted on a horse borrowed from a friend rather than leased from the postmaster. Gilpin also avoided paying tolls, because his appearance—dashing at break-neck speed with stoneware bottles flying from his belt—caused the toll gate keepers to think he was running a race:

> Away went Gilpin—who but he?
> His fame soon spread around;
> "He carries weight! He rides a race!"
> "'Tis for a thousand pound!"
> And still, as fast as he drew near,

---

56 *E.g.*, U.S. Const., art. I, § 8, cl. 1.("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare").

57 *Natelson, Conventions, supra* note 1, at 629.

58 Robinson, *supra* note 1, at 78.

59 Ellis, *supra* note 1, at 16.

60 *Id*. at 18.

61 Joyce, *supra* note 1, at 47. By 1700, there were eight clerks of the roads, but still only six great post roads. Hemmeon, *supra* note 1, at 27

62 Joyce, *supra* note 1, at 130-31; 9 Ann., c. 10 (1711), § 20.

63 When the traveler reached a stage and hired new horses, the guide took the horses back to the stage whence they had come. Joyce, *supra* note 1, at 30. Under the 1711 statute, the charge for a horse was three pence per mile and the charge for the guide was four pence per stage. *Id.* at 130; 9 Ann., c. 10 (1711), § 14. *See also* Robinson, *supra* note 1, at 23 & 48-49 (describing the transportation monopoly).

64 22 Geo. 2, c. 25 (1749).

65 19 Geo. 3, c. 51 (1779); 20 Geo. 3, c. 51 (1780).

> ’Twas wonderful to view,
> How in a trice the turnpike-men
> Their gates wide open threw.[66]

Thus, by the eighteenth century the royal post was an elaborate carriage and transportation institution. The verb usually employed for erecting such an institution was to *establish.* The dictionary said that *establish* denoted “[t]o settle firmly, to fix unalterably; to found, to build firmly, to fix immovably; to make settlement of any inheritance.”[67] To “establish” a postal network meant to create the entire apparatus, including a complete set of rules for initiating and operating it.[68] When Parliament decided to expand postal services for the first time to the Isle of Man, it granted the postmaster general the authority to create the island’s system from the ground up by empowering him “to establish Post Offices and Post Roads.”[69] In other contexts, the word “establish” could be used for instituting particular ingredients of an existing system, such as posts, packets, and roads.[70]

### *D. Purposes of the British Postal System*

Today we think of the British and American post offices as primarily public service institutions and as networks for popular distribution of information. The eighteenth century records disclose some evidence of that mode of thought, particularly among printers campaigning for free or reduced-cost newspaper carriage.[71] This was not, however, the prevailing rationale for the post office until the nineteenth century.[72] Its original rationale was to provide a network for travelers and couriers on official business. Government officials soon perceived a need for more: “From the start government was obsessed by the desire to monopolize and control and even limit the communication of the people,” writes postal historian Howard Robinson.[73] Kenneth Ellis, another postal historian, adds:

> Throughout the eighteenth century the Post Office circulated propaganda distributed by Country Deputies [i.e., MPs] . . . . Propaganda consisted

---

66 *Cowper, supra* note 1, at 191.

67 Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789) (unpaginated) (defining “establish”). The definitions in other dictionaries were similar, *e.g.*, Samuel Johnson, A Dictionary of the English Language (8th ed. 1786) (unpaginated) (listing seven definitions, including “To settle firmly; to fix unalterably”); Nathan Bailey, A Universal Etymological English Dictionary (25th ed. 1783) (unpaginated) (“to make stable, firm and sure, to fix or settle”).

68 *E.g.*, 9 Ann., c. 10 (1711) (referring to comprehensive creation and regulation of a postal system as “establishing” it); 4 Geo. 2, c. 33 (1731) (referring to the “Establishment” of the penny post).

69 7 Geo. 3, c. 50 (1767), § 5.

70 *E.g.*, Preambl., 9 Ann., c. 10 (1711) (referring to the establishment of individual posts); *id.* § 5 (referring to post roads “settled and established”); 7 Geo. 3, c. 50 (1767), § 4 (“establish a packet boat”).

71 *Infra* Part V.B.

72 *See generally* John, Spreading, *supra* note 1 (focusing on the “public service” theme).

73 Robinson, *supra* note 1, at vii.

> of Proclamations, prayers, and notices usually sent as State's Franks, and Gazettes, newspapers, and pamphlets, as Newspaper Franks . . . [W]ith the expansion of the government press in the early eighteenth century, its value greatly increased. Pamphlets, then the best propaganda, were frequently delivered at the office on the government's orders for free distribution by Country Deputies, Customs and Excise officers. Subsidized newspapers, known as Pension Papers, were also circulated to meet the growing demand of gentry, innkeepers, and provincial editors.[74]

The postal system enabled officials to collect as well as distribute communications. By having the post send newspapers to them, officials could monitor activities throughout the country.[75] The monopoly on letting horses on post roads, together with official records of who was renting what to go whither, facilitated government oversight of travelers.[76] The monopoly on transmitting correspondence assured that officials could choose to open almost any letter sent from, to, or within Great Britain.[77]

The practice of letter opening diminished somewhat after the accession of William and Mary in 1689,[78] but it did not stop. Some of it was legal: The 1711 postal statute explicitly permitted some letter-opening.[79] Most of it was illegal.[80] Targets included the mail of foreign diplomats, hired Hessian soldiers,[81] and other inhabitants of foreign countries and of Scotland and Ireland. Professor J.C. Hemmeon observes:

---

74 Ellis, *supra* note 1, at 47-48.

75 *Id.* at 61; Robinson, *supra* note 1, at 120; Joyce, *supra* note 1, at 7 ("[I]t is a fact beyond all question that the posts in their infancy were regarded and largely employed as an instrument of police. It was not until the reign of William the Third that they began to assume their present shape of a mere channel for the transmission of letters.").

76 Joyce, *supra* note 1, at 6-7 ("no letter and, except along the bye-roads where posts did not exist, no traveller [*sic*] could pass between one part of the kingdom and another without coming under the observation of the Government.").

77 On monopoly status as facilitating surveillance, see also *Ogilvie*, *supra* note 1, at 444.

78 Robinson, *supra* note 1, at 45 (stating that during the seventeenth century, "[s]uspected letters were constantly opened."); *id.* at 54 (discussing a "device for the expert opening and resealing of letters); Hemmeon, *supra* note 1, at 21 (discussing the opening of letters under the Commonwealth [1649-60]). *See also id.* at 47:

> We find very few complaints about the opening of letters during the second half of the eighteenth century. On the other hand it must be confessed that letters were at times opened and searched merely to learn the beliefs and plans of political opponents.

However, Professor Ellis' findings tend to show the level of spying in the late eighteenth century was greater than Hemmeon suggests. *Infra* notes 80 & 83-86 and accompanying text.

79 9 Ann., c. 10 (1711), § 40 (authorization for opening mail by warrant of one of the principal secretaries of state).

80 Ellis, *supra* note 1, at 60-76.

81 Rodney Atwood, The Hessians: Mercenaries from Hessen-Kassel in the American Revolution 53 (1980) ("[A]ll Hessian personnel were allowed to send letters home without charge provided they were marked 'Bureau General des Postes à London'. This gave the British an opportunity to spy on the mail and check the morale of their auxiliaries."). *See also id*. at 110.

> [T]he early English postal System was mainly political in its aims. The great post roads were important from a political rather than an economic standpoint. It was necessary to keep in close touch with Scotland because the Scotch would always stand watching. The wild Irish needed a strong hand and it was expedient that English statesmen should be well acquainted with things Irish. The post to and from the continent was quite as necessary to keep them informed of French and Spanish politics.[82]

Other targets were Englishmen whom those in power thought "stood watching." Royal governors in the colonies routinely opened letters coming into their territory.[83] Private letters to and from political opponents of current cabinet ministers were frequently inspected.[84] A secret government department—although not actually part of the post office—was devoted to this activity.[85] The functionaries in the office were experts in covering up their work:

> Security depended on technical skill, restricted knowledge, loyalty, and the absence of parliamentary criticism. As regards the first, a high level of efficiency was maintained, especially in the case of diplomatic correspondence, the seals being carefully engraved, special wax procured, and opening and closing done without trace. Neither time nor trouble were spared, three hours being regularly spent on the King of Prussia's dispatches in mid-century.[86]

Despite the care taken, many people knew, or suspected, that letter-opening was common. Members of Parliament knew.[87] So did other well-connected figures, many of them victims of surveillance.[88] The list of persons spied upon during the eighteenth century reads like a "Who's Who" of distinguished persons[89]—Benjamin

---

[82] Hemmeon, *supra* note 1, at 97-98.

[83] Ellis, *supra* note 1, at 64.

[84] *Id.* at 71-72.

[85] Robinson, *supra* note 1, at 121-25; Ellis, *supra* note 1, at 67. *See also* Betty Kemp, *Review of Kenneth Ellis, The Post Office in the Eighteenth Century*, 73 Eng. Hist. Rev. 726, 727 (1958) (pointing out that the secret office was not part of the postal department).

[86] Ellis, *supra* note 1, at 75-76.

[87] Joyce, *supra* note 1, at 170-71:

> As early as 1735 members of Parliament had begun to complain that their letters bore evident signs of having been opened at the Post Office . . . .but it was not until six years later . . . that the state of the case became fully known. It then transpired that in the Post Office there was a private office, an office independent of the postmasters general and under the immediate direction of the Secretary of State, which was expressly maintained for the purpose of opening and inspecting letters. It was pretended, indeed, that these operations were confined to foreign letters, but as a matter of fact, there was no such restriction. . . . It was in June 1742 that these shameful facts became known, through the report of a committee of the House of Commons . . . .

[88] *Adelman*, *supra* note 1, at 737 ("Whig leaders had first-hand evidence that their letters were not secure").

[89] Ellis, *supra* note 1, at 72, lists, among others, Viscount Bolingbroke, a noted Tory leader and theorist; Sir William Pulteney, a wealthy landowner, lawyer and politician; John

Franklin among them.[90] Thus, the need for surveillance was a second reason for operating the postal system.

The third reason was revenue,[91] for which monopoly status heightened the value.[92] The government collected money from postage on letters and packages (usually paid by recipients rather than senders),[93] tolls paid at turnpike stations,[94] proceeds from renting horses and vehicles,[95] and fees for postal guides. The fourth purpose—one frequently mentioned in British postal statutes[96]—was to assist trade and commerce.[97]

The relative importance of these four motivations varied over time. Transaction of official business always remained significant, as did revenue.[98] During the eighteenth century the system's propaganda role declined,[99] but its surveillance role remained crucial.[100] With the expansion of commerce, the benefits for trade became weightier.

---

Carteret, Lord President of the Privy Council; cleric and author William Temple; John Wilkes, Mayor of London and controversial parliamentarian; Lord Rockingham, who, among much other service, became prime minister; the Earl of Shelburne, also prime minister for a time; and Charles James Fox, one of the greatest Whig political figures of the century.

90 Robinson, *supra* note 1, at 124. Jonathan Swift (dean of St. Patrick's Cathedral in Dublin, and author of *Gulliver's Travels*) also was aware that his mail was opened, and offered a characteristically humorous response. Robinson, *supra* note 1, at 123.

91 Encyclopaedia Britannica, *supra* note 1, at 6442 ("The duty for the carriage of letters by post in Britain, forms a branch of the Revenue."); 1 William Blackstone, Commentaries *311-312 ("Another very considerable branch of the revenue is . . . the post-office, or duty for the carriage of letters."); Ellis, *supra* note 1, at 2 & 38-39 (describing the postal system as a source of revenue). *See also* Roper, *supra* note 1, at 11:

> From this time [1708] until the opening of the first English railways and the postal reforms of Roland Hill, the British post office was deliberately used by the Government as a means of taxation, with little or no regard for the advantages to be gained by facilitating correspondence among the people.

92 W.T. Laprade, *Book Review: Kenneth Ellis*, The Post Office in the Eighteenth Century, 16 Wm. & Mary Q. 147, 147-48 (1959) (describing monopoly status as increasing revenue).

93 Ellis, *supra* note 1, at 38.

94 Robinson, *supra* note 1, at 62 (reporting that "the first of a long series of turnpike acts was passed in 1663").

95 Post horse rental apparently represented a significant part of the revenue. Lewins, *supra* note 1, at 48; Joyce, *supra* note 1, at 52.

96 *E.g.*, *Ogilvie*, *supra* note 1, at 446 (quoting from the preamble for the 1660 statute); 9 Ann., c. 10 (1711), § 27 ("and that the People of these Kingdoms may have their Intercourse of Commerce and Trade the better maintained") & § 40 (reciting the damage to "Trade, Commerce, and Correspondence" from mail tampering); 5 Geo. 3, c. 25 (1765), § 6 (citing "the Conveniency of Trade and Commerce"); 7 Geo. 3, c. 50 (1767), preamb. & § 4 (reciting the importance of trade and commerce).

97 Jacob, *supra* note 1, at 253 ("the Post is of the greatest Consequence in Point of Advice and Intelligence; without which, Trade and Commerce . . . could not in any Degree be rendered so flourishing").

98 *Ogilvie*, *supra* note 1, at 451 & 453 (providing charts with eighteenth century and early nineteenth century revenue amounts).

99 Ellis, *supra* note 1, at 59.

100 *Id.* at 60-77.

Late in the eighteenth century, some Englishmen began to see the postal system as an agent of public service.[101] This view was encouraged by the free and low cost delivery of newspapers and by the decision in *Smith v. Powdich*,[102] in which the court of King's Bench ruled that local postmasters must deliver letters to the residences to which they were addressed, rather than merely holding them at the post office for delivery.[103] One writer claims that *Powdich* "in the most deliberate and solemn manner had affirmed this principle . . . that the Post Office was to wait upon the people, and not the people upon the Post Office."[104] There is little evidence, however, that this opinion was widespread among the people who mattered.

### *E. The British Post Office Becomes Imperial: The Statute of 1711*

The English Parliament adopted comprehensive postal legislation in 1657[105] and 1660,[106] but both enactments suffered from legal irregularities. The 1657 act was passed during the time of Oliver Cromwell, "the usurper." The 1660 act was passed not by Parliament, but by the "Convention Parliament," which had met without royal sanction.[107] Moreover, those laws applied only to England. In 1707, England and Scotland became the United Kingdom of Great Britain, and the United Kingdom ruled a large overseas empire. Postal legislation was due for an overhaul.[108]

The overhaul came in 1711, during the reign of Queen Anne, in the form of a statute entitled "an Act for establishing a General Post-Office for all Her Majesty's Dominions, and for settling a Weekly Sum out of the Revenues thereof, for the Service of the War, and other Her [*sic*] Majesty's Occasions."[109] This measure served as the foundation of the imperial postal service for over a century.[110]

It was adopted at the behest of William Lowndes, the secretary of the treasury,[111] and as its title suggests it was primarily a revenue measure.[112] The text disclosed the secondary goal of facilitating "Trade and Commerce."[113] As the title further indicated,

---

101 *Cf.* Ellis, *supra* note 1, at 59.
102 (K.B. 1774) 1 Cowp. 182, 98 Eng. Rep. 1033.
103 Joyce, *supra* note 1, at 198-202 & Hemmeon, *supra* note 1, at 39 (discussing the case).
104 Joyce, *supra* note 1, at 202.
105 Robinson, *supra* note 1, at 46; Hemmeon, *supra* note 1, at 23-24, 138 & 195; Joyce, *supra* note 1, at 27-28; Lewins, *supra* note 1, at 45-46.
106 Robinson, *supra* note 1, at 48; Lewins, *supra* note 1, at 47; Hemmeon, *supra* note 1, at 25; Joyce, *supra* note 1, at 27-28.
107 This was the first occasion in the Anglo-American political practice of resorting to conventions as substitutes for legislatures. *Natelson, Conventions, supra* note 1, at 264.
108 Joyce, *supra* note 1, at 117-27 (describing the conditions promoting the 1711 statute); Robinson, *supra* note 1, at 95-96 (same, in a more abbreviated treatment).
109 9 Ann., c. 10 (1711).
110 Robinson, *supra* note 1, at 98.
111 Ellis, *supra* note 1, at 7.
112 Robinson, *supra* note 1, at 95; 9 Ann., c. 10 (1711), § 2 ("and the Revenue arising by the said Office better improved").
113 9 Ann., c. 10 (1711), § 10. *See also id.* § 13 (exempting certain merchants' papers from postage); § 15 (imposing rules on ship masters to protect "Merchants and others"); § 27 ("and that the People of these Kingdoms may have their Intercourse of Commerce and Trade the better maintained"); § 40 (reciting the damage to "Trade, Commerce, and Correspondence" from mail tampering).

the measure applied to the entire empire, including British North America.[114] In addition to specifying disposition of post office revenue, the 1711 act—

- authorized chief letter offices in Edinburgh, Dublin, and New York,[115] and granted the postmaster general authority to constitute certain other offices and appoint personnel to run them;[116]
- reaffirmed the monopoly in carrying letters, packets, and parcels, with delineated exceptions;[117]
- mandated service on certain routes;[118]
- provided for a monopoly in letting post horses and associated "furniture" (saddles, carriages, etc.) within Great Britain and Ireland;[119]
- specified in detail the levels of postage for letters and "other Things of greater Bulk" and for rental of horses and vehicles;[120] postage for heavier items was calculated by weight, without any weight limit except that luggage for travelers was limited to eighty pounds avoirdupois;[121]
- authorized the postmaster general to operate a fleet of packet boats,[122] erect cross-stages,[123] and measure the post roads;[124]
- laid down rules governing letters to and from overseas;[125]
- defined offenses against the post office, listed their punishments,[126] and identified the courts in which they were to be prosecuted and the causes of action for the purpose;[127]
- prescribed oaths for post office personnel;[128]
- authorized the king or queen to fix further regulations;[129]
- regulated ferry men in North America and imposed mandates on them;[130] and
- disqualified postal personnel from parliamentary politics.[131]

---

114 9 Ann., c. 10 (1711), §2 (establishing a general post office for Great Britain, Ireland, and British colonies in North America and the West Indies).

115 9 Ann., c. 10 (1711), § 4.

116 *Id.* § 4.

117 *Id.* §§ 2, 3 & 17 (creating a monopoly for letter and packet delivery and specifying exceptions); see also § 6 (setting rates for letters, packets, and parcels), § 7 (providing for overseas carriage of letters, packets, and parcels), § 13 (enumerating exceptions), § 22 (providing exception).

118 *Id.* § 26.

119 *Id.* § 5 & 17 (creating hiring monopoly).

120 *Id.* § 6, 8 & 14.

121 *Id.* § 14.

122 *Id.* § 9.

123 *Id.* § 10.

124 *Id.* §§ 11 & 12.

125 *Id.* § 15 & 16.

126 *E.g.*, *id.* § 17 (prescribing punishment for illegal carriage), § 18 (punishment for mail-tampering), § 21 (prescribing punishment for negligent postal personnel); § 40 ("wilfully opening, imbezzling, detaining and delaying of Letters or Packets").

127 *Id.* § 19 & § 30.

128 *Id.* § 25 & 41.

129 *Id.* § 27.

130 *Id.* § 29.

131 *Id.* § 44.

Thus, the statutory title's reference to "establishing a General Post-Office" signified creating an entire postal system, with all its elements.

During the period between this statute's passage and the Constitution's ratification, Parliament supplemented the measure several times.[132]

### F. Motifs in the Development of the Imperial Postal System

Several persistent motifs characterized the history of the royal post before the American Revolution erupted in 1775. These motifs were (1) proliferation of post roads and routes, (2) the post office's enjoyment of significant legal privileges, (3) proliferation of private privileges against the post office, in tension with the revenue-raising goal, and (4) sporadic progress in methods and technology.

The expansion in the number of post roads and routes was certainly impressive. By 1737, treatise writer Giles Jacob could report that the "Conveyance of Post-Letters extends to every considerable Market-Town."[133] By 1775, the number of post roads had grown from the initial six into a spider's web covering England and extending to Edinburgh.[134]

The royal post enjoyed various legal privileges denied to private enterprise. One was the carriage and transportation monopoly. Others were exemptions from otherwise-general legal duties. Thus, postal couriers were exempt from the tolls that everyone else paid,[135] and postal employees were exempt from jury and militia duty.[136] Still another sort of privilege consisted of legal mandates imposed on outsiders for the benefit of the postal service. For example, Parliament required private ship masters to assist the post office in various ways.[137] When private operators were finally

---

[132] 6 Geo. 1, c. 21 § 51 (1719) (clarifying postage rates on merchants' documents); 4 Geo. 2, c. 33 (1731) (clarifying charges for delivery by penny post); 22 Geo. 2, c. 25 (1749) (exempting chaises and calashes from the exclusive hiring rule); 26 Geo. 2, cc. 7 & 8 (1753) (clarifying postage rates on legal writs and clothing patterns); 4 Geo. 3, c. 24 (1764) (curbing the practice of franking); 5 Geo. 3, c. 25 (1765) (altering rates of postage and adopting other reforms); 7 Geo. 3, c. 50 (1767) (extending service to the Isle of Man); 19 Geo. 3, c. 51 (1779) (licensing horse rental and eliminating monopoly); 20 Geo. 3., c 51 (1780) (replacing 1779 statute); 22 Geo. 3, c. 70 (1782) (expanding the frank) & 23 Geo. 3., c. 69 (1783) (expanding the frank); 25 Geo. 3. c. 51 (1785) (a rental licensing and toll law)

[133] Jacob, *supra* note 1, at 263.

[134] *Compare* Robinson, *supra* note 1, at 17 (showing a postal map from Elizabethan times), *with id*. at 61 (1675 map) *and* 104 (1756 map). Even the latest map shows only a single post road entering Scotland and ending at Edinburgh.

[135] 25 Geo. 3, c. 57 (1785) (exempting carriages and horses carrying mail from all tolls); Lewins, *supra* note 1, at 140-41 (discussing the exemption and its effects).

[136] Hemmeon, *supra* note 1, at 9; Lewin, *supra* note 1, at 47 & 62. American deputy postmasters were supposed to enjoy such exemptions as well, but administrative problems sometimes prevented American postmasters from obtaining them. Finlay, *supra* note 1, at 33 (describing one case).

[137] *E.g.*, 9 Ann., c. 10 (1711), § 16 (requirement that ship masters deliver letters to the post office) & § 24 (restrictions on nationality of ships and seamen), *explained in* Jacob, *supra* note 1, at 255 ("If the Mail be carried out of *England* in any Vessel not English built, and navigated with English Seamen, the Postmaster-General shall forfeit 100 l."). *See also* 3 Geo. 3, c. 25, § 3 (1765) (providing that arriving ships may not "break bulk" until letters are delivered to the post office).

allowed to rent horses and vehicles for post-road travel, Parliament exacted license fees and other duties.[138] Mandates on American ferry men were particularly onerous. They were required to carry the mail on demand, and without compensation.[139]

While granting the postal system special privileges against the public, Parliament granted individuals and institutions privileges against the postal system. The third motif was the conflict between these privileges and revenue-raising objectives. The 1711 statute exempted England's two universities, Oxford and Cambridge, from the postal monopoly. Students, professors, and staff could send letters any way they wished.[140] Politicians diverted a significant amount of revenue to private parties, as when they used postal funds to pay one of Charles II's mistresses the enormous pension of £4700 annually.[141] The government provided secret mail-opening services to the politically-powerful.[142] Of course, the post office also was a source of patronage—although during the eighteenth century patronage does not seem to have greatly impaired worker quality.[143]

A particularly costly privilege was *franking*. The frank exempted many people from paying postage at all,[144] even for carriage of very large items.[145] Each chamber of Parliament demanded the frank for its own members as the price of passing the 1711 statute,[146] and the statute extended the privilege to other government functionaries as well. The frank was widely abused, to the great injury of the revenue.[147]

Parliament periodically expanded[148] and contracted[149] the scope of the frank. The statutes expanding it attained their objective, but it is unclear whether those attempting to contract it did so successfully. The leading effort at contraction was a 1764 measure that one historian claims rendered the situation worse,[150] but another argues reduced a £170,000 annual leakage by £30,000.[151]

---

[138] *E.g.*, 25 Geo. 3. c. 51 (1785) (requiring licensing of those letting horses and equipment for riding post).

[139] 9 Ann., c. 10 (1711), § 29.

[140] *Ogilvie*, *supra* note 1, at 449; 9 Ann., c. 10 (1711), § 32.

[141] Robinson, *supra* note 1, at 53. *See also id.* at 79 (reporting continued payment of this pension to her and her successors until the government purchased it in 1856).

[142] *Supra* notes 79-80 and accompanying text.

[143] Ellis, *supra* note 1, at 46 (stating that the "defects lay in the postal system rather than the staff").

[144] Robinson, *supra* note 1, at 113-19 (discussing franking).

[145] Lewins, *supra* note 1, at 96 (listing large franked items).

[146] *Id.* at 97 (stating that the Lords initially rejected the measure because it contained no provision for their franking; after the bill was amended to permit them to frank, they passed it).

[147] Joyce, *supra* note 1, at 132-35.

[148] 5 Geo. 3, c. 25 (1765), § 26 (extending the privilege) 22 Geo. 3, c. 70 (1782) (same) & 23 Geo. 3, c. 69 (1783) (same).

[149] *E.g.*, 4 Geo. 3, c. 24 (1764); Robinson, *supra* note 1, at 116-19 (discussing the 1764 law and its aftermath); Ellis, *supra* note 1, at 41 (discussing the law); Robinson, *supra* note 1, at 152-153 (discussing other efforts to curb franking). *See also* 24 Geo. 3., c. 37 (1784) (delineating franking requirements); Ellis, *supra* note 1, at 42 (discussing the 1784 statute).

[150] Joyce, *supra* note 1, at 188. This measure was adopted in the Parliament beginning in 1763, but the journal of the House of Lords shows that it was finally passed on April 16, 1764. 30 Lords J. 578 (Apr. 16, 1764).

[151] *Ogilvie*, *supra* note 1, at 451.

Newspaper publishers and printers (generally the same people) received special privileges. Their papers passed free or at very low cost.[152] The printers were not necessarily grateful. They frequently sent their publications in clumsily-folded conditions with the ink still wet, thereby defacing the letters with which their papers were bundled.[153]

The privilege afforded newspapers can be seen as a laudable exercise of public spirit, for it facilitated dissemination of information,[154] but more than public spirit lay behind it. Newspapers were vehicles by which members of Parliament distributed propaganda,[155] and officials tapped newspaper traffic—as well as other matter sent by post—to gather intelligence for government use.[156]

A fourth motif in British post office history pertains to its progress (and non-progress) in methods and technology. In competitive markets, efficiency improvements occasionally burst in with leaps and bounds, but far more often they crawl in. That is, improvements occur in small increments, identified by participants who operate under strong incentives to seek even marginal ways of doing things better. However, a state owned enterprise with monopoly privileges offers few incentives for such vigilance. The methods and technology of the royal post typically stagnated until a zealous reformer, usually an outsider, found a way to force change.[157]

There are many illustrations of this motif. One of the most cited is the episode of Thomas Dockwra's "penny post" of 1680.

Before Dockwra arrived on the scene, the royal post carried letters to cities and towns throughout England, but although headquartered in London it offered no service *within* London. When the London Common Council tried to fill the gap with its own courier operations, Parliament quickly suppressed them.[158]

In 1680 Dockwra created a new company called the "penny post" to serve the capital city and its suburbs.[159] His service proved highly popular because it

---

[152] Robinson, *supra* note 1, at 147. For this, William Cowper was grateful. Once the post boy delivered the newspaper on a winter evening, Cowper settled down comfortably:

> This folio of four pages, happy work!
> Which not even critics criticise, that holds
> Inquisitive attention while I read
> Fast bound in chains of silence, which the fair,
> Though eloquent themselves, yet fear to break,
> What is it but a map of busy life,
> Its fluctuations and its vast concerns?

*The Task*, Book IV, lines 50-56, Cowper, *supra* note 1, at 76. "The fair" is Cowper's common appellation for womankind.

[153] Joyce, *supra* note 1, at 262. John Palmer seems to have corrected the packaging problem. *Id.*

[154] Robinson, *supra* note 1, at 147-49.

[155] *Supra* notes 73 & 74 and accompanying text.

[156] *Supra* notes 75-90 and accompanying text.

[157] Judith Blow Williams, *Book Review: The British Post Office: A History. By Howard Robinson*, 21 J. Modern Hist. 141, 142 (1949) ("[T]he stimulus for change came usually from persistent criticism from without the regular organization of the post office."); Robinson, *supra* note 1, at vii ("Again and again reformers labored to speed up a slowly evolving government department.").

[158] Joyce, *supra* note 1, at 24-25.

[159] Robinson, *supra* note 1, at 70-76 (discussing Dockwra's penny post). *See also* Joyce, *supra* note 1, at 36-40; Hemmeon, *supra* note 1, at 28; *Ogilvie*, *supra* note 1, at 447-48.

responded to an unmet need and was otherwise superior to the royal post office in almost every respect.[160]

At that time, the principal beneficiary of revenue from the royal post was the Duke of York, the future James II.[161] As long as Dockwra was incurring the financial losses characteristic of most start-up companies, the Duke did not interfere. When Dockwra began to make a profit,[162] the Duke slammed him with *twenty* separate lawsuits for breaching the postal monopoly. Although Dockwra wasn't exactly competing with the royal post—merely serving routes it did not serve—the courts put him out of business.[163] The government carried off the spoils, absorbing the penny post into its own network.

After the 1688 Revolution had evicted James II, the government partially compensated Dockwra with a pension and a short-lived job as penny post administrator.[164]

Other entrepreneurs rose to challenge the postal monopoly, each to be suppressed in turn. The government's motives for crushing them were not wholly financial:

> [In 1683] the panic caused by the discovery of the Rye-House Plot had led to the issue of a Proclamation which, if differing little from others that had gone before, acquires importance from the circumstances under which it appeared. Unauthorised posts had again sprung up in all directions, simply, no doubt, because there was a demand for the accommodation they afforded; but the Government, no less than the persons who denounced Dockwra's undertaking as a Popish contrivance, seem to have been possessed with the idea that these posts were mere vehicles for the propagation of treason. To prevent treasonable correspondence was the avowed object of the present Proclamation, and the means by which the object was sought to be attained was the suppression of private and irregular posts, for by these, the Proclamation went on to declare, the conspirators had been materially assisted in their designs.[165]

The Rye House plot was long gone when, in 1708, another entrepreneur, Charles Povey, created a "half penny post" for London. The government prosecuted him and destroyed his enterprise.[166] Again it carried away the spoils, including Povey's innovation of couriers ringing bells to announce their arrival at the post office.[167]

---

160 For example, Dockwra perfected the institution of the post mark. Hemmeon, *supra* note 1, at 29.

161 The Duke acquired this benefit in 1675, while his brother, Charles II, was still king. *See* Jacob, *supra* note 1, at 256 ("By 15 Car. 2, "All the Profits . . . were settled upon *James* Duke of *York*."); Lewins, *supra* note 1, at 52.

162 Lewins, *supra* note 1, at 55 (" No sooner, however, was that success apparent, and it was known that the speculation was becoming lucrative to its originator, than the Duke of York, by virtue of the settlement made to him, complained of it as an infraction of his monopoly."). *Accord*: Hemmeon, *supra* note 1, at 30.

163 Robinson, *supra* note 1, at 74.

164 Lewins, *supra* note 1, at 55. Dockwra was dismissed in 1700. Hemmeon, *supra* note 1, at 30.

165 Joyce, *supra* note 1, at 43.

166 Robinson, *supra* note 1, at 87-88; Lewins, *supra* note 1, at 82-84; Joyce, *supra* note 1, at 121-23; Hemmeon, *supra* note 1, at 197.

167 Robinson, *supra* note 1, at 88; Joyce, *supra* note 1, at 123.

Other challenges arose after the rate increases in the statute of 1711.[168] In 1719, an adaptable outsider decided that "crony capitalism" might be a better way to get rich than direct competition. Ralph Allen[169] offered to pay the government a fixed annual sum in exchange for the exclusive privilege of extending cross posts to unserved areas. Allen incurred losses for years, but was ultimately successful and died wealthy. He became a towering figure in British postal affairs without ever holding an official position in the inland office.[170]

John Palmer was another who successfully negotiated the route to lucrative crony capitalism. As is important for crony capitalists, Palmer was well connected: He had a friend in the younger William Pitt, then prime minister. Palmer convinced Pitt to allow him to contract for letter delivery on major routes using coaches rather than riders. Despite stubborn bureaucratic resistance,[171] the idea was a decided success. Palmer made a great deal of money.[172]

After Palmer's reforms, post boys drove coaches as well as rode horseback, as illustrated in Cowper's poetic account of the vicissitudes of John Gilpin. In Cowper's poem, Mrs. Gilpin offered the post boy a half-crown to pursue her husband and bring him back safely. The post boy had been driving a post-chaise. He uncoupled one of the horses, swung onto its back, and headed after Mr. Gilpin:

> Away went Gilpin, and away
> Went postboy at his heels,
> The postboy's horse right glad to miss
> The lumbering of the wheels.[173]

But unlike this post boy's horse, British postal institutions advanced only by fits and starts. In some instances, the office wielded government power to shatter competitors, enabling it to scavenge among the debris. In other cases, innovators wielded the government power against the post office, compelling it to reform.

## II. Background History: The Colonial American Postal System

### *A. The American Post Office as the Successor to the British Imperial Post Office*

Until 1775, the American postal network operated under the aegis of the Crown. From 1775 to March 1, 1781 it functioned under the Continental Congress and

---

168 Joyce, *supra* note 1, at 133-34.

169 Lewins, *supra* note 1, at 105-09; Joyce, *supra* note 1, at 146-86; Robinson, *supra* note 1, at 99-112; Hemmeon, *supra* note 1, at 36-39; Roper, *supra* note 1, at 11 (all discussing Allen's career). *See also Ogilvie*, *supra* note 1, at 452 (outlining Allen's reforms).

170 Robinson, *supra* note 1, at 106.

171 *Id.* at 69 & 134-36.

172 Robinson, *supra* note 1, at 126-40; Lewins, *supra* note 1, at 123-36; Joyce, *supra* note 1, at 208-13; Hemmeon, *supra* note 1, at 40-42; Roper, *supra* note 1, at 12; *Ogilvie*, *supra* note 1, at 452 (all discussing Palmer's career).

173 *Cowper, supra* note 1, at 194.

from the latter date until April 1789 (when the new government began operations) under the Confederation Congress. Throughout those years the post office remained essentially the same institution.[174] Knowledge of this continuity is a key to understanding the full meaning of the constitutional phrase "to establish Post Offices and post Roads." Knowledge of this continuity is also a key to understanding ratification-era postal controversy, why citizens demanded a Bill of Rights, and why that Bill included protections from searches and seizures and for freedom of press and speech.

The seventeenth century witnessed scattered efforts to create an indigenous American postal service,[175] complete with post-road travel monopolies.[176] If those efforts had been successful, perhaps the eighteenth-century American post office would not have become a mere branch of the British system. Nothing much did come of them, however; and they were superseded by the appointment, on February 7, 1692 (1691, old style),[177] of Thomas Neal as postmaster general for the colonies.[178] The post office in America would be directed from London.

Neal remained in Britain, but designated Andrew Hamilton as his man on location. Hamilton was an energetic Scottish merchant and a former lieutenant governor and future governor of New Jersey.[179] In creating postal institutions he was forced to depend on the cooperation of the colonial assemblies, some of which passed facilitating legislation.[180] Postal rates had to be negotiated separately with

---

[174] John, Spreading, *supra* note 1, at 25 states the same idea another way:

> Prior to 1792, the American postal system remained constrained by the assumptions that had shaped royal policy . . . In the seventeen-year period between 1775 and 1792, the American postal system was little more than a mirror image of the royal postal system for British North America as it had existed in the period prior to 1775.

As explained in Part VII.B the situation did not change radically even in 1792.

[175] *Wooley*, *supra* note 1, probably remains the leading study of pre-1711 American postal matters. She begins with the practice of employing Indians as messengers and details the unsuccessful efforts to create an inter-colonial service. *Id.* at 270-74. *See also* Rich, *supra* note 1, at 1-8; Leech, *supra* note 1, at 7-8 (describing those efforts).

[176] *Wooley, supra* note 1, at 276-77 (describing New York legislation creating a horse and "furniture" rental monopoly on the post road), 286 (describing a Pennsylvania law providing for rental of horses to travelers), 289 (describing a New Jersey law banning private renting of "horses or furniture").

[177] In 1751, Parliament converted from the Julian to the Gregorian calendar. Effective January 1, 1752, Parliament changed the beginning of the year from March 25 to January 1. It also provided that the day after September 2, 1752 would be designated as September 14. This reform applied to the entire British Empire, including the American colonies. 24 Geo. 2, c.23 (1751). The change explains why the English Declaration of Right, promulgated during the Glorious Revolution of 1688, frequently is dated 1689. The Declaration was delivered to William and Mary on February 13, 1688 "old style," which was February 25, 1689 "new style."

[178] *Wooley*, *supra* note 1, at 275; Roper, *supra* note 1, at 20.

[179] *Id.* at 275; Rich, *supra* note 1, at 14. *See* Louise P. Kellogg, The American Colonial Charter 235, 239-40 (Washington: Government Printing Office 1904) (stating that Hamilton served as lieutenant governor under the Andros administration and later served as a competent governor).

[180] *Wooley*, *supra* note 1, at 276-90 (outlining colonial legislation); Rich, *supra* note 1, at 14-16. *See also* Roper, *supra* note 1, at 21 (claiming that "After much negotiation [Hamilton] succeeded in inducing practically all the colonial assemblies to pass postal

each colonial government.[181] By 1698, Hamilton had established posts running once a week from Boston to Newcastle, Pennsylvania.[182]

Parliament's 1711 statute completed the process of pulling the American postal system under the same umbrella that covered England, Wales, Scotland, Ireland, and the British West Indies.[183] This statute enabled British-designated postmasters to extend the inter-colonial service far beyond the achievements of Andrew Hamilton. When Hugh Finlay came to America, the colonial post office had been an integral part of the imperial system for a lifetime.

### *B. American Colonial Operations and Ben Franklin*

The 1711 statute created a central post office in New York City to govern operations in North America.[184] By 1764, Britain had acquired Canada and Florida, and in that year the North American territories were split into the districts referred to earlier.[185] Two deputies were assigned to the northern district and one to the southern; their respective headquarters were New York and Charleston.[186]

In Virginia there was resistance to the notion that Parliament, rather than local assemblies, could set the postal rates. Some Virginians saw these charges as a form of taxation.[187] The furor eventually faded, but classification of postal rates remained a sensitive issue. When testifying before the House of Commons in 1766, Franklin danced around that issue, characterizing postage as a fee-for-service rather than as a tax.[188] During the 1770s, the colonists again protested postage as an unconstitutional "internal tax."[189]

In 1737, Franklin became postmaster in Philadelphia, and in 1753, jointly with William Hunter, deputy for the colonies.[190] He had sought both jobs,[191] allured partly by the benefits they would offer his newspaper business.[192] Franklin made significant improvements and helped to put the colonial network on a sound financial basis.[193] Most writers have ranked him as the colonies' best postal administrator.[194] When

acts that were sufficiently identical in their terms to permit the establishment of a united system of posts in America.").

181 *Smith*, *supra* note 1, at 267; Rich, *supra* note 1, at 14.
182 Joyce, *supra* note 1, at 111.
183 9 Ann., c. 10, § 2 (1711).
184 *Id.* § 4 (1711).
185 Rich, *supra* note 1, at 39.
186 *Smith, supra* note 1, at 272-73.
187 *Id.* at 268; Jaffe, *supra* note 1, at 38-39.
188 Rich, *supra* note 1, at 41.
189 *Adelman*, *supra* note 1, at 730 & 735-36.
190 Leech, *supra* note 1, at 8.
191 Jaffe, *supra* note 1, at 39-40 (reporting that Franklin sought the Philadelphia position); Rich, *supra* note 1, at 29-32 (reporting that he sought the deputy postmaster general position).
192 Jaffe, *supra* note 1, at 39-40; Rich, *supra* note 1, at 30.
193 Rich, *supra* note 1, at 37-38; *Smith*, *supra* note 1, at 270.
194 *E.g.*, *Smith*, *supra* note 1, at 270 ("The line of undistinguished administrators of the post-office in America came to an end in 1753 when Benjamin Franklin was made deputy postmaster-general jointly with William Hunter of Virginia."); Jaffe, *supra* note 1, at 39-43 (outlining his accomplishments). *See also* Roper, *supra* note 1, at 35-36; Holbrook, *supra* note 1, at 6-8.

the colonies were divided into two districts, Franklin became deputy postmaster for the northern region along with John Foxcroft.[195]

Franklin's early contributions were admirable, but the fact remains that he was absent for 15 of his 21 years as deputy postmaster general, and this absent period included virtually the entire time he headed the northern district.[196] Some of the deficiencies Hugh Finlay observed may have resulted from his absence. It certainly is possible that Foxcroft found the far-flung and relatively populous northern district too much for one person to handle. It is interesting that Foxcroft was the person who asked Finlay to undertake his inspection.[197] This raises the question of why a postmaster would encourage an inspector to identify deficiencies in the postmaster's own bailiwick. Perhaps Foxcroft was building a case against Franklin. Whether or not this was true, Franklin was dismissed on January 31, 1774[198]—at least partly,[199] but perhaps not entirely—on political grounds. The man appointed to replace him was Finlay.[200]

### *C. The American Postal System in the Sunset of British Rule*

In Finlay's time the American postal system centered on a single post road extending from Falmouth, Massachusetts (now Portland, Maine)[201] to Savannah, Georgia. The 2000 miles of post road[202] were nearly all within the main artery, for there were very few cross-posts—although the main post road divided into three branches through much of New England.[203]

The southernmost post office in the northern district was Suffolk, Virginia. The northernmost post office in the southern district was Edenton, North Carolina.[204] They were supposed to coordinate the transfer of mails between them, but Finlay "suspected some mismanagement at the Junction of the Northern and the Southern district."[205]

I have not been able to determine with certainty how many post offices then served the thirteen colonies. Finlay's journal does not provide a complete list:

---

195 Rich, *supra* note 1, at 39.

196 *Smith*, *supra* note 1, at 270 n.42 (observing that Franklin was in England from 1757 to 1762 and again from 1764 to his dismissal in 1774).

197 Finlay, *supra* note 1, at 1.

198 Roper, *supra* note 1, at 35.

199 Leech, *supra* note 1, at 8; *Adelman*, *supra* note 1, at 736-37. The fact that Franklin was dismissed in January, 1774, before Finlay had a chance to finish his inspection, reduces, but does not eliminate, the chances that it was related to his non-performance. Foxcroft asked for the survey in April, 1773. Finlay, *supra* note 1, at 1.

200 *Steele, Finlay*, *supra* note 1.

201 Finlay, *supra* note 1, at 14.

202 Leech, *supra* note 1, at 11.

203 These were the upper, middle, and lower sections. Holbrook, *supra* note 1, at 30; Richard DeLuca, *Boston Post Road Carved out Three Travel Routes through State*, Connecticut History.org at http://connecticuthistory.org/boston-post-road-carved-out-three-early-travel-routes-through-state/. The map in *Adelman, supra* note 1, at 721, omits part of the upper and middle sections.

204 Finlay, *supra* note 1, at 72 & 84.

205 *Id.* at 73.

His expedition was interrupted by his appointment as joint deputy postmaster general,[206] and perhaps by unsettled pre-revolutionary conditions.[207] Thus, his journal fails to mention post offices in Delaware, New Jersey, Pennsylvania (other than Philadelphia), or Maryland (other than Baltimore). The journal's total count, if I read it right, is 36.[208] However, in 1788, a scant fourteen years later, there were 69.[209] The latter figure, and the fact that Finlay omitted offices in several states, suggests that the number of offices at the close of the colonial era may have been in the neighborhood of 60.

As in Britain, postmasters often were newspaper publishers.[210] As in Britain also, post roads were those served by stations ("posts") offering shelter, food, and drink for man and beast and amenities such as newspapers. In some ways, however, the system on this side of the water was less complete than that in Britain. Finlay noted the absence of post horns[211] and widespread disregard of the requirement that arriving ship masters carry letters entrusted to them to the post office.[212] He heard many complaints about the relative insecurity of the mail.[213]

Regulation of travelers was less thorough than in Britain. Efforts to establish transportation monopolies in some colonies[214] apparently had not taken hold, and Parliament's 1711 statute exempted North America from the rules applied to personal post-road travel in the mother country.[215] Yet Americans recognized that the system included transportation components. Post riders were required to act as travelers' guides when so requested,[216] and the taverns at stages along the post road were for travelers as well as for mail couriers.

The colonies north of Maryland were far more densely populated than those to the south. There were post offices every twelve to fifty miles in the North, each supervised by a deputy postmaster. The South had but a handful. Much of the southern post road ran through "Pine, Sand, and Swamp," and was difficult

---

206 *Steele, Finlay*, *supra* note 1.

207 *Accord: Hugh Finlay (1731-1801)*, Smithsonian National Postal Museum, http://postalmuseum.si.edu/outofthemails/finlay.html (last visited Feb. 28, 2018) ("Finlay's expedition came to an end in June 1774 when growing unrest in the northern colonies made the job of surveying the roads hazardous and, in some cases, impossible.").

208 Only six post offices were in the three southernmost states: one in Georgia (Savannah), two in South Carolina (Charles Town and Georgetown), and three in North Carolina (Wilmington, New Bern, and Edenton). By contrast, Finlay visited, or made reference to, eighteen in the four New England states.

209 34 J. Cont. Cong., *supra* note 1, at 462 (Aug. 27, 1788).

210 Jaffe, *supra* note 1, at 36; *e.g.*, Finlay, *supra* note 1, at 30 (noting that the Providence postmaster was also a printer).

211 Finlay, *supra* note 1, at 30. *See* https://www.youtube.com/watch?v=0twzFyFEQrM (featuring post horn design and fanfare). However, there had been post horns in Massachusetts at the beginning of the eighteenth century. *Wooley, supra* note 1, at 290-91 (quoting from a letter referring to them).

212 Finlay, *supra* note 1, at 56 & 92-93.

213 *Id.* at 73.

214 *Wooley, supra* note 1, at 276-77 (describing New York legislation creating a horse and "furniture" rental monopoly on the post road); 286 (describing a Pennsylvania law providing for rental of horses to travelers); 289 (describing a New Jersey law banning private renting of "horses or furniture").

215 9 Ann., c. 10 (1711), § 5.

216 Holbrook, *supra* note 1, at 21.

of passage.[217] The traveler had to cross expansive rivers and inlets that invaded the continent from the sea. Finlay wrote that because of the width of these bodies of water, the mandates imposed on North American ferry men by the 1711 statute made little sense.[218]

Finlay found that while American deputy postmasters generally were conscientious,[219] they often lacked such basic amenities as credentials.[220] Their monopoly was continually breached. Private carriers abounded,[221] and there were even a few private post offices.[222] Postal riders negotiated to carry letters and other items for their own profit, outside their postal contracts.[223] Portmantles might be filled with "bundles, packages, boxes, canisters" carried for the profit of the post rider, but often damaging to legitimate mail.[224] Finlay complained of riders who contracted to drive oxen along the post road[225] and of riders who demanded money from the recipients for delivering letters on which postage was pre-paid.[226] Riders frequently overcharged recipients and pocketed the excess,[227] and they took time to tend to their personal carrying business before attending to that of the post office.[228] Some local postmasters who printed newspapers delayed mails containing other newspapers while they pirated items for their own publications.[229]

Finlay concluded that in the restless state of the colonies, attempts to enforce the law would have been useless. His report written in Salem, Massachusetts, is illustrative:

> October 11th.- [Deputy Postmaster Edward Norice's] books were not in good order, he follows the form, but they are dirty and not brought up regularly; he understands the business of a deputy. The office is kept in a small mean looking place. He teaches writing. He has no commission

---

[217] FINLAY, *supra* note 1, at 52-53.

[218] *Id.* at 91-92. The mandates were imposed by 9 Ann., c. 10 (1711), § 19. A domestic American legislature—that of North Carolina—imposed the same mandates. 9 N.C. RECORDS, *supra* note 1, at 438-39 (Mar. 4, 1773), but allowed double fare to the ferryman.

[219] FINLAY, *supra* note 1, at 30 (describing John Carter, deputy postmaster for Providence, Rhode Island, as a "seemingly active sensible man"); FARRAND, *supra* note 1, at 40 (stating of the New Haven, Connecticut, deputy postmaster, "he understands his business thoroughly"); FARRAND, *supra* note 1, at 57 (stating of the Savannah, Georgia deputy that "he is an excellent officer.").

[220] *E.g.*, FINLAY, *supra* note 1, at 33 (reporting that the Bristol, Connecticut deputy postmaster had no credentials) & 89 (reporting that the postmaster at Suffolk, Virginia had no credentials).

[221] *Id.* at 18 (describing private stage coach carriers, one of which was eventually hired by the official system).

[222] FINLAY, *supra* note 1, at 32 (describing that of Peter Mumford in Newport, Rhode Island).

[223] *Id.* at 28; 32, 35 & 38 (describing the practices of Peter Mumford). *See also id.* at 39, 40-41 & 55.

[224] *Id.* at 40-41. *See also id.* at 43.

[225] *Id.* at 39 ("Many people ask'd me if I had not met the Post driving some oxen"). *See also id.* at 41.

[226] *Id.* at 45 ("I find that it is the constant practice of all the riders between New York and Boston to defraud the Revenue as much as they can in pocketing the postage of all way letters").

[227] *Id.* at 43-44, 45 & 67.

[228] *Id.* at 38 & 42.

[229] *Id.* at 31 (reporting on this practice by the New London postmaster).

> [i.e., formal credentials] to act, he took charge of the office at the death of his father; he reports that every other day the stage coach goes for Boston, the drivers take many letters, so that but few are forwarded by Post to or from his office. If an information were lodged (but an informer wou'd get tar'd and feather'd) no jury wou'd find the fact; it is deemed necessary to hinder all acts of Parliament from taking effect in America. They are they say to be governed by laws of their own framing and no other.[230]

Distaste for the imperial post induced Americans to opt out. In 1774, William Goddard,[231] a Baltimore printer, proposed a "constitutional post office" as a replacement. His quarrels with the imperial system were based partly on insecurity of the mail, but he also claimed that its fees represented unconstitutional taxation.[232] Yet even Goddard based his proposed service closely on British rules and procedures.[233]

On April 28, 1775, Boston's committee of safety recommended establishment of new postal services, and the following month it created its own routes.[234] In June 1775, the Rhode Island legislature voted to establish a state post office, pending cooperation with other colonies to establish a continental system. The Rhode Island legislature elected Peter Mumford—one of the post boys Finlay had found so troublesome—as its rider from Newport to Providence, instructing him and his colleague (also a Mumford) to refuse to cooperate with the imperial post office.[235]

Goddard was unsuccessful in convincing the First Continental Congress to sponsor his "constitutional post office."[236] He also was unsuccessful with the Second Continental Congress, apparently due in part to the opposition of Franklin, who wanted to operate the new institution himself.[237] On May 29, 1775, Congress placed Franklin on a committee "to consider the best means of establishing posts for conveying letters and intelligence through this continent.[238] When, on July 21, Franklin presented Congress with his proposed Articles of Confederation, they included provision for "the Establishment of Posts."[239] Five days later Congress

---

230 *Id.* at 23-24 & 40. *See also id.* at 32 ("Were any Deputy Post Master to do his duty, and make a stir in such matter, he would draw on himself the odium of his neighbours and be marked as the friend of Slavery and oppression and a declar'd enemy to America.").

231 On Goddard's career and activities, see Jaffe, *supra* note 1, at 53-55 & 61-62 & 63-65; *Adelman*, *supra* note 1, at 725-28, 732 & 740.

232 Rich, *supra* note 1, at 43.

233 *Id.* at 44; *Adelman*, *supra* note 1, at 728:

> [T]he operational details of the post office that Goddard proposed differed little from those of the existing imperial system. The plan proposed no new routes, nor any new way to provide postal service to correspondents. As Thomas Young noted to John Lamb in May 1774, "We would not be under the least difficulty in this Colony" in making the transition from imperial to "constitutional" post," as there would be no change in the persons employed."

234 Rich, *supra* note 1, at 46.

235 *Resolution of Rhode Island Legislature*, *in* 7 Records of the Colony of Rhode Island and Providence Plantations 351-53 (1775) (Providence, A. Crawford Green, 1862).

236 J. Cont. Cong., *supra* note 1, at 55 (Oct. 5, 1774).

237 Jaffe, *supra* note 1, at 65.

238 2 J. Cont. Cong., *supra* note 1, at 71 (May 29, 1775).

239 2 J. Cont. Cong., *supra* note 1, at 195 (July 21, 1775).

resolved to begin service, and selected Franklin as postmaster general.[240] Franklin, in turn, named his son-in-law, Richard Bache, as controller and deputy and Goddard as surveyor (inspector).[241]

Congress authorized a line of posts from Falmouth to Savannah—the same route then served by the royal post. All profits were to be paid to the treasury. Presumably as an inducement for the public to utilize the congressional network, postage rates were slashed 20 percent.[242] Shortly thereafter, Congress abandoned the price cut because the lower rates could not support the necessary riders.[243]

The royal post, shunned by the public, formally closed its doors on December 25, 1775.[244] Finlay remained in Quebec. From at least 1784 he served as postmaster there; in 1787 he corresponded with U.S. postmaster Ebenezer Hazard,[245] and in 1792 he negotiated a postal convention with the United States.[246]

## III. The Continental Post Office in the Sunrise of Independence

### *A. The Vocabulary of the Continental Post Office*

Because the new United States post office was the direct successor to the North American branch of the imperial system—even many of the personnel and operational policies were the same[247]—American postal vocabulary was identical to British vocabulary. A post office was the same thing in America as in Britain. A courier was a "post"[248] or "post boy."[249] The same meaning was assigned to the verb "establish," both as to the postal system in general,[250] and as to specific elements

---

240 *Id*. at 209 (Jul. 26, 1775).

241 Jaffe, *supra* note 1, at 65; Rich, *supra* note 1, at 48-49.

242 2 J. Cont. Cong., *supra* note 1, at 203-09 (Jul. 26, 1775). When in England, Franklin had successfully lobbied for lower postage rates, accurately predicting that the result would be more business and more revenue. Jaffe, *supra* note 1, at 43 & 62.

243 2 J. Cont. Cong., *supra note* 1, at 267 (Sept. 30, 1775).

244 Roper, *supra* note 1, at 40; *Smith*, *supra* note 1, at 275.

245 32 J. Cont. Cong., *supra note* 1, at 79-80 (Feb. 26, 1787).

246 *Steele, Finlay*, *supra* note 1. Finlay died in Quebec in 1801, and subsequently became known as the "father of the Canadian post office." *Id*.

247 *Adelman*, *supra* note 1, at 742 & 744.

248 5 N.C. Records, *supra* note 1, at 732 (Oct. 23, 1756) (referring to a courier as a "post"); *id.* at 918 (Dec. 10, 1757) (same).

249 5 *id.* at 684 (Oct. 23, 1756) (reproducing a letter from the speaker of the lower house referring to a mail courier as a "post boy"); *id.* at 732 (Oct. 23, 1756) (same); Clyde Augustus Duniway, The Development of Freedom of the Press in Massachusetts 131 (1906) (reporting that the title of an eighteenth century Massachusetts paper was *The Gazette and Post-Boy*).

250 *See infra* Part III.A. *See also* Statutes of the State of Vermont Passed by the Legislature in February and March 1787 116-17 (1787) (reproducing "An act for establishing Post-Offices within this State," which act provided for offices, post riding, postage, financial accounting, monopoly status, franking, and authorization for additional offices); *Adelman*, *supra* note 1, at 736 (quoting an 1774, an essay in the Connecticut Gazette referring to the post office as "a parliamentary Establishment"); 5 N.C. Records, *supra* note 1, at 516 (Oct. 14, 1755) (reproducing note from house speaker referring to "Established Post"); *id.* at 555

of it.[251] I have not found pre-constitutional references to "establishing post roads," but the term must have been similarly broad: In American usage, to "establish" a road included not just designating it (as Thomas Jefferson once suggested)[252] but surveying and laying it out, cutting and improving it, and dedicating it.[253]

### *B. The Purposes of the Continental Post Office*

During the time of the Continental Congress (1775-81) and the Confederation Congress (1781-89), the Post Office functioned as one of several executive departments reporting directly to Congress.[254] In general, Congress saw the purposes

---

("establishing a post for one year from this to Neighbouring Colonies"); 6 *id.* at 484 (Nov. 18, 1760) (referring to a "Bill for Establishing a post office"); *id.* at 853 (Nov. 22, 1762) ("A Bill for Establishing a Post thro this Province"); 7 *id.* at 413 (Nov. 28, 1766) (reporting resolution stating "that after the Post Master General shall have Established a post"); 8 *id.* at 365 (Jan. 17, 1771) ("A Bill to encourage and support the establishment of a Post Office in this Province"); 9 *id*. at 541 (Feb. 25, 1773) ("the establishment of a post office"); Letter from John Adams to James Warren (Jul. 26, 1775) *in* 2 Delegate Letters, *supra* note 1, at 667, 668 ("We shall establish a Post office").

Thus, the recorded assertion by the distinguished legal commentator John Norton Pomeroy that the verb *establish* "poorly express[es] the object" of creating and regulating the postal system, Rogers, *supra* note 1, at 24-25 (quoting Pomeroy), reflected Pomeroy's unfamiliarity with founding-era vocabulary.

[251] *E.g.*, Editor's note to Letter from Benjamin Franklin to Joseph Greenleaf (Oct. 26, 1775) *in* 2 Delegate Letters, *supra* note 1, at 255 (referring to a Massachusetts "committee 'for establishing post offices and post riders'"); Letter from Roger Sherman to Jonathan Trumbull, Sr. (Dec. 28, 1779) *in* 14 Delegate Letters, *supra* note 1, at 305 (mentioning an "establishment" of express riders); 23 J. Cont. Cong., *supra* note 1, at 673 (Oct. 18, 1782) (referring, in the governing ordinance of the postal system, to establishing a public rider on a cross-road); *id.* at 676 (referring to establishment an individual post office).

[252] Letter from Thomas Jefferson to James Madison (Mar. 5, 1796), *in* The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds. 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_7s4.html (last visited Feb. 28, 2018) ("Does the power to *establish* post roads, given you by Congress, mean that you shall *make* the roads, or only select from those already made, those on which there shall be a post? If the term be equivocal, [& I really do not think it so,] which is the safest construction?") (italics in original); *but see* Letter from John Jay to George Washingon (Nov. 13, 1790), http://founders.archives.gov/documents/Washington/05-06-02-0313 (arguing that the power to establish post roads includes authority to repair the roads) (last visited Feb. 28, 2018).

[253] Laws of Maryland, 1765, c. xv (reproducing "an Act to establish a road," to include clearing, opening, repairing, and financing the road); *id.* 1783, c. xi (reproducing a law to "lay out and establish a public road," including appointment of commissioners, authorizing them to lay out the road of a specified width, and providing for compensation to injured landowners); 7 The Public Records of the State of Connecticut 160 (Leonard Woods Labaree ed. 1948) (reproducing a public act in which the designation, laying out, and approval of a road are described as rendering it "fully established for a public Highway"); Statutes of the State of Vermont Passed by the Legislature in February and March 1787 at 79 (1787) (including in "establish" the steps taken by a court to open a road); *cf.* 5 N.C. Records, *supra* note 1, at 687 (Oct. 25, 1756) (recording presentation to the governor of "a Bill for establishing public roads and Ferries and for the better regulation of the same").

[254] By the end of the Confederation era the congressional bureaucracy included, in addition to the post office, departments of war and foreign affairs (each administered by a

of the post office in much the same way the British did: as a medium for official government intercourse, as a source of government intelligence and revenue, and as an aid for commerce. The system was, as Ben Franklin said of the newspapers it distributed, "useful to Government, and advantageous to Commerce, and to the Publick."[255] In that order.

Congress's actual or perceived need for intelligence often motivated its postal decisions.[256] Congress created a British-style "dead letter office," with an inspector "to examine all dead letters at the expiration of each quarter; to communicate to Congress such letters as contain inimical schemes or intelligence."[257] The 1782 postal ordinance, adopted after active hostilities had ceased, authorized army generals and state chief executives to open mail in wartime, and the president of Congress to do so at any time.[258] Three years later, Congress empowered the Secretary of Foreign Affairs (John Jay) to open any letters if he deemed the country's "safety or interest require[d] it," but exempted letters franked by, or addressed to, members of Congress.[259] The congressional resolution contained a sunset date, but the following year Congress extended Jay's power indefinitely.[260]

As in Britain, some official postal espionage took place without legal sanction. In 1788 Postmaster General Ebenezer Hazard informed Congress that the president of Pennsylvania had been opening private mail, or at least attempting to do so. Hazard questioned whether this was permitted,[261] and Congress referred his question to a committee. The committee concluded as follows:

---

secretary), and a department of finance (administered by the board of treasury consisting of three commissioners). There were other officers as well, including superintendents of Indian affairs for the northern and southern departments.

Confederation executive and judicial functions have, perhaps, been too little studied, since Confederation-era usage has consequences for constitutional interpretation—for example, in defining the meaning of the constitutional word "department." *E.g.*, U.S. Const. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested. . . in any Department . . . thereof."); *id.* art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments").

255 Quoted in Jaffe, *supra* note 1, at 42.

256 *E.g.*, 5 J. Cont. Cong., *supra* note 1, at 717-18 (Aug. 20, 1776) (appointing committee to consider establishing "advice boats" "so as to facilitate and expedite the conveying of intelligence"); *id.* at 720 (Aug. 30, 1776) ("That the communication of intelligence with frequency and despatch [*sic*], from one Part to another of this extensive continent, is essentially requisite to its safety"); 6 *id.* at 927 (Nov. 5, 1776) (instructing the postmaster general to hire more riders "for obtaining early and frequent intelligence" from the armies); 17 *id.* at 467 (May 27, 1780 ("the establishment of Posts and expresses who shall bring the earliest intelligence of the arrival of the fleet of our ally and the motions of the Enemy ").

*See also* Letter from Benjamin Franklin to Ebenezer Hazard (Sept. 25, 1775) *in* 2 Delegate Letters, *supra* note 1, at 56 (stating, "It seems the more necessary to establish Speedily a Post to Albany, as we have an Army on your Frontiers.").

Thus, Professor Desai's description of the post office at this time as "simply a revenue-generating enterprise," *Desai*, *supra* note 1, at 677, was much too limited.

257 9 J. Cont. Cong., *supra* note 1, at 817 (Oct. 17, 1777).

258 23 *id.* at 671 (Oct. 18, 1782).

259 29 *id.* at 685 (Sept. 7, 1785).

260 31 *id.* at 909 (Oct. 23, 1786).

261 34 *id.* at 232 (Jun. 13, 1788) (reproducing letter).

- Because of Congress's exclusive power over the post office, only Congress could delegate authority to open private letters.
- Congress had delegated such authority to state chief executives for the duration of the Revolutionary War,[262] but it had expired when the war ended.
- It would improper to delegate such authority to any person not "immediately under the controul of and responsible to Congress."[263]

The Pennsylvania president on the receiving end of this slapdown was Ben Franklin.

Congress hoped to use the post office as a source of general revenue as well as of intelligence.[264] Congress considered revenue effects when it fixed rates[265] and when it weighed whether and where to add new routes.[266]

During the war years generating income was difficult. Congress repeatedly raised rates and salaries to offset wartime inflation.[267] It also experimented with lowering rates to increase demand.[268] On occasion it tried to cut expenses, but its efforts were not consistent. In 1779, for example, Congress fired all express riders[269]—but in the same resolution raised salaries and allowances.[270] By late 1781, express riders were for some reason once again in post office employ, and again Congress voted to terminate them.[271]

During the war Congress frequently had to cover deficits.[272] Not until hostilities

---

262 23 *id.* at 671 (Oct. 18, 1782) (reproducing the congressional ordinance).

263 34 *id.* at 239 (Jun. 18, 1788).

264 *E.g.*, 12 *id.* at 930 (Sept. 19, 1778) (committee report on application of postal revenue).

265 31 *id.* at 116 (Feb. 26, 1786) (producing letter by postmaster general on the subject); 33 *id.* at 695 (Oct. 20, 1787) (reproducing congressional resolution reducing rates on large packages to increase revenue).

266 *E.g.*, 32 *id.* at 59 (Feb. 15, 1787) (reproducing letter of postmaster Ebenezer Hazard stating that a particular route would have the advantage of "greatly encreasing the Revenues of the General Post Office"). *See also id.* at 60 (reproducing congressional resolution conditioning contract on not "occasion[ing] an expence to the general post); 34 *id.* at 76 (Mar. 3, 1788) (reproducing a letter from the postmaster general assessing the financial aspects of a Philadelphia-to-Pittsburgh route).

267 *E.g.*, 9 *id.* at 817 (Oct. 17, 1777) (rate increase of 50 percent); 13 *id.* at 463 (Apr. 16, 1779) (rate doubling); 16 *id.* at 413 (May 5, 1780) (rate doubling); 19 *id.* at 191 (Feb. 24, 1781) (rate doubling). *See also* 18 *id.* at 1142 (Dec. 12, 1780) (salary increases)

268 21 *id.* at 1066 (Oct. 19, 1781).

269 Letter from Roger Sherman to Jonathan Trumbull, Sr. (Dec. 28, 1779) *in* 14 Delegate Letters, *supra* note 1, at 305 (mentioning a congressional resolution discharging express riders, "which establishment had envolved [*sic*] the public in a very enormous expense").

270 15 J. Cont. Cong., *supra* note 1, at 1419 (Dec. 27, 1779) (cutting express riders while increasing the salary of the post master general and allowances to surveyors).

271 21 J. Cont. Cong., *supra* note 1, at 1067 (Oct. 19, 1781).

272 *E.g.*, 13 *id.* at 74 (Jan. 16, 1779) (payment to the postmaster general of $20,000); 13 *id.* at 463 (Apr. 16, 1779) (payment of additional amounts of $6967 and $5000); 14 *id.* at 633 (May 22, 1779) (payment of $10,000). *See also* 15 *id.* at1203-04 (Oct. 23, 1779) (reporting large deficits).

were over and Ebenezer Hazard had replaced Richard Bache as postmaster did the department run a profit.[273]

The importance of the post office as an aid to commerce was reinforced by the close relationship between trade and revenue. As Postmaster General Hazard repeatedly reminded Congress, merchants were by far the system's most important paying customers.[274]

### *C. Congress Decides to Emulate the British*

In most respects the structure of the American post office, as well as its goals, mirrored that of the British. Congress required operatives to take loyalty oaths, as in Britain.[275] The administrative structure—postmaster general, surveyor, and local deputies—was similar. The system enjoyed British-style legal privileges. Among these were carriage mandates on ferries[276] and a near-monopoly on carrying letters and packages. Efforts to breach the monopoly were taken very seriously.[277] There were also privileges for postal workers. In 1776, Congress recommended to the states that they excuse deputy post masters from any public duties "which may call them from attendance at their offices,"[278] and Congress directly exempted riders from military obligations.[279] The following year, Congress extended the exemption from military conscription to everyone working for the postal service.[280]

Congress granted franking privileges much as Parliament did. "[T]he members of Congress were determined to enjoy all the privileges of officials under the old [royal] office, for on November 8 [1775] it was provided that all letters and packets sent or addressed to the delegates should be free during the sessions of Congress."[281]

Insofar as American practices were looser than those in Britain, officials made efforts to tighten them. While still post office surveyor, Ebenezer Hazard wrote to the North Carolina legislature asking that it impose British-style mandates on ship

---

273 28 *id.* at 109 (Feb. 28, 1785); Letter from George Washington to Ebenezer Hazard (Jul. 3, 1789), http://founders.archives.gov/documents/Washington/05-03-02-0049 (observing that the post office had been generally profitable since 1782, the year Hazard became postmaster general).

274 29 *id.* at 527 (Jul. 12, 1785) (reproducing a letter from the postmaster general in which he refers to "the mercantile Interest, from whence the Post Office Establishment derives its principal Support"); 33 *id.* at 671, 672 (Oct. 12, 1787) (reproducing letter from postmaster general stating, "Trade is the principal, and almost only, Support of the Post Office Department").

275 10 *id.* at 69 (Jan. 21, 1778).

276 6 *id.* at 927 (Nov. 5, 1776).

277 6 *id.* at 927 (Nov. 5, 1776) (denying payment to post riders who take letters and packages on their own account); 12 *id.* at 463 (Apr. 16, 1779) (plea to public to use the post office and not to send letters "through any oeconomical view, by a private conveyance"); 27 *id.* at 582-83 (July 10, 1784); (prosecution of person carrying letters); 27 *id.* at 584 (Jul. 10, 1784) (describing action to suppress independent packet boats delivering mail); *id.* at 585 (Jul.12, 1784) (same).

278 5 *id.* at 720 (Aug. 30, 1776).

279 5 *id.* at 638 (Aug. 8, 1776).

280 7 *id.* at 347 (May 12, 1777).

281 Rich, *supra* note 1, at 50.

masters and increase its mandates on ferries.[282] As postmaster general, he urged Congress to stiffen the rules on carriages traveling the post roads and on ships carrying mail from overseas.[283] His recommendations were included in Congress's proposed ordinance of 1787.[284]

### *D. Regularizing Postal Law Under the Articles of Confederation*

In 1777, Congress adopted the final version of the Articles of Confederation[285] and began to operate under them *de facto*, although they were not fully ratified until March, 1781.[286] Article IX provided in part:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office . . . [287]

During the 1780s, Congress negotiated a postal convention with France[288] and sought to expand the practice of paying postage in advance rather than upon receipt.[289] More important for constitutional interpretation were efforts at comprehensive statutory reform—then referred to as the "new establishment."[290] In August, 1781, Congress authorized an expanded post office committee to "prepare and report the state of the present expences of the Post Office, and a system for regulating the same in future."[291] The target date was for December 1, 1781,[292] but Congress subsequently postponed it to January 1, 1782[293] and later to February 1.[294] The committee finally produced a draft ordinance in March.[295] Nothing further was reported until July 19, 1782,[296] when a committee produced another draft. Congress adopted the final measure on October 18. It was entitled "An Ordinance for Regulating the

---

282 Memorial from Ebenezer Hazard to the North Carolina General Assembly (Apr. 6, 1778), *in* 12 N.C. Records, *supra* note 1, at 395-96.
283 29 *id*. at 528 (Jul. 12, 1785) (reproducing letter of July 11).
284 32 *id*. at 51-52 (Feb. 14, 1787). For further discussion of the proposed ordinance, see *infra* Part III.D.
285 9 *id*. at 907 (Nov. 15, 1777).
286 19 *id*. at 214 (Mar. 1, 1781) (recording final ratification).
287 Arts. Confed., art. IX.
288 30 J. Cont. Cong., *supra* note 1, at 80-82 (Feb. 15, 1786) (reproducing some of the proceedings); 30 *id*. at 141-42 (Mar. 29, 1786) (same).
289 31 *id*. at 674 (Sept. 20, 1786).
290 16 *id*. at 413 & 414 (May 5, 1780) (recording two uses of the phrase).
291 12 *id*. at 820 (Aug. 1, 1781).
292 21 *id*. at 1067 (Oct. 19, 1781) (providing that the coming "establishment of the Post Office" occur on December 1).
293 21 *id*. at 1131 (Nov. 22, 1781).
294 22 *id*. at 1 (Jan. 2, 1782) ("Resolved, That the post office be continued on the old establishment until the first day of February next").
295 22 *id*. at 121-26 (Mar. 11, 1782) (reproducing draft ordinance).
296 22 *id*. at 402 (Jul. 19, 1782).

Post Office of the United States of America."[297] On October 28 Congress added a "supplemental ordinance,"[298] and on December 24 "An Ordinance for Amending An Ordinance Regulating the Post Office of the United States of America."[299]

In the main, the 1782 measures tracked the subject matter of Parliament's 1711 statute and of subsequent parliamentary enactments.[300] The new ordinances authorized a network extending from New Hampshire to Georgia, empowered the postmaster general to hire personnel at stated rates of compensation, and authorized him to supervise the entire system. The ordinances fixed postage rates (by page for most letters and by weight for larger items, with no weight limit), delineated rules for ships carrying in mail from overseas, defined postal offenses and punishments, designated courts for prosecution of offenses, prescribed an oath for post office personnel, and issued rules by which officials could open letters. The ordinances imposed, with certain exceptions, a letter-carrying monopoly.[301] They contained provisions for dead letters[302] and franking exemptions.[303] The growing popularity of newspapers was acknowledged by allowing post riders to carry them "at such moderate rates as the Postmaster General shall establish."[304]

In a few respects the ordinances departed from British precedents. They did not disqualify postal personnel from parliamentary politics because America had no general parliament. They did not attempt to control transportation on the post roads; any such regulation would have been impossible to enforce. The principal ordinance seemed to subordinate revenue-raising to conveyance of information: It recited "the communication of intelligence with regularity and despatch"[305] as a primary justification for the post office and provided that after the debt to Congress was re-paid, any surplus would be reinvested in the post office.[306] This language notwithstanding, revenue remained a significant concern.[307]

Congress eventually concluded that the 1782 reforms were not sufficient. On February 25, 1786, it appointed a new committee "to prepare and report an Ordinance on the post Office."[308] The committee produced a draft on February 14, 1787, entitled "An Ordinance for Regulating the Post Office of the United States

---

[297] 23 *id*. at 670-78 (Oct. 18, 1782).

[298] 23 *id*. at 688-89 (Oct. 28, 1782).

[299] 23 *id*. at 880 (Dec. 24, 1782). An earlier version had been defeated. *Id*. at 754-55 (Nov. 27, 1782), 757 (Dec. 2, 1782), 764 (Dec. 4, 1782) & 770 (Dec. 6, 1782).

[300] *Supra* Parts I.E & I.F.

[301] *See generally An Ordinance for Regulating the Post Office of the United States of America*, 23 J. Cont. Cong., *supra* note 1, at 670-78 (Oct. 18, 1782) (setting forth these provisions).

[302] *Id.* at 675 (Oct. 18, 1782); *id.* at 689 (Oct. 28, 1782).

[303] 23 J. Cont. Cong., *supra* note 1, at 830 (Dec. 24, 1782).

[304] 23 *id*. at677 (Oct. 18, 1782).

[305] 23 *id*. at 670 (Oct. 18, 1782).

[306] *Id.* at 677 (Oct. 18, 1782).

[307] *E.g.*, 34 J. Cont. Cong., *supra* note 1, at 76 (Mar. 3, 1788) (reproducing a letter from the postmaster general assessing the financial aspects of a Philadelphia-to-Pittsburgh route); see also John, Spreading, *supra* note 1, at 26 ("Long after the break with Great Britain, this rationale [revenue] remained influential in the United States, with public figures taking it more or less for granted that postage . . . should be treated as a tax.").

[308] 30 J. Cont. Cong., *supra* note 1, at 84 (Feb. 25, 1986).

of America."[309] This ordinance essentially re-codified and reinforced existing practice. It would have added two assistant postmasters general, and required them to visit every office in their respective districts at least every six months. It would have fixed rates for conveyance of periodicals, and required that they be dry when deposited into postal custody. It sought to formalize the custom[310] of permitting newspaper owners to exchange papers with each other without charge and allowed printers to send newspapers to subscribers at fixed fees.

When the Constitutional Convention met, this draft ordinance represented the latest official thinking on postal affairs. The following year the Confederation Congress adopted the newspaper exchange provision,[311] and in 1792 the Federal Congress enacted the fixed fee for newspaper postage.[312]

### *E. The Woes of a State-Owned Enterprise*

#### *1. Problems Inherited from the British Model*

Having copied the British model, Congress had to wrestle with its inherent defects. As in Britain, post riders were a persistent problem. They were often tardy, and they undertook for their own profit tasks that interfered with their postal duties.[313] On some routes, coaches were a possible alternative to riders. But coaches could be prohibitively expensive, and their owners insisted on schedules inconvenient for the merchants who were the post office's most important customers.[314]

Another weakness in the British model was its vulnerability to political meddling. Mail-tampering was widely suspected.[315] Franking made it harder for the system to earn a profit, and franking seemed constantly to increase. Members of Congress, of course, held the frank. Congress extended it to the lower ranks in the Continental Army,[316] then to army officers,[317] army generals,[318] diplomatic officers,[319] the director of the hospital,[320] delegates to the Constitutional Convention,[321] and

[309] 32 *id*. at 45 (Feb. 14, 1787).
[310] *Adelman*, *supra* note 1, at 723 (mentioning the exchange custom).
[311] 34 J. Cont. Cong., *supra* note 1, at 144 (May 7, 1788).
[312] Act of February 20, 1792, ch. 7, 1 Stat. 232, § 22.
[313] *E.g.*, 26 J. Cont. Cong., *supra* note 1, at 84-85 (Feb. 13, 1784) (reproducing a committee report on the problem and a congressional resolution authorizing an investigation). *See also* 28 *id*. at 109 (Feb. 28, 1785) (describing mail delivery problems); 34 *id*. at 595 (Oct. 2, 1788) (reproducing a committee report detailing the failures of riders "wholly unworthy of so important a Trust").
[314] 29 *id*. at 525-29 (Jul. 12, 1785) (discussing the expense and scheduling issues).
[315] *Infra* Part V.B. *See also* Letter from John Adams to Cotton Tufts (July 20, 1776) *in* 4 Delegate Letters, *supra* note 1, at 492 (suspecting "some unfair Practice in the Post Office" due to mail tampering).
[316] 4 J. Cont. Cong., *supra* note 1, at 43 (Jan. 9, 1776).
[317] 4 *id*. at 155 (Feb. 16, 1776); 15 J. Cont. Cong., *supra* note 1, at 1415 (Dec. 28, 1779).
[318] 4 *id*. at 294 (Apr. 19, 1776).
[319] 15 *id*. at 1415 (Dec. 28, 1779).
[320] 20 *id*. at 624 (Dec. 11, 1781).
[321] 32 *id*. at 228 (Apr. 23, 1787).

General George Washington *after* he had left active duty.[322] A motion in Congress on August 2, 1781 to end the practice[323] was defeated.[324] A few days later, a special committee also recommended that franking cease.[325] Instead, Congress extended the privilege,[326] as when it permitted department heads to frank even if they neglected to write an "on public service" legend on the outside of the letter.[327] By 1790, abuse was very widespread:[328] According to one estimate, franking and unauthorized private delivery were costing the post office seven-eighths of its potential revenue.[329]

Demands for patronage represented another kind of political meddling. Benjamin Franklin was the master demander. Under British rule he had filled post office jobs with family and business associates,[330] and in 1776, he convinced Congress to allow his son-in-law, Richard Bache, to replace him as postmaster general.[331] Bache proved less able than necessary to operate the post office under trying wartime conditions.[332] Congress responded by repeatedly raising his salary.[333]

Bache finally retired in 1782, after which Congress learned that he had allowed the post office to run out of such basic supplies as account books and portmantles, and had considerably overpaid the post riders.[334]

The choice of Bache's successor was more fortunate. Ebenezer Hazard[335] was well qualified for the job. He had served as "constitutional postmaster" in New

---

322 26 *id*. at 314 (Apr. 28, 1784). Washington hardly needed the privilege. At the time he may have been the wealthiest man in America.

323 21 *id*. at 828 (Aug. 2, 1781).

324 21 *id*. at 1054 (Oct. 15, 1781).

325 21 *id*. at 1066 (Oct. 19, 1781).

326 23 *id*. at 678 (Oct. 18, 1782); 23 *id*. at 880 (Dec. 23, 1782).

327 24 *id*. at 156-57 (Feb. 28, 1783). This was before envelopes came into common use. Letters were folded and addresses written on the outside. *See also* Letter from Elbridge Gerry to Abigail Adams (Nov. 1, 1783) *in* 21 Delegate Letters, *supra* note 1, at 148 (complaining of postmasters' refusal to honor the frank, apparently subsequent to the congressional resolution, when an "on publick Business" legend was omitted in order to save the post office money).

328 15 First Congress, *supra* note 1, at xx-xxii (2004) (editor's note on franking and its abuses).

329 1 Annals of Cong. 1567 (reproducing remarks by Jeremiah Wadsworth) (April 1, 1790). Postmaster General Samuel Osgood, however, stated that the amount lost from franking was impossible to quantify. Postmaster General's Report, Jan. 20, 1790, *in* 1 Annals of Cong. 2161, 2161.

330 *Adelman*, *supra* note 1, at 717.

331 Leech, *supra* note 1, at 9. 6 J. Cont. Cong., *supra* note 1, at 931 (Nov. 7, 1776).

332 Letter from John Hancock, president of Congress, to Richard Bache (Jan. 13, 1777) *in* 6 Delegate Letters, *supra* note 1, at 90 (complaining of late delivery, disloyal riders, and lack of compliance with congressional directions); Letter from John Adams to Thomas Jefferson (May 26, 1777) *in* 7 Delegate Letters, *supra* note 1, at 120 (reporting that a congressional "Committee on the Post office, too, have found, a thousand difficulties," and looking to surveyor Ebenezer Hazard to set things right); 6 John, Spreading, *supra* note 1, at 27 (accusing Bache of "incompetence"). I have adopted a more guarded assessment than Professor John because of the enormous wartime challenges under which Bache worked.

333 *E.g.*, 13 J. Cont. Cong., *supra* note 1, at 464 (Apr. 16, 1779); 15 *id*. at 1339 (Dec. 1, 1779); 15 *id*. at 1419 (Dec. 27, 1779); 16 *id*. at 19 (Jan. 6, 1780).

334 23 *id*. at 548 (Sept. 5, 1782).

335 Letter from John Hanson as president of Congress to Ebenezer Hazard (Jan. 30, 1782) *in* 18 Delegate Letters, *supra* note 1, at 315 (informing Hazard that "you are elected Post Master General").

York,[336] and later as surveyor for the U.S. system.[337] His work had received good reviews.[338] By all accounts Hazard did a far better job as postmaster general than his predecessor.[339] It is, perhaps, symbolic of the defects in the Anglo-American postal model that while Bache received multiple salary increases and continued in his position until he voluntarily retired, Hazard was to be skewered on the spit of political controversy.[340]

### *2. Other Problems*

In Britain, Parliament left post office administration largely to the postmasters general. In this respect, Americans did *not* follow the British model. Congress never delegated much power to the administrators charged with running the post office.

Legally, this was justifiable. In Britain, parliamentary legislation delegated to officials the power to (in the words of one statute) "establish Post Offices and Post Roads."[341] However, the Articles of Confederation granted Congress the "sole and exclusive right and power of . . . establishing or regulating post offices."[342] This language seemingly required that Congress adopt a more hands-on approach than did the British Parliament.

Congress created a standing committee on the post office.[343] Congress sometimes appointed ad hoc committees for special postal projects.[344] The congressional journals show that these committees, and Congress itself, were

[336] Leech, *supra* note 1, at 9; Letter from Benjamin Franklin to Ebenezer Hazard (Aug. 3, 1775), in 25 Delegate Letters, *supra* note 1, at 559 (stating that Hazard would be appointed).

[337] Jaffe, *supra* note 1, at 84.

[338] Letter from John Adams to Thomas Jefferson (May 26, 1777) *in* 7 Delegate Letters, *supra* note 1, at 120 (reporting on problems under Bache, and stating, "Mr. Hazard is now gone Southward, in the Character of Surveyor of the Post office, and I hope will have as good Success, as he lately had eastward, where he has put the office into good order").

[339] 24 J. Cont. Cong., *supra* note 1, at 329 (May 5, 1783) (reproducing a laudatory committee report); 34 *id*. at 462, 463 (Aug. 27, 1788) (reproducing a committee report praising certain post office procedures); Letter from Charles Thomson as secretary of Congress to Ebenezer Hazard (Jun. 22, 1786) *in* 23 Delegate Letters, *supra* note 1, at 369 (recording congressional approval of Hazard's decision not to accept paper money for postage).

[340] *Infra* Part VII.C.

[341] 7 Geo. 3, c. 50 (1767), § 5 (granting authority to "establish Post Offices and Post Roads" on the Isle of Man to the postmaster general); 5 Geo. i, c. 21 § 11 (granting authority to postmaster general and his deputies to establish "penny post" offices).

[342] Arts. Confed., art. IX (1781).

[343] *E.g.*, 12 J. Cont. Cong., *supra* note 1, at 26 (Jan. 5, 1779) (referring to it as "the committee for superintending and regulating the post office"). Other references are too numerous to list. *But see, e.g.*, 13 *id*. at 74 (Jan. 16, 1779) ("committee appointed to regulate the affairs of the post office"); 14 *id*. at 819 (Jul. 12, 1779) ("committee on the post office"); 15 *id*. at 1149 (Oct. 7, 1779) ("committee on the post office"); 16 *id*. at 12 (Jan. 3, 1780) ("committee on the Post-office").

[344] *E.g.*, 11 J. Cont. Cong., *supra* note 1, at 550 (May 29, 1778) ("Resolved, That a committee of four be appointed to report a plan for regulating continental expresses, and to enquire into and rectify abuses in the general post office"); 24 *id*. at 37 (Jan. 6, 1783) (appointment of a committee "to enquire fully into the proceedings of the Post Office").

deeply involved in postal administration. Sometimes the issues were relatively important, such as designation of routes,[345] packet boat schedules,[346] and whether coaches or riders were appropriate for particular routes.[347] On other occasions, the issues were of the kind Congress easily could have delegated to the postal staff.

By way of illustration: Congress spent an untoward amount of time investigating incidents of mail robbery.[348] Congress deemed it necessary to pass a resolution directing the postmaster general to fire a deputy and apprehend him for examination.[349] Congress passed a resolution reinstating an express rider.[350] Congressional expenditure authorizations extended to routine payments, reimbursements, and advances.[351] At one point, Postmaster General Hazard felt compelled to write a lengthy letter to Congress explaining in detail how a delegate's mail been torn.[352] And a congressional resolution was deemed necessary to pay a rider the sum of *six dollars.*[353]

Whatever might be the legal justification for Congress retaining so much control, the records demonstrate that a roomful of politicians is not a viable board of directors for a business enterprise. Congressional directions to the postmaster general sometimes were unclear or unwittingly contradicted earlier decisions.[354] Congress often had trouble making up its collective mind. It doubled the pay of post riders, then suspended the increase three weeks later.[355] It raised surveyors' fixed

---

[345] *E.g.*, 15 *id*. at 1411 (Dec. 27, 1779); 16 *id*. at 413 (May 5, 1780); 34 *id*. at 65 (Feb. 27, 1788).

[346] *E.g.*, 16 *id*. at 117 (Feb. 1, 1780).

[347] *E.g.*, 30 *id*. at 411 (Jan. 17, 1786 (reproducing motion of William Grayson for stage carriage); 31 *id*. at 501 (reproducing committee report for stage carriage and for leaving the mode of transportation for other routes to the postmaster general's discretion); 31 *id*. at 630 (Sept. 4, 1786) ("the Post Master General be, and hereby is authorised and instructed to enter into contracts . . . for the conveyance of the mails by stage carriages, *if practicable*, for one year") (emphasis added).

[348] 22 *id*. at 402 (Jul. 17, 1782); 25 *id*. at 790 (Nov. 1, 1783); 26 *id*. at 8-10 (Jan. 6, 1784) & 26 *id*. at 201 (Apr. 6, 1784).

[349] 6 *id*. at 968 (Nov. 20, 1776).

[350] 16 *id*. at 283 (Mar. 23, 1780).

[351] *E.g.*, 6 *id*. at 978 (Nov. 23, 1776); 8 *id*. at 618 (Aug. 6, 1777).

[352] The complaint is recorded in Letter from Benjamin Contee to Congress (Mar. 17, 1788) *in* 25 Delegate Letters, *supra* note 1, at 17 and Hazard's response in 34 J. Cont. Cong., *supra* note 1, at 144 (May 6, 1788). Hazard's response correspondence describes how the post office bundled and unbundled letters.

[353] 26 J. Cont. Cong., *supra* note 1, at 201 (Apr. 6, 1784).

[354] 34 J. Cont. Cong., *supra* note 1, at 312-15 (Jul. 9, 1788) (reproducing letter). Hazard's concluding paragraph was a pointed piece of diplomacy:

> Your Excellency, I flatter myself, will excuse these Remarks, as the Difficulties stated are obviously of such a Nature as to be insurmountable, except through the Intervention of Congress; and will your Excellency permit me to submit it to Consideration, *whether a standing Instruction to Committees upon the Business of any Department, to consult with the Head of the Department upon the Object of their Appointment, would not be useful*, as tending to furnish necessary Information, and to prevent Confusion.

34 *id*. at 314-15 (italics added).

[355] 18 *id*. at 1142 (Dec. 12, 1780) (doubling pay); 19 *id*. at 22 (Jan. 4, 1781) (suspending increase).

expense allowances, then repealed the increase and replaced it with reimbursement for documented expenses, and then repealed the reimbursement provision—all within the space of five months.[356] Debates over postal routes were not so much discussions of public need as contests in raw political power, with each delegate struggling to obtain more subsidized service for his own constituents.[357]

This kind of administration necessarily reduced the ability of the system to respond to emergencies. Thus, when Congress proved unable to meet the needs of Virginia state government for wartime intelligence, Governor Thomas Jefferson took it upon himself to institute a line of expresses.[358]

## IV. The Drafting of the Postal Clause

### *A. Why Adopt a Postal Clause?*

State owned enterprises suffer from widely-recognized challenges, particularly when they operate in non-competitive environments. These challenges include, but are not limited to, conflicting objectives, political interference, anti-competitive behavior, inefficient operations, and lack of accountability.[359] With respect to postal services in particular, the pre-constitutional history of the British and American systems offer many specific illustrations of such difficulties.[360]

In other respects, the Constitution favored private and competitive solutions rather than government enterprises and monopoly. It did not establish a state church, for example, and it proscribed religious tests.[361] It failed to list an explicit incorporation power because some framers feared such a power might spawn

---

356 15 *id*. at 1412 (Dec. 27, 1779 (raising $20 per day allowance to $40); 16 *id*. at 21 (Jan. 7, 1780) (repealing $40 allowance and opting for reimbursement), 16 *id*. at 413 (May 5, 1780) (repealing reimbursement provision).

357 *E.g.*, 34 J. Cont. Cong., *supra* note 1, at 161-63 (May 20, 1788); *id.* at 174 (May 22, 1788) (detailing rival proposed routes for Pennsylvania, Massachusetts, and Delaware). *See also* Letter from Nathaniel Peabody to Richard Bache (Aug. 30, 1780) *in* 15 Delegate Letters, *supra* note 1, at 637 (containing demand from congressional delegate from New Hampshire for more postal service in his state).

358 Letter of Thomas Jefferson to the President of Congress (Samuel Huntington) (Jun. 9, 1780) in 3 The Works of Thomas Jefferson 15, 18-19 (Paul Leicester Ford ed., 1904) (reporting the problem); Letter of Thomas Jefferson to George Washington (Jun. 11, 1780), *in id*. at 19 (reporting the solution); Letter of Thomas Jefferson to the President of Congress (Samuel Huntington) (Jun. 15, 1780), *in id.* at 24 (reporting the solution); 17 J. Cont. Cong., *supra* note 1, at 574 & 575 (June 29, 1780).

359 World Bank Group, Corporate Governance of State-Owned Enterprises: A Toolkit 12-15 (2014), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf?sequence=1&isAllowed=y. *See also* OECD, OECD Guidelines on Corporate Governance of State-Owned Enterprises 12 (2015), *available at* http://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en.

360 *Supra* Parts I.F & III.E.

361 U.S. Const., art. VI, cl. 3 (“no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

monopolies.[362] Other than the post office, the Constitution did not authorize the federal government to erect state owned enterprises, such as the British government's lotteries or the Spanish government's monopoly of salt mines.[363]

Yet for postal services, the framers wrote into the Constitution a clause authorizing a state-owned monopoly, and this decision was almost unquestioned during the ratification debates.[364]

One underlying reason may have been that the founders were temperamentally disposed toward preservation. They fought a revolution, but a conservative revolution. They repudiated specific English institutions, but they did not repudiate their entire heritage. The Postal Clause is only one of many constitutional provisions reflecting continuity with England.

Moreover, Congress inherited the American branch of the imperial post office at a time when Congress desperately needed two benefits that institution traditionally provided: intelligence and revenue. The framers and ratifiers may have believed that a socialized monopoly was the only way the system could generate revenue. Some contemporaneous writers defended government postal monopolies on grounds similar to the modern economic concept of the "natural monopoly."[365] Adam Smith's *Wealth of Nations*—then an increasingly influential work[366]—strongly recommended that governments avoid other "mercantile projects," but was more favorable to government ownership of the post office: "It is perhaps the only mercantile project which has been successfully managed by, I believe, every sort of government. The capital to be advanced is not very considerable. There is no mystery in the business. The returns are not only certain, but immediate."[367]

Newspaper publishers saw the post office as a ready, and perhaps subsidized, way to deliver their product. A few outside the newspaper business envisioned the

---

[362] 2 Farrand, *supra* note 1, at 615-16 (Sept. 14, 1787) (Madison). Another reason was that some framers—not all—thought the power to regulate commerce already included a power to grant monopolies. *Id.* at 616. *Cf.* Rogers, *supra* note 1, at 24 (attributing defeat of the canal power in part to antipathy to monopolies).

[363] 27 Geo. 3, c. 41 (1788) (authorizing raising of money by lottery); Jaime Vicens Vives, An Economic History of Spain 529 (1969) (mentioning the Spanish government's salt monopoly); see also Smith, Wealth *supra* note 1, at 468-71 (discussing other contemporaneous state owned enterprises).

[364] *Infra* Part VII.B.

[365] *Natural Monopoly*, Investopedia, http://www.investopedia.com/terms/n/natural_monopoly.asp ("A natural monopoly is a type of monopoly that exists as a result of the high fixed costs or startup costs of operating a business in a specific industry."). *Cf.* 1 William Blackstone, Commentaries at *312 ("[N]othing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another."); Encyclopaedia Britannica, *supra* note 1, at 6442 (repeating the same justification).

[366] Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 Wm. & Mary Q. 897, 901-04 (2002) (discussing evidence that the Founders read and admired *The Wealth of Nations*).

[367] Smith, Wealth *supra* note 1, at 469. Of other state owned enterprises, he wrote:

> Princes, however, have frequently engaged in many other mercantile projects, and have been willing, like private persons, to mend their fortunes by becoming adventurers in the common branches of trade. They have scarce ever succeeded.
>
> *Id*.

post office as what it later became—a great democratic circulatory system. Dr. Benjamin Rush, a signer of the Declaration of Independence and friend of Franklin, presented this concept in a pamphlet published in early 1787:

> For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the united states—every state—city—county—village—and township in the union, should be tied together by means of the post-office. This is the true non-electric wire of government. It is the only means of conveying heat and light to every individual in the federal commonwealth. Sweden lost her liberties, says the abbe Raynal, because her citizens were so scattered, that they had no means of acting in concert with each other. It should be a constant injunction to the postmasters, to convey newspapers free of all charge for postage. They are not only the vehicles of knowledge and intelligence, but the centinels of the liberties of our country.[368]

Rush's sentiments were not representative of wider public opinion, but other individuals may have shared them.

Probably a greater factor was the prestigious presence of Benjamin Franklin. Franklin sat in the Continental Congress that created the American post office. He produced the initial draft of the Articles of Confederation, which included a postal power.[369] He was willing to serve as postmaster general. He was at the convention that drafted the Constitution, and he supported ratification. His participation in all critical decisions must have helped the cause of the post office very much.

### *B. The Constitutional Convention*

The proceedings of the Constitutional Convention refer only rarely to the Postal Clause. Apparently everyone assumed that the new government would continue to operate the Confederation postal service. A June 11, 1787 speech by James Wilson, as reported by Robert Yates, discloses the assumption: "He supposed that the impost will not be the only revenue—the post office he supposes would be another substantial source of revenue."[370] A postal power was probably implicit in Edmund Randolph's Virginia plan, which included a grant of authority "to legislate in all cases to which the separate States are incompetent."[371] Similar "competence" language in Franklin's draft of the Articles had included the explicit example of the post office.[372] William Paterson's New Jersey plan, essentially a strengthened

---

[368] Benjamin Rush, *Address to the People of the United States*, American Museum (Jan. 1787), *in* Friends of the Constitution: Writings of the "Other" Federalists, 1787-1788 1, 4 (Colleen A. Sheehan & Gary L. McDowell eds. 1998).

[369] 2 J. Cont. Cong., *supra* note 1, at 195 (July 21, 1775).

[370] 1 Farrand, *supra* note 1, at 205 (June 11, 1787) (Yates).

[371] *Id.* at 21 (May 29, 1787) (Madison).

[372] Franklin's Articles of Confederation, art. V, *in* 2 J. Cont. Cong., *supra* note 1, at 195, 196 (July 21, 1775) ("The Congress shall also make such general Ordinances as tho' necessary to the General Welfare, particular Assemblies cannot be competent to; viz. Those that may relate . . . to the Establishment of Posts").

version of the Articles of Confederation, included a postal power with revenue as a principal goal:

> Resd. that in addition to the powers vested in the U. States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue . . . by a postage on all letters or packages passing through the general post-Office, to be applied to such federal purposes as they shall deem proper & expedient . . ..[373]

A constitutional plan of uncertain date traditionally ascribed to South Carolina's Charles Pinckney also featured the enumerated power "of establishing Post-Offices."[374]

The next reference to the post office in convention records was a June 27, 1787 speech by Luther Martin, who also spoke of the subject in a revenue context.[375] On July 26, the convention adjourned and committed its resolutions to a five-member Committee of Detail charged with producing a draft constitution. Committee member Edmund Randolph produced an initial outline for his colleagues. The convention had produced no resolution specifically authorizing a post office, but Randolph's outline included an enumerated legislative power "To establish post-offices."[376] The committee's final draft, presented on August 6, provided, "The Legislature of the United States shall have the power . . .To establish Post-offices."[377]

Nothing in the ensuing debate is recorded about the postal power until August 16, when Elbridge Gerry of Massachusetts moved to add "and post-roads." John Francis Mercer of Maryland seconded Gerry's motion.[378] Neither Gerry nor Mercer were advocates for a strong national government, and during the ratification debates both opposed the Constitution. Their motion foreshadows support for a central post office even among Antifederalists.

The state-by-state voting on the proposed amendment to add post roads was close (six states to five), but does not display any particular pattern.[379] No debate is recorded, so one can only guess at the reasons pro and con. Perhaps the supporters wished to clarify that power to establish post offices included authority to establish post roads. Perhaps some dissenters thought the point was obvious and that no

---

[373] 1 Farrand, *supra* note 1, at 243 (Jun. 15, 1787) (Madison).

[374] 2 *id*. at 135 (Committee of Detail records).

[375] 1 *id*. at 442 (Jun. 27, 1787) (King) ("Congress could not raise a penny except agreeably to Rule of Taxation in the 8th Art—not even from the Post Office").

[376] 2 *id*. at 144 (Committee of Detail records). Other documents considered by the committee also refer to the post office. 2 *id*. at 157 (reproducing James Wilson's extract of the New Jersey Plan); *id*. at 167-68 ("to establish Post-offices") (Wilson's extract of the Pinckney Plan).

[377] 2 *id.* at 181-82 (Aug. 6, 1787).

[378] 2 Farrand, *supra* note 1, at 308 (Aug. 16, 1787) (Madison).

[379] *Id.* at 308 (Aug. 16, 1787) (Madison). Voting in favor were Massachusetts (Gerry's state), Maryland (Mercer's state), Delaware, Virginia, South Carolina, and Georgia. Voting against were New Hampshire, Connecticut, New Jersey, Pennsylvania, North Carolina. There were large and small states on both sides. There were also states with a developed road system on both sides and states with large undeveloped tracts on both sides.

clarification was needed. Perhaps other dissenters feared Congress might create a British-style transportation monopoly.

Until July 17, 1787 advocates of a strong central government were in control of the federal convention. After that date, the convention usually resisted efforts to add federal powers.[380] This generalization holds for all efforts to augment the postal power beyond the post road addition. The delegates rejected an effort (possibly by Charles Pinkney)[381] to empower Congress "[t]o regulate Stages on the post roads."[382] The motion was sent to the Committee of Detail and never re-emerged. Gerry moved "to provide for public securities for stages on post-roads.[383] It is unclear what this meant (perhaps armed guards or bonds to finance construction), but the motion was similarly committed, and not seen again.[384] On August 20, Gouverneur Morris proposed to establish a "secretary of domestic affairs" whose duties would have included, among many others, "the opening of roads and navigations, and the facilitating communications thro' the U.States."[385] This motion also was interred in the Committee of Detail. On September 14, Franklin sought to add to the postal clause "a power to provide for cutting canals where deemed necessary."[386] After unsuccessful efforts to expand this language further, the entire motion went down.[387]

The framers' rejection of proposals pertaining to stage carriages can be read two ways: (1) The framers may have viewed them as superfluous, because post-road authority always had included regulating vehicles on the road, or (2) the framers may have wanted to constrain federal power over post roads more narrowly than in Britain. The former is more probable, if only because, in the absence of contrary evidence we should presume that people as lawyerly as the framers wanted to retain what was familiar. As far as I know, there is no contrary evidence.

## V. The Ratification Era: 1787-90

### *A. Ratification-Era Evidence*

The Constitution was signed on September 17, 1787. Convention president George Washington transmitted it to Congress, which sent it to the states for ratification. Each state legislature eventually called a popular ratifying convention to consider the document. All ratified. Rhode Island was the last to do so—on May 29, 1790. Thus, the ratification era extended from September 17, 1787 to May 29, 1790.[388]
Ratification-era evidence of the Postal Clause's meaning is not copious. This Part V

[380] *Natelson, Enumerated*, *supra* note 1, at 473 (marking July 17 as "the high tide of nationalization").
[381] 2 Farrand, *supra* note 1, at 325 n.4 (Aug. 18, 1787) (Madison).
[382] *Id.* at 326.
[383] *Id.* at 328.
[384] *Id.* at 328.
[385] *Id.* at 342-43 (Aug. 20, 1787) (Madison).
[386] *Id.* at 615 (Sept. 14, 1787) (Madison).
[387] *Id.* at 616 (Sept. 14, 1787) (Madison).
[388] *See* 13 Documentary History, *supra* note 1, at xl - xlii (containing a chronology of events).

arranges what we do have: (1) Material from the debates over ratification within the state conventions and among the general public, (2) proceedings in the Confederation Congress, and (3) proceedings in the first session of the First Federal Congress.

### *B. The Ratification Debates in State Conventions and in Public*

In one respect, the debates over the Postal Clause in the ratifying conventions and among the general public were similar to those in the Constitutional Convention: There was some controversy, but not very much. Both Federalists[389] and Antifederalists[390] generally approved of the Postal Clause. Antifederalists sometimes cited the post office as a power the central government ought to possess,[391] as opposed to others it ought not possess. The Federalists constricted the scope of potential controversy by distinguishing post roads from other roads, representing that only the state governments would exercise jurisdiction over the latter.[392]

Some dissention arose at the margin. At the New York ratifying convention, Samuel Jones, a state legislator, offered an amendment that would narrow the scope of the term "establish:"

> Resolved . . . that the power of Congress to establish post-offices and post-roads is not to be construed to extend to the laying out, making, altering, or repairing high ways, in any state, without the consent of the legislature of such state.[393]

---

389 *E.g.*, Thomas McKean, *Speech to the Pennsylvania ratifying convention, in* 2 DOCUMENTARY HISTORY, *supra* note 1, at 415 (Nov. 28, 1787) ("The punishment of forgery and the establishment of post offices and post roads are subjects confessedly proper to be comprehended within the federal jurisdiction"); CUMBERLAND GAZETTE, Nov. 15, 1787, *in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 245-46 (pointing out that congressional jurisdiction over the post office was granted by the Articles of Confederation); THE FEDERALIST NO. 40, *supra* note 1, at 202 (James Madison) ("Do these fundamental principles require particularly, that no tax should be levied without the intermediate agency of the States? The confederation itself authorises a direct tax to a certain extent on the post-office"); THE FEDERALIST NO. 42, *supra* note 1, at 222 (James Madison) ("The power of establishing post-roads, must in every view be a harmless power; and may perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States, can be deemed unworthy of the public care.").

390 *E.g.*, Federal Farmer, Letter I, Oct. 8, 1787, *in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 18 (same); Federal Farmer, Letter III, Oct. 10, 1787, *in* 14 DOCUMENTARY HISTORY, *supra* note 1, at 30, 35 (same).

391 *E.g.*, Samuel Chase's Objections, Apr. 24-25, 1788, *in* 12 DOCUMENTARY HISTORY, *supra* note 1, at 641 (citing the post office as an appropriate congressional power). Antifederalists generally looked favorably on the post office as a source of revenue. *Id.* at 642; Melancton Smith, *Speech to the New York Ratifying Convention*, Jun. 27, 1788, 22 DOCUMENTARY HISTORY, *supra* note 1, at 1931) ("The genl. govt. will have a certain & very productive revenue from impost & post office"); John Lansing, Jr, *Speech to the New York Ratifying Convention*, in *id.* at 2020 (same).

392 *Natelson, Enumerated, supra* note 1, at 488.

393 22 DOCUMENTARY HISTORY, *supra* note 1, at 2077 (Jul. 2, 1788) (Chiles, *Debates*).

The proposal was not adopted, and may have may provoked amusement among those who thought it querulous.[394] This rejection did not prevent Jones from supporting the Constitution, and other objections to the postal power are hard to find.[395]

If the ratification era witnessed little controversy about the Postal Clause as such, it witnessed a raging controversy over the post office itself. Some people were convinced their mail was being interrupted or opened and scrutinized,[396] but far more were angry over a fall-off in postal reliability. The fall-off was real, an unintended consequence of Postmaster General Hazard's efforts to *improve* service.[397]

On November 2, 1786, Hazard had written to Congress about postal contracts for the calendar year 1787. He recommended that Congress continue to contract with stage coaches for mail delivery from New York to points south. However, he requested authority to revert to post riders for routes from New York through New England.[398] Hazard detailed concerns of cost, reliability, and scheduling leading to his recommendation.[399]

Congress made no change for calendar year 1787. On October 12, 1787, Hazard renewed his request for calendar 1788.[400] Three days later, Congress granted it.[401]

The ensuing change probably did not cause major kinks in letter delivery, but the results for newspapers turned out to be very bad. Stagecoaches had carried newspapers

---

[394] N.Y. Daily Advertiser, Jul. 8, 1788, *in* 22 Documentary History, *supra* note 1, at 2079, 2080 (claiming Jones's proposal was greeted with laughter).

[395] 23 Documentary History, *supra* note 1, at 2323 (Jul. 26, 1788) (Convention Journal); *but see* 2 *id.* at 507 (Dec. 5, 1787) (notes of James Wilson) (recording the complaint of Pennsylvania Antifederalist Robert Whitehill that "Even post roads are in the power of Congress.").

[396] George Washington to the Marquis de Lafayette, Feb. 7, 1788, 8 Documentary History, *supra* note 1, at 355:

> As to my sentiments with respect to the merits of the new Constitution, I will disclose them without reserve (although by passing through the Post offices they should become known to all the world) for, in truth, I have nothing to conceal on that subject."

*See also* Letter from Richard Henry Lee to Samuel Adams (Oct. 27, 1787), *in* 13 Documentary History, *supra* note 1, at 484 (stating, in a letter carried by Elbridge Gerry, "Our mutual friend Mr. Gerry furnishes me with an opportunity of writing to you without danger of my letter being stopt on its passage, as I have some reason to apprehend has been the case with letters written by me and sent by the Post."); Letter from William Ellery to Benjamin Huntington (Jun. 7, 1788), *in* 26 Documentary History, *supra* note 1, at, 1037 ("By some bad conduct of the Post master at Little Rest your letter of the 22d. of May did not come to hand timely enough to be answered in my last of the 1st. of June.—This is not the first time that he has been guilty of mal-conduct.").

[397] The controversy is summarized and relevant documents reproduced in *Appendix II*, 16 Documentary History, *supra* note 1, at 540 and Jaffe, *supra* note 1, at 84-8. Jaffe's narrative leans against Hazard, depicting him as having bad judgment and a personal antipathy to stage coaches. I do not share this view.

[398] 31 J. Cont. Cong., *supra* note 1, at 922-23 (Nov. 2, 1786).

[399] *See also* Letter from Ebenezer Hazard to Jeremy Belknap (May 17, 1788), *in* 16 Documentary History, *supra* note 1, at 593, 594 (explaining reasons for using riders rather than coaches).

[400] 33 J. Cont. Cong., *supra* note 1, at 672 (Oct. 12, 1787).

[401] *Id.* at 684 (Oct. 15, 1787) ("Resolved That the postmaster general be and he is hereby authorised to contract for the transportation of the mail for the year 1788 by stage carriages or horses as he may judge most expedient and beneficial; provided that preference is given to the transportation by stages to encourage this useful institution").

from publisher to publisher without charge,[402] but post riders insisted on payment.[403] This seems only fair, as John Jay recognized at the time,[404] but the publishers were unhappy about having to pay. Moreover, post riders, even when compensated, proved undependable. Newspapers are bulkier than letters, and there is less room atop a horse than in a coach. Sometimes riders threw papers away en route.[405] Sometimes they sold them for profit rather than delivering them properly.[406]

Complaints about unreliable delivery came from both sides of the constitutional controversy. Some (not all)[407] Antifederalists saw it as the product a Federalist plot[408] whereby the post office would obstruct opposition papers while allowing Federalist papers to pass freely.[409]

By March, 1788, the charges against the post office had become very numerous. Hazard believed they justified response. He issued a public letter itemizing a series of supposed facts:

> That the post-office was established for the purpose of facilitating commercial correspondence; and has, properly speaking, no connection with news-papers, the carriage of which was an indulgence granted to the post-riders, prior to the revolution in America:
>
> That the riders stipulated with the Printers for the carriage of their papers, at a price which was agreed upon between them; and this price was allowed as a perquisite to the riders . . .
>
> That news-papers have never been considered as a part of the mail, nor (until a very few years) admitted into the same portmanteau with it; but were carried in saddle-bags, provided for that purpose, by the riders, at their own expence:

---

402 Jaffe, *supra* note 1, at 86.

403 2 Documentary History, *supra* note 1, at 643 (editor's note).

404 Letter from John Jay to George Washington (Sept. 21, 1788), *in* 23 Documentary History, *supra* note 1, at 2472.

405 16 Documentary History, *supra* note 1, at 541 (Appendix II).

406 *Stoppage of Newspapers*, Mass. Centinel, May 7, 1788, *in* 16 Documentary History, *supra* note 1, at 589, 590 (detailing misdeeds of post riders).

407 2 *id*. at 644 (editor's note).

408 The controversy was provoked by a Pennsylvania Antifederalist writing under the pen name of "Centinel." *See, e.g.*, *Centinel, Letter IX*, Phila Independent Gazetteer, Jan. 8, 1788, *in* 15 *id*. at 308, 310:

> [D]uring almost the whole of the time that the late convention of this state were assembled, the newspapers published in New-York, by Mr. Greenleaf, which contains the essays written there against the new government, such as the patriotic ones of Brutus, Cincinnatus, Cato, &c. sent as usual by the printer of that place, to the printers of this city, miscarried in their conveyance . . . and I stand informed that the printers in New-York complain that the free and independent newspapers of this city do not come to hand; whilst on the contrary, we find the devoted vehicles of despotism pass uninterrupted.

*See also* Centinel, Letter XI, Phila Independent Gazetteer, Jan. 16, 1788, *in* 15 *id*. at 386.

409 *E.g. A Correspondent*, Phila. Independent Gazetteer, Apr. 15, 1788, *in* 16 *id*. at 584.

> That, to promote general convenience, the post-masters (not officially) undertook to receive and distribute the news-papers brought by the riders, without any other compensation for their trouble than the compliment of a newspaper from each printer:
>
> That, although the United States in Congress assembled, from an idea that beneficial improvements might be made in the transportation of the mail have directed alterations as to the mode of carrying it; yet they have not directed any to be made in the custom respecting newspapers:
>
> And, That the post-master-general has given no orders or directions about them, either to the post-masters, or to the riders. From this succinct state of facts the post-master general apprehends it will clearly appear, that so far as the post office is concerned, the carriage of news-papers rests exactly on its original foundation; and that the attempts to excite clamors against the department must have some other source than a failure in duty on the part of the officers.[410]

This response was politically inept. It conveyed a tone sounding in arrogance, doubly so because it came from a person who was supposed to be a public servant. Furthermore, at least two of Hazard's "Thats" were not strictly accurate. Congress had not "directed" a change in the mode of carriage. Congress had *authorized* it at Hazard's request. Also, his claim that the post office was primarily for "commercial correspondence" was overstated. Opponents had no trouble shredding Hazard's defense.[411]

Adding to Hazard's difficulty is that he had annoyed people who purchased ink by the barrel.[412] As purveyors of the written word, newspapermen were well situated to air complaints about the loss of their privileges. With some fairness, they could point out that even the British imperial post had permitted each printer to send one copy of each edition *gratis* to every other printer. With less justification, they pressed the Antifederalists' claim that public service was the primary reason for the post office.[413]

---

410 16 *id*. at 567-68 (Mar. 19, 1788).

411 *A True Federalist*, Mar. 25, 1788, *in* 16 *id*. at 569. The author reproduced in his response, *id.* at 571, the resolution of Congress that authorized, but did not require the postmaster general to revert to post riders. *See also Algernon*, Phila. Independent Gazetteer, Apr. 10, 1788, *in* 16 *id*. at 582.

412 "Never pick a fight with people who buy ink by the barrel"— attributed to Mark Twain.

413 *E.g.*, *Manco*, Maryland J., Mar. 18, 1788, *in* 16 Documentary History, *supra* note 1, at 561:

> The News-Papers are the best vehicles of intelligence and information, respecting public affairs, to the people at large; and to stop their free circulation, is an act of injury and insult to the citizens of these United States. At no time can it be more necessary to keep open the channels of communication than at the present moment. The great motive for erecting the present Post-Office in America, was to promote the public good, by facilitating a constant and speedy conveyance of public despatches and private letters; and the incidental revenue arising from the latter, was but a secondary object.

*See also A True Federalist*, N.Y. J., Mar. 25, 1788, *in* 16 *id*. at 569; Phila. Independent

What could be more in the nature of public service than distributing newspapers?

> The stopping of public newspapers, in a free country, is an outrage upon all mankind, because it interrupts business, and foils the public in general of the only easy and expeditious mode of communicating important events and sentiments.—In them we find many interesting thoughts in religion, morals, politics, law, physic, agriculture, and commerce—by them we learn the state of foreign nations and foreign affairs—the various things that concern domestic oeconomicks, as well as the casualties of neighbourhoods. The merchant learns the general state of trade, hears the prices current, knows his losses in every quarter of the globe—thus he and the insurer are mutually advantaged and do mutual benefit to the community. The artist hears of employ or presents an advertisement of the various things he has for sale. The learned hears of new publications—their vent is increased—and innumerable advantages are extended to all.[414]

I have not found any printer who admitted at this juncture that he produced his papers for profit, or that he could have secured stage coach distribution merely by paying for it.[415]

The controversy is notable from the constitutional perspective in that even amid sharp debates over the Constitution, no one questioned the propriety of the Postal Clause, or argued that postal service should not be a government monopoly. All recorded complaints were about the quality of the service only.

### *C. Ratification-Era Proceedings in the Confederation Congress*

The ratification-era record of the Confederation Congress can be summarized in a short sentence: Congress opted for the status quo. During this period, Congress spent perhaps more time on postal matters than in any comparable period, but it did nothing that would alter public understanding of what it meant "to establish Post Offices and post Roads."

Thus, in the fall of 1787, Congress remitted a breach-of-contract penalty for a contractor and authorized him to switch from coaches to horses.[416] It debated delivery routes,[417] entertained a report from Postmaster General Hazard on southern routes,[418] opened the contracting process for 1788,[419] and reduced postage rates in hope of increasing business.[420]

---

Gazetteer, Apr. 21, 1788, *in* 16 *id*. at 587.

414 *New Hampshire Spy*, Mar. 28, 1788, *in* 16 *id*. at 577. *See also Mentor*, Petersburg Va. Gazette, Apr. 3, 1788, *in* 16 *id*. at 578 (containing another panegyric to newspapers coupled with an attack on the post office).

415 The campaign of newspapermen for a compliant post office is the theme of *Adelman*, *supra* note 1.

416 33 J. Cont. Cong., *supra* note 1, at 533 (Sept. 25, 1787).

417 *Id.* at 647-49 (Oct. 10, 1787).

418 *Id.* at 671-73 (Oct. 12, 1787).

419 *Id.* at 684 (Oct. 15, 1787).

420 *Id.* at 695 (Oct. 20, 1787).

During 1788, most activity was of the same kind.[421] In an effort to quiet the newspaper delivery controversy, the committee on post offices recommended allowing publishers to exchange papers free of charge,[422] but Congress took no action. Congress also took no action on the pending revision of the postal ordinances.[423] A congressional committee determined that state executives had no authority to open the mail.[424]

Perhaps the most interesting development in 1788 was a harbinger of future patronage battles: A debate erupted among Pennsylvania, Massachusetts, and Delaware delegates over which states would obtain new postal routes.[425]

A 1788 report from the post office committee summarized the condition of the postal system.[426] The staff consisted of the postmaster general, one assistant, and 69 deputy post masters, one for each office. Deputies were paid a commission of 20 percent of the postage on all letters delivered. Mail delivery was contracted out rather than entrusted to employees. Routes south of Virginia, where population was diffuse and delivery costs were high,[427] ran a financial deficit. Northern routes more than made up the difference. At least since 1785, the office had been a profitable enterprise, and had paid substantial sums to the treasury[428] despite the revenue drain from illegal competition and franking.[429] During 1788, the office had managed to cut delivery costs considerably.

The committee commended the post office for its contracting standards and the extremely low rate of contractual default.

### *D. Ratification Era Proceedings in the First Federal Congress*

When the First Federal Congress convened in April, 1789,[430] about a year remained in the ratification era, for neither North Carolina nor Rhode Island had entered the union. The new government did nothing during that period that would have changed the public meaning of the Postal Clause. It seems to have been taken for granted that the postal system would serve its traditional role as a medium for governmental intelligence, a source of revenue, and an aid to commerce. There

---

[421] *E.g.*, 34 J. Cont. Cong., *supra* note 1, at 65-66 (Feb. 27, 1788) (authorizing posts for the transportation of mail between Philadelphia and Pittsburgh); 34 *id*. at 66-67 (Feb. 27, 1788) (entertaining the postmaster's request for authority to cancel an unfulfilled contract); 34 *id*. at 76-77 (Mar. 3, 1788) (receiving postmaster general's report on the Pittsburgh route); 34 *id*. at 81-82 (Mar. 4, 1788) (receiving his report on a proposed Maine route); 34 *id*. at 142-44 (May 6, 1788) (receiving his report on a damaged mail shipment); 34 *id*. at 273-74 (Jul. 1, 1788) (authorizing bidding for mail contracts).

[422] 34 *id*. at 144 (May 7, 1788); 16 Documentary History, *supra* note 1, at 589.

[423] *Supra* notes 308-310 and accompanying text.

[424] 34 J. Cont. Cong., *supra* note 1, at 232 (Jun. 13, 1788) & 239 (Jun. 18, 1788).

[425] *Id.* at 161-63 (May 20, 1788) & 174 (May 22, 1788).

[426] *Id.* at 462-65 (Aug. 27, 1788).

[427] The committee also noted that the cost of delivery per mile was "generally greater at the Southward than Eastward." 34 *id*. at 464 (Aug. 27, 1788).

[428] *See* 34 *id*. at 463-64 (setting forth the statistics).

[429] *Supra* notes 316-329 (describing losses from franking).

[430] The House attained a quorum on April 1 and the Senate on April 6. 1 Annals of Cong. 16 & 100.

was no mention of the "public service" theory formerly promoted by newspaper publishers and Antifederalists.

Congressional attention was mostly on revenue.[431] The executive branch was similarly focused. The new postmaster general, Samuel Osgood, worked directly under Secretary of the Treasury Alexander Hamilton, and on January 20, 1790 Hamilton provided Congress with a report by Osgood.[432] The report addressed several topics, but Osgood viewed them principally in the light of revenue.

Osgood rejected the idea that newspapers should travel free, advocating a charge of one or two cents on each.[433] He did cite a goal of easing communication—but principally between remote regions and the national capital.[434] In other words, the Washington administration was still thinking of the post office "intelligence" function as primarily serving the government. Moreover, Osgood assured Congress that contact between the capital and remote regions could be accomplished without diminishing revenue.[435]

To the extent that Osgood proposed reform, he recommended changes that would have moved the American system closer to the British model. He favored strengthening the postal monopoly by cracking down on competition.[436] He suggested exerting more control over the transportation network by barring from the post roads any coach not commissioned by the postal service.[437] He recommended that Congress delegate to his department power to establish new post offices and post roads.[438]

Congress's September, 1789 legislation "for the temporary establishment of the Post Office"[439] provided for a postmaster general and assistants in the new executive branch, and added that "the regulations of the post-office shall be the same as they last were under the resolutions and ordinances of the late Congress."[440] This law was "to continue in force until the end of the next session of Congress, and no longer"—that is, until 1790. But Congress extended it in 1790 and again in 1791.[441]

---

[431] *E.g.*, 1 Annals of Cong. 316 (May 9, 1789) (quoting Theodorick Bland on the post office as a source of revenue); *id.* 1566-67 (April 1, 1790) (quoting Jeremiah Wadsworth in discussing postal revenue as part of a review of the secretary of the treasury's report); *id.* at 1579 (Apr. 13, 1790) (quoting remarks by Hugh Williamson on postal revenue). *See also id.* at 1936 & 1938 (Jan. 31, 1791) (quoting post-ratification statement by Hugh Williamson and James Jackson on the revenue effects of different postal routes).

[432] Postmaster General's Report, Jan. 20, 1790, *in* 1 Annals of Cong. 2161.

[433] 1 Annals of Cong. 2163.

[434] *Id*. at 2164. This lends content to a sentence in President Washington's admonition that Congress direct its attention to post offices and post roads to "facilitat[e] the intercourse between the distant parts of our country." 1 Annals of Cong. 970.

[435] *Id.* at 2164.

[436] *Id.* at 2166 (extending prohibition on carriage of letters for those who carried without compensation and defining postal crimes more carefully).

[437] *Id.* at 2165.

[438] *Id.* at 2167.

[439] So characterized *id.* at at 82 (Sept. 15, 1789); *id.* (Sept. 17, 1789); *id.* at 927 (Sept. 16, 1789); *id.* at 928 (Sept. 17, 1789); *id.* at 1027 (June 21, 1789) and passim.

[440] Act of Sept. 22, 1789, ch. 16, 1 Stat. 70.

[441] Act of Aug. 4, 1790, ch. 36, 1 Stat. 178; Act of Mar. 3, 1791, ch. 23, 1 Stat. 218. The 1791 extension also expanded franking privileges and authorized a postal route from Albany, New York to Bennington, Vermont. *Id.* §§ 2 & 3.

Congress may have failed to adopt comprehensive postal legislation from a sense that the office was working well enough to allow it to concentrate on other priorities. The reason usually cited, however, is that Senate and House were divided on Osgood's request that Congress delegate to him authority to designate post roads. It is true that, while other issues arose in congressional debate,[442] delegation was the principal sticking point.[443]

# VI. The Original Meaning of the Postal Clause

## *A. Questions Raised*

One way to clarify the original meaning of the Postal Clause is to answer several questions repeatedly posed about the scope of the postal power:[444]

- What was a "post road?" Was it any road over which the mail was carried?
- What did "establish" mean? In particular, did the power to "establish" post offices include authority to define and provide for prosecution and punishment of postal crimes?
- Did the Postal Clause permit the post office to pursue entrepreneurial opportunities? If so, which ones?[445]
- Did the Clause authorize constructing new roads and facilities or merely designating existing ones?
- If the power extended to constructing roads, did it include eminent domain?

The material presented heretofore in this Article enables us to answer most of these questions. The question pertaining to eminent domain requires additional discussion, presented below.[446]

## *B. What Was a "Post Road?"*

Before answering the first question, it may be helpful to summarize some of the findings already presented in this Article.

---

[442] *E.g.*, 1 Annals of Cong. 1580 (Apr. 13, 1790) (discussing whether "farming" [contracting out] should be permitted); 13 First Congress, *supra* note 1, at 1570 (1995) (Jun. 15, 1790 discussion of whether private stage passengers should be permitted to carry letters).

[443] *Currie*, *supra* note 1, at 628-32 (describing the debate in the first and second federal Congresses); *Mashaw*, *supra* note 1, at 1293-94. *See also infra* Part VII.B.

[444] *Cf.* Rogers, *supra* note 1, at 10 & 31-36.

[445] Elaine C. Kamarck, Delaying the Inevitable: Political Stalemate and the U.S. Postal Service 10-11 (Brookings Inst. 2015) (discussing postal initiatives toward banking, parcel post, and telephone and telegraph in the early twentieth century and grocery delivery in 2014).

[446] *Infra* Part VI.E.

During the founding era, post offices and post roads were not separate institutions. They comprised parts of single system, and the Postal Clause granted power to create and regulate it. The system was a network designed primarily to (1) facilitate information flow between the central government and the public at large (including government intelligence and propaganda), (2) raise revenue, and (3) facilitate trade and commerce. Providing a means of private correspondence and information dissemination was a subsidiary goal

The activities of a postal system included carriage of persons, freight, and letters. For international and coastal transportation and delivery, the system relied on a fleet of packet boats.[447] For inland transportation and delivery, it relied principally on post roads.

A *post road* was a highway punctuated by *posts*—and thereby distinguished from public ways of other kinds.[448] Each post was overseen by a *post master* who carried out his official functions in a *post office*. A post marked the end and beginning of successive *stages*. A post (sometimes also, confusingly called a "stage") was where traffic switched from one stage to another. It was a site for feeding, stabling, exchanging and renting horses; storing, exchanging, and renting vehicles; accepting letters and packages from an earlier courier and handing them to the next; and assessing payment for carriage, rental, and tolls. Many, if not most, posts provided amenities such as taverns, inns, and newspapers.

We are now prepared to answer the first question. A post road was not so called because the mail was carried over it. Precisely the reverse was true: The mail was called the "post" because it was carried principally on the post road. The post road was the central feature of a postal system, and it gave its name to the freight, to post offices, post boys, and riding post. If a post boy carried letters from the post office across city streets to individual addresses, as King's Bench required in *Smith v. Powdich*,[449] that did not convert city streets into post roads.

Of course, a particular post or stage might lack one or more facilities available at others, and a postal system might have more or fewer features than others. However, the scope of the constitutional phrase "Post Offices and post Roads" cannot be defined by the activities of any particular postal institution at any one time, but by what the founding generation understood could be within a postal system's purview. In essence, this comprised the maintenance of packet boats, the construction and care of post roads, and the carriage and delivery of humans, animals, letters, and freight by means of packet boats and post roads.

### *C. What Did "Establish" Mean, and Did the Power to "Establish" a Postal System Include Defining and Punishing Postal Crimes?*

To "establish" a postal system, or one of its components, comprehended all actions necessary to make the system or component work: In the case of the postal system, this included purchasing, maintaining, and operating packet boats; laying out, constructing, and maintaining posts, toll gates, and post roads; hiring and directing

---

[447] Lewins, *supra* note 1, at 94-95.

[448] *Cf. Natelson, Enumerated*, *supra* note 1, at 480 n.65 (referring to "roads [except post roads"] & 488 (similar distinction).

[449] (K.B. 1774) 1 Cowp. 182, 98 Eng. Rep. 1033.

postal employees and contractors; specifying the rules for travel,[450] carriage, pickup and delivery; issuing and selling stamps and passage rights; obtaining and renting out horses and vehicles; and so forth. To "establish" postal institutions encompassed granting them and their employees monopoly status and other privileges,[451] as well as granting privileges to persons and institutions against the postal system, such as the frank.

In Anglo-American practice, "establishing" a postal system always included defining and providing for prosecution and punishment of postal crimes. This was not a mere incidental power memorialized by the Necessary and Proper Clause,[452] as some have assumed.[453]

### *D. Did the Postal Clause Permit the Post Office to Pursue Entrepreneurial Opportunities? If So, Which Ones?*

Entrepreneurial activities engaged in by the post office, or proposed for it, have included the parcel post, banking, job placement, telephone and telegraph services, and, most recently, delivery of groceries. Assessing which of these is within or without the original meaning of the Postal Clause requires that we consider what the founding generation understood a postal system to be: a system of staged roads, vehicles, packet boats, and associated institutions for transport of letters, animals, goods, and persons. Certainly, this grant was not limited to the technology of the founding era: Congress could replace horses with motor vehicles, gravel with asphalt, and sailing vessels with diesel or atomic power. But the grant did not encompass establishing or operating businesses the Constitution's ratifiers would have thought quite distinct from postal services.

---

450 Thus, the decision of the Committee of Detail at the Constitutional Convention not to include the phrase "to regulate stages on the post roads," Rogers, *supra* note 1, at 23, did not affect the scope of the Clause.

451 *Cf.* Rogers, *supra* note 1, at 41 ("Nor has there been any dispute as to the power of Congress to establish a monopoly by forbidding private postal enterprises").

452 U.S. Const., art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. ").

453 *E.g.*, Andrew Koppelman, *Bad News For Bank Robbers: The Obvious Constitutionality of Health Care Reform*, 121 Yale L.J. Online 1 (apparently assuming that defining postal crimes is an exercise of power under the Necessary and Proper Clause).
The assumption arises from language in *McCulloch v. Maryland*, 17 U.S. 316, 385 (1819) ("the power of establishing post-offices and post-roads, involves that of punishing the offence of robbing the mail"), the leading case on the Necessary and Proper Clause, coupled with the premise that the Clause substantively adds to the power to "establish." From a founding-era prospective, however, the Clause was merely a rule for interpreting the word "establish." The term "establish," if construed according to its original meaning, already included the power to create postal crimes. *See also* Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause*, in Lawson, et al., *supra* note 1, at 97-108 (2010) (collecting evidence showing that the Clause was understood during the ratification as merely a rule of construction). Modern readers are apt to misread Marshall's language if they are not aware that in his day the word "involve" could mean "include." Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789) (unpaginated) (defining "involve").

Except for the London penny post,[454] the British and American post offices often carried large or usual items. That was the purpose of the *stage wagon*[455] and one of the purposes of the packet boat.[456] Congress's 1782 ordinance contained no limits on weight, other than those inherent in the cost of postage. There were no restrictions, other than those of practicality, on what was carried. British riders and stage coaches transported—indeed, in some cases franked—items as diverse as dogs and cattle; stockings, lace, and other clothes; medicines, tea, and bacon.[457] It follows that parcel post and grocery delivery are within the original scope of the postal power.

On the other hand, nothing within the founding-era understanding of a postal system encompassed banking[458] or job placement. The framers' refusal to add canals to the Postal Clause[459] implies that it excludes non-road networks, such as telegraph and telephone services.

### *E. Did the Clause Authorize Constructing New Roads and Facilities or Merely Designating Existing Ones?*

Thomas Jefferson once suggested that "establishing" a post road was limited to merely designating which existing roads should be used for the transport of the mail—that the power to "establish" did not include building roads.[460] The suggestion was perhaps whimsical or mischievous, for there is no support for such an interpretation other than Jefferson's prestige.

Just as "establishing" a postal system encompassed performing what was needed to create and regulate that system, founding-era sources show that "establishing" a road included whatever was necessary for bringing it into existence: planning, laying out, clearing, surfacing, and so forth.[461]

---

[454] *E.g.*, 5 Geo. i, c. 21 § 14 (eliminating general practice of delivering bulky parcels in the penny post).

[455] Lewins, *supra* note 1, at 76.

[456] *Id*. at 94-96.

[457] *Id*. at 96 (listing items). The list also includes "Two maid servants going as laundresses to my Lord Ambassador Methuen"—whether indentured or free is not stated. *Id.*

[458] In 1792, the British post office began to offer a money order service but this was, of course, after the Constitution was ratified. Additionally, money orders were then limited to soldiers and sailors who wished to send part of their pay home without entrusting coins or bank notes to the mail. Lewins, *supra* note 1, at 152. It was not a general banking service.

[459] *Supra* notes 386-387 and accompanying text.

[460] Letter from Thomas Jefferson to James Madison (Mar. 5, 1796), *in* The Founders' Constitution (Philip B. Kurland & Ralph Lerner eds. 1987), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_7s4.html (last visited Feb. 28, 2018) ("Does the power to *establish* post roads, given you by Congress, mean that you shall *make* the roads, or only select from those already made, those on which there shall be a post? If the term be equivocal, [& I really do not think it so,] which is the safest construction?") (italics in original).

[461] *Supra* notes 252 & 253 and accompanying text.

### *F. Did the Grant of Power to Establish Post Roads Include an Incidental Grant of Eminent Domain Authority?*

In *Kohl v. United States*,[462] the Supreme Court answered this question in the affirmative. The court noted that eminent domain was a prerogative of sovereignty during the founding era, and it identified the Fifth Amendment's Takings Clause as an acknowledgment that the federal government could condemn property. However, in a study published in 2013, Professor William Baude questioned this holding.[463] Professor Baude argued that the founding generation would have deemed eminent domain a "great power"[464]—Chief Justice John Marshall's term for what was more commonly called a principal or express power[465]—rather than one that could be merely incidental or implied.[466] Because founding-era law required that a grant enumerate principal powers explicitly,[467] Professor Baude concluded the Constitution's failure to enumerate the power of eminent domain meant it was not conveyed.[468]

Professor Baude's study focused primarily on developments well after the founding. His founding-era evidence was relatively slender, and some of it was equivocal,[469] open to challenge,[470] or dependent on inference or analogy.[471] In my

---

[462] 91 U.S. 367, 368-73 (1875).

[463] *Baude*, *supra* note 1.

[464] *Id.* at 1755-61.

[465] McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

[466] Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Lawson, et al., *supra* note 1, at 60-68 (explaining the contemporaneous doctrine of principal and incidental powers).

[467] *Cf. McCulloch*, 17 U.S. at 406-08 (stating that in a constitution it is sufficient to enumerate the great powers and leave the incidentals to inference); Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Lawson, et al., *supra* note 1, at 64 ("Although transfer of the principal automatically included the incident, grant of an incident, without more, did not carry the principal with it").

[468] *Baude*, *supra* note 1, at 1745-61. Similarly, in 1808 Secretary of the Treasury Albert Gallatin contended that federal eminent domain required state consent. Albert Gallatin, Report of the Secretary of the Treasury on the Subject of Public Roads and Canals 73 (1808). Gallatin provided no support for this statement.

[469] Professor Baude seems to recognize its equivocal nature. *E.g. Baude, id.* at 1758-60 (relying on words and phrases such "it might suggest," "not the only plausible construction" and "suggests").

[470] For example, Professor Baude observes that for the Crown to exercise eminent domain, "It had to be granted explicitly by Parliament, not carried through by implication." *Baude, supra* note 1, at 1756, citing *Stoebuck, supra* note 1, at 562-66. However, as Professor Stoebuck makes clear, eminent domain required a parliamentary grant because it was a purely legislative power and was not included among certain similar powers ordinarily encompassed by the royal prerogative. *Id*. at 564. Obviously, the fact that eminent domain was legislative tells us nothing about whether it could be granted as an incident to other legislative powers.

[471] *E.g.*, *Baude, supra* note 1, at 1756-57 (arguing from analogies to the power to tax) and *id. supra* note 1, at 1768 (noting that during the ratification debates Federalists represented that states would have exclusive power over land titles). I previously documented the same Federalist representations, *Natelson, Enumerated, supra* note 1, at 481-82, but I recognize that the Federalists could have been stating a general, not an invariable, rule.

view, neither the Supreme Court's nor Professor Baude's treatment is sufficient to resolve this question.

During the eighteenth century, the exercise of eminent domain customarily accompanied construction and widening of roads and canals. Statutes empowering boards of trustees to undertake those activities routinely included grants of condemnation authority.[472] However, custom alone did not determine whether a linked power was principal or incidental; it was principal if "worthy" enough to qualify as such.[473]

The fact that the drafters of road statutes took the trouble to enumerate eminent domain authority expressly is evidence that it was regarded as a principal, rather than incidental, power. However, parliamentary road statutes and the Constitution were very different kinds of documents. One expects a statute to itemize more than a constitution.[474] Moreover, the grantees in most parliamentary road statutes were private trustees,[475] but eminent domain was an incident of *sovereignty*.[476] There was more need to mention it explicitly in a constitution than in a conveyance to non-sovereigns. So to answer our question, we need other forms of evidence.

The evidence falls into two broad categories. One consists of contemporaneous law books classifying fields of Anglo-American jurisprudence. Professor Herbert A. Johnson's survey of eighteenth century American law libraries provides evidence of which of these works were in common use on this side of the Atlantic.[477] Their classification schemes tell us which topics were deemed more important (and therefore potentially "principal") and which were deemed less so (and potentially "incidental"). The other category of evidence consists of documents that, like the Constitution, granted legislative authority to new governments or government agents.

The most probative law books may have been the multi-volume digests or "abridgments" that sorted Anglo-American law into topics, subtopics, and lesser divisions. Probably the best, one of the most popular, and certainly the most current,

---

[472] *E.g.*, 33 Geo. 2, c. 56 (1759) (Alexander Kincaid, Edinburgh, 1775) at 21-23 (providing for exercise of mandatory sale in repairing and widening a road); 1 Geo. 3, c. 35 (1761) (published as *An Act for Amending the Road from Sacred Gate . . .*), at 6-7 (providing for mandatory sale in improving a road);18 Geo. 3, c. 75 (1778) (published as *An Act for Making a Navigable Canal from the Town of Basingstoke . . .*), at 4-5 (providing for condemnation in construction of canal); 28 Geo. 3, c. 86 (1787) (published as *An Act for Amending, Widening, and keeping in Repair, the Road from the Bottom of Whitesheet Hill . . .*"), at 12 (providing for condemnation in improving and widening a road); 31 Geo. 3, c. 94 (1790) (published as *An Act for Making a new Road from Saint George's Gate . . .*"), at 11-13 (providing for condemnation in constructing a road).
*See also Stoebuck supra* note 1, at 561n. 28 (citing colonial laws authorizing condemnation for roads).

[473] Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Lawson, et al., *supra* note 1, at 61.

[474] *Cf. McCulloch, supra*, 17 U.S. at 407 ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind.")

[475] *See* sources cited *supra* note 472.

[476] *Stoebuck supra* note 1, at 559-60 (citing the views of leading contemporaneous commentators).

[477] Johnson, Imported Treatises, *supra* note 1.

was the 1786 edition of Matthew Bacon's *A New Abridgment of the Law*.[478] An examination of this work shows that many of its first-order titles featured concepts corresponding to constitutional categories.[479] Where they did not, it was often because the author divided topics at a lower level of generality. For example, the Constitution refers to "commerce," but Bacon split commerce into principal titles such as "carriers" and "fairs and markets."[480] Despite its frequent adoption of a lower order of generality, Bacon's *Abridgment* contains no title, or even subtitle, for eminent domain or for synonyms such as compulsory acquisition, compulsory powers, condemnation, expropriation, or taking.[481]

The other three among the four most popular digests—those by Knightly D'Anvers, Charles Viner, and John Lilly—similarly contained no first-order title for the subject.[482]

Also widely-used were "institutes." These were treatises surveying the entire scope of the law. The two eighteenth century institutes most generally held in America were William Blackstone's *Commentaries,* and Thomas Wood's *Institute of the Laws of England*.[483] The *Commentaries* contained a short treatment of

---

478 Bacon's work appeared in ten of the 22 law libraries surveyed. Johnson, Imported Treatises, *supra* note 1, at 59. The abridgment by Knightly D'Anvers was more widely held (by thirteen libraries), but it had not been updated since 1737, *id.* at 17-18, and as far as I can ascertain, was never completed. My assessment that Bacon's digest was probably the best in its category is based on my own experience with such works over the last thirteen years.

479 Matthew Bacon, A New Abridgement of the Law (Dublin, 1786). The following headings, which are located in unpaginated portions of each volume, correspond to explicit constitutional categories:
*Volume 1*: bail (two headings), bankrupt, carriers (a division of commerce), courts and their jurisdiction in general, of the court of admiralty—with headings for many other judicial categories.
*Volume 2*: felony, fairs and markets (another division of commerce), fines and amercements, forgery, forfeiture, grants.
*Volume 3:* habeas corpus, highways, juries, merchant and merchandize [i.e., more commerce], offices and officers, pardon, piracy.
*Volume 4*: privilege, soldiers, statute.
*Volume 5:* tender [of money], treason, trial.

480 *Id*.

481 *Cf. Stoebuck supra* note 1, at 554 (listing some of these synonyms).

482 Johnson, Imported Treatises, *supra* note 1, at 59 sets forth the number of libraries for each of the following: Knightly D'Anvers, A General Abridgment of the Common Law (2d ed. 1725-37) (3 vols.) (held by 13 of 22 law libraries surveyed); Charles Viner, A General Abridgment of Law and Equity (1st ed. 1742-45) (24 vols.) (held by nine libraries); John Lilly, The Practical Register, or a General Abridgment of the Law (2d ed. 1745) (two vols.) (held by eight libraries).
Lists of topics in the D'Anvers and Viner works appear in unpaginated sections at the beginning of each volume.

483 Johnson, Imported Treatises, *supra* note 1, at 59 (indicating that Blackstone's *Commentaries* appeared in ten of 22 libraries, and Wood's *Institute* in eight).
I have not relied on Edward Coke's *Institutes,* which were widely held but already well over a century old. In any event, eminent domain and its synonyms do not appear as a title in eighteenth century editions of this treatise. Edward Coke, The First Part of the Institutes of the Laws of England (13th ed. 1788) (unpaginated table near the end of the volume); Edward Coke, the Second Part of the Institutes of the Laws of England

eminent domain, referring to it as a legislative prerogative and using road-building as an example; however, Blackstone (or his publisher) did not think the concept worth an index entry.[484] There was an index entry for "taking," but it referred the reader to felonious and unlawful takings, not to eminent domain. Wood's *Institute* featured no relevant entry.[485]

Founding-era legal dictionaries consisted of more than definitions. Their comprehensive entries made them akin to single volume encyclopedias. In America the most popular work of this kind—by a wide margin—was Giles Jacob's *A New Law-Dictionary.*[486] Most of the leading nouns in the Constitution's enumeration of congressional powers[487] also appear in Jacob's 1782 edition, either in the same form or in close variations: Among Jacob's entries were "tax," "debt," "money," "creditor," "commerce," "naturalization," "bankrupt," "coin," "counterfeits," "post," "pirates," "letters of marque," and "militia." Yet there is no entry for any of the synonyms for eminent domain other than "taking,"[488] and the two entries for "taking" referred to felonious and unlawful taking, as in Blackstone's index. References to eminent domain are likewise lacking in other contemporaneous law dictionaries.[489]

In sum, the classification schemes adopted by leading works of eighteenth century law imply that eminent domain was not a prominent legal concept. It surely did not rank with taxation, military affairs, or commercial regulation as a principal power in a grant of governmental authority.

Another form of evidence consists of contemporaneous documents that, like the Constitution, conveyed legislative authority to governments and governmental agents. Those most relevant to America were (1) colonial charters by which the British Crown empowered colony organizers, (2) commissions by which the Crown empowered colonial governors, and (3) founding-era state constitutions, by which the people of each state created new governments and granted power to them.

---

(unnumbered ed. 1797) (unpaginated tables near beginning and end of the volume); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (unnumbered ed. 1797) (same); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (unnumbered ed. 1797) (same).

484 1 WILLIAM BLACKSTONE, COMMENTARIES *135; 4 *id*. (unpaginated index).

485 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND (10th ed. 1783) (unpaginated table near the end of the volume).

486 The edition used in this search was GILES JACOB, A NEW LAW-DICTIONARY (10th ed. 1782). JOHNSON, IMPORTED TREATISES, *supra* note 1, at 61, states that Jacob's dictionary in one edition or another was in twelve of 22 surveyed law libraries. Next in popularity was John Cowell's *Interpreter*, held by six libraries, tied with a Law-French dictionary.

487 Principally U.S. CONST. art. I, § 8, although other congressional powers are scattered throughout the document.

488 *Id.* (unpaginated).

489 JOHN COWELL, A LAW DICTIONARY, OR THE INTERPRETER OF WORDS AND TERMS (Improved, enlarged ed. 1727) (held by six libraries); WILLIAM RASTELL, LES TERMES DE LA LEY (unnumbered ed. 1742) (held by four); TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1783) (held by three); THOMAS BLOUNT, A LAW DICTIONARY AND GLOSSARY (3d ed. 1717) (held by three). I also examined two dictionaries not on Professor Johnson's list, ANONYMOUS, THE STUDENT'S LAW-DICTIONARY (1740) and RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY (1792), with similar results.

English law recognized a subsidiary legislative authority within the royal executive's prerogative to govern conquered and unorganized territories.[490] Thus, royal charters erecting colonial governments enumerated and conveyed legislative powers, usually to be exercised by the governor and council in conjunction with an elected assembly. Typically listed were taxation,[491] legislation,[492] commercial activities,[493] land disposition,[494] and creation of courts[495]—all powers found in the Constitution. In no charter did eminent domain appear separately. Yet we know that colonial governments exercised eminent domain,[496] so it must have been implied from the enumerated powers.

In 1688 the absolutist government of James II (1685-89) issued a commission to Edmund Andros as governor of the "Dominion of New England."[497] The Dominion consolidated not only modern New England, but New Jersey and New York. In addition to granting executive and judicial authority, the commission granted Andros an expansive list of legislative powers. These included the power to make laws, impose taxes, appropriate funds, raise military forces, create courts, dispose of land, and provide for fairs, markets, ports, and similar instrumentalities of commerce.[498] Eminent domain was not enumerated. This cannot be because the parties were ignorant of the subject. Only five years earlier eminent domain had been banned in New York by an instrument revoked when the Dominion was created.[499] Thus, it is highly unlikely that the Crown intended to deny Andros authority to take land for improvements such as roads. That authority must have been implied in the enumerated grants.

In the century after the British evicted James II and the colonists disposed of Andros, the commissions of colonial governors became highly standardized. They

---

490 Campbell v. Hall, 98 Eng. Rep. 848 (K.B. 1774) (holding that the Crown may legislate for conquered territories until formally admitting English law and institutions into the territory, but not afterward). *Cf.* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States").

491 *E.g.*, Mass. Charter (1691) ("And alsoe to impose Fines mulcts Imprisonments and other Punishments And to impose and leavy proportionable and reasonable Assessments Rates and Taxes"); Md. Charter, art. XVII (1632) ("Power . . . to assess and impose the said Taxes ").

492 *E.g.*, Ga. Charter (1732) (". . . full power and authority to constitute, ordain and make, such and so many by-laws, constitutions, orders and ordinances").

493 *E.g.*, Pa. Charter (1681) (authorizing importation, creation of fairs, markets, and "Sea-ports, harbours, . . . and other places, for discharge and unladeing of goods").

494 *E.g.,* Ga. Charter (1732) (granting power to colonial common council to convey land). *Cf.* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . .").

495 *E.g.*, Ga. Charter (1732) ("to erect and constitute judicatories and courts of record, or other courts)."

496 *Stoebuck supra* note 1, at 561n. 28 (citing colonial laws authorizing condemnation for roads).

497 *Commission to Sir Edmund Andros as governor of the Dominion of New England*, *in* EHD, *supra* note 1, at 239.

498 *Id*.

499 *The New York Charter of Liberties and Privileges* (Oct. 30, 1683), *in* EHD, *supra* note 1, at 228, 230 (denying authority to dispose of land without the owner's consent).

all enumerated legislative functions to be exercised in conjunction with an elective assembly. They all left eminent domain to implication.[500]

Between 1776 and May 29, 1790, when Rhode Island ratified the Constitution, all states except Connecticut and Rhode Island adopted new constitutions. The framers of these documents typically contemplated general purpose governments, so most state constitutions granted legislative authority in bulk rather than in enumerated detail.[501] A partial exception was the Massachusetts Constitution of 1780, drafted primarily by John Adams, which conveyed to the legislature ("general court") authority to erect a judiciary, to tax, and to otherwise legislate.[502] Eminent domain was not set forth explicitly. But it must have been implied from the principal grants, because another portion of the same document limited its exercise.[503]

It thus appears that the founding generation did not consider eminent domain to be a "great," or principal, power. There was no need for the Constitution's framers to enumerate it separately, because it was incidental to items they did enumerate. Among these was authority to "establish post Roads."

---

[500] Anthony Stokes, A View of the Constitution of the British Colonies 150-64 (B. White 1783) (reproducing form commission) (available at http://books.google.com/books?id=VmNzusdnHlcC&printsec=frontcover& dq=anthony+stokes#PPP7,M1).
The legislative authority granted was very broad, *e.g., id.* at 155 ("And you the said A. B. by and with the consent of our said Council and Assembly, or the major part of them respectively, shall have full power and authority to make, constitute, and ordain laws, statutes, and ordinances, for the public peace, welfare, and good government of our said province"). Governors also had the arguably legislative powers, without need for assembly consent, to "constitute" as well as appoint judges, *id*. at 158; to dispose of lands, *id*. at 162; and to establish fairs, markets, and harbors— considered aspects of the power to "regulate Commerce," *id.* at 163.
*See also* EHD, *supra* note 1, at 195 (editor's note) (observing that "By the eighteenth century, the commissions of royal governors had arrived at a standard pattern," and setting forth as an example the commission of New York governor George Clinton, issued Jul. 3, 1741).

[501] *E.g*., Del. Const., art. 5 (1776) (granting to the legislature "all other powers necessary for the legislature of a free and independent State"); Ga. Const. (1777), art. VII (granting to the legislature "power to make such laws and regulations as may be conducive to the good order and well-being of the State"). Other constitutions without detailed enumerations of legislative powers include Md. Const. (1776), N.C. Const. (1776), N.H. Const. (1784), Part II (enumerating separately from a general legislative grant only the power to constitute courts); N.J. Const. art II (granting indefinite legislative authority); N.Y. Const. (1777), art. II (stating a general legislative grant); Pa. Const. (1776), § 2 (granting "supreme legislative power") & § 9 (granting to the legislature, in addition to authority to regulate its own proceedings, "all other powers necessary for the legislature of a free state or commonwealth"); S.C. Const. (1776), art. VII (general grant of legislative authority to "the president and commander-in-chief, the general assembly and legislative council"); S.C. Const. (1778), art. II (vesting legislative authority in a general assembly); Va. Const. (1776) (creating a legislature without a specific grant of authority).

[502] Mass. Const. (1780), Part II, ch. I, § 1, arts III & IV.

[503] *Id.* Part I, Art. X (requiring personal or legislative consent and reasonable compensation).

# VII. Three Views Forward

## *A. Limitations Imposed by the Bill of Rights*

The Constitution's plenary grant of a power to Congress ordinarily permits Congress to exercise it in any way and for whatever reasons it chooses.[504] However, adoption of the first eight amendments on December 15, 1791 restricted previously-legitimate exercises of federal authority, including postal authority.[505] The Bill of Rights marks the first constitutional retreat from the British postal model.

Parliament authorized compensation for takings in road construction only as to certain kinds of land.[506] The Fifth Amendment limited the exercise of eminent domain by requiring that the federal government *always* pay "just compensation."[507] The British Parliament could ban from the mail anything it wished. The Second Amendment probably restricted Congress in this respect.[508] The Sixth[509] and Eighth[510] Amendments limited the scope of Congress's ability to define the procedures and punishments for postal crimes.

Most importantly, the First and Fourth Amendments limited the role of postal institutions as instruments of political control. The Fourth Amendment restricted the kind of warrantless mail searches previously so common[511]—although, admittedly, much previous mail-opening was already illegal.[512] After ratification of the First Amendment,[513]

---

[504] United States v. Darby, 312 U.S. 100, 114 (1941) (stating that motive or consequence of an otherwise valid regulation of commerce does not render that exercise unconstitutional); Champion v. Ames, 188 U.S. 321 (1903) (upholding use of commerce power to prohibit trafficking in lottery tickets; *cf*. Rogers, *supra* note 1, at 47-57 (discussing the promotion of social policies by banning items from the mail).

[505] The Ninth and Tenth Amendments were explanatory or declarative rather than substantive. Robert G. Natelson, The Original Constitution: What It Actually Said and Meant 195-96, 261-63, 264-68 (Apis Books, 3d ed. 2014).

[506] *E.g.*, 1 Geo. 3, c. 35 (1761) (published as An Act for Amending the Road from Sacred Gate . . .), at 7 (authorizing payment of damages for injury to some real estate, but not for injury to "Commons and waste Grounds").

[507] U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.")

[508] U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

[509] U.S. Const. amend. VI (guaranteeing speedy public trial by jury and other protections).

[510] U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[511] *Cf.* Ex Parte Jackson, 96 U.S. 727, 727 (1877).

> The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.

[512] *Supra* notes 261-263 and accompanying text.

[513] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

the federal government could still disseminate propaganda through the mail, but it could not ban opposing material.[514] In this respect the First Amendment responded to Antifederalist fears that the new government would use postal institutions to suppress dissent. The First Amendment also promoted the post office's development into its later role as an instrument of public information and democratic participation.[515]

### *B. The Federal Congress's Postal Act of 1792—and Implications for the Nondelegation Principle*

Events occurring after May 29, 1790 (the day Rhode Island ratified the Constitution) generally are poor evidence of what the constitutional bargain meant to the parties earlier. This is especially true of events arising after adoption of the Bill of Rights. In reconstructing the original meaning of the Postal Clause, therefore, I have not relied on the Postal Act of 1792, adopted by the Second Federal Congress.[516] But I do wish to offer reassurance to the curious.

Adoption of the Bill of Rights signaled a modest change in the postal mission.[517] Professor Richard R. John argues that the 1792 statute was a far more profound change because it opened newspapers to the mail, protected the privacy of letter writers, and laid the foundation for postal expansion.[518] He is correct that the 1792 law encouraged publication and circulation of newspapers by affording them additional certainty and security.[519] However, it did so mostly by reaffirming pre-constitutional usages. The statute's recognition of a right of free exchange among newspaper publishers[520] codified a longstanding practice of the British and American post offices.[521] Paid and franked newspaper carriage to subscribers had been a feature for decades, both in Britain and in America.[522] A more significant change was standardization of newspaper delivery rates and diversion of the revenue from the carriers to the post office—but these changes had been part of

---

[514] *Cf. Jackson, supra*, 96 U.S. at 727 (1877) ("Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing").

[515] *E.g.*, Desai, *supra* note 1 (discussing the interaction of the First Amendment and postal policy).

[516] Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.

[517] *Supra* Part VII.A.

[518] John, Spreading, *supra* note 1, at 31; see also *Desai*, *supra* note 1, at 683 (claiming that "the historical origins of the postal network as a vehicle for distribution of news . . . culminated in the passage of the 1792 Post Office Act.").

[519] *Adelman*, *supra* note 1, at 746 ("By establishing a standard policy, the 1792 Act effectively established newspapers as the main source of news in the United States and affirmed the post office as the main network for the circulation of political debate.").

[520] Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, §§ 21 & 22.

[521] *Adelman*, *supra* note 1, at 723 (mentioning the exchange custom).

[522] *See, e.g.*, Finlay, *supra* note 1, at 41 & 43 (complaining of the volume of newspapers carried in 1773 and 1774); *Adelman*, *supra* note 1, at 712 (noting the role of the post office in newspaper distribution by the 1770s); *id. at* 718 (noting use of the frank to disseminate newspapers).

the Confederation Congress's 1787 draft ordinance,[523] and are not of constitutional significance.

As for the contention that the 1792 law protected the privacy of letter writers by prohibiting mail tampering, it is difficult to see how this was a significant change. Most postal tampering always had been illegal.[524]

Professor John's assertion that the 1792 law laid the basis for future growth is difficult to evaluate, for there is strong reason to believe growth would have come in any event. Both the slow growth of the postal system during the Continental-Confederation era and the faster expansion later are better explained by factors other than the marginal changes in the 1792 law.[525] The question is, in any event, not a constitutional one, and outside the scope of this Article.

Congressional debate on the 1792 law sometimes is treated as a landmark in the constitutional history of the Supreme Court's "nondelegation principle."[526] To be sure, most of the Second Federal Congress's delegation decisions were uncontroversial: It prescribed in the statute those subjects formerly determined by its Continental and Confederation predecessors, and delegated to the executive subjects formerly delegated.[527] But one significant delegation issue proved more difficult: To what extent did the Constitution permit Congress to grant the executive the authority to "establish post Roads?" British and American history offered precedents in both directions, and the Senate and House split on the question.[528]

In the modern era, when Congress routinely delegates massive authority to administrative agencies, legal commentators may opine that constitutional scruples over delegation were "little short of absurd"[529] because "in most respects, management is an executive, not a legislative function."[530] However, this position

---

523 32 J. Cont. Cong., *supra* note 1, at 55 (Feb. 14, 1787).

524 *Supra* notes 80 & 261-263 and accompanying text.

525 Among the reasons for slow growth were the war and, as Professor John recognizes, the limitations of Postmaster Bache. John, Spreading, *supra* note 1, at 27. Among the reasons for faster growth later were relative peace, the First Amendment, increased literacy, Jacksonian democracy, technological progress, and the nation's explosive population and territorial expansion.

The net effect on growth of Congress's decision to retain control over postal routes is also unclear. Intuitively, it would seem that granting the postmaster more flexibility would have been growth-friendly, but some believe that the congressional decision promoted expansion. Richard B. Kielbowicz, *Preserving Universal Postal Service as a Communication Safety Net: A Policy History and Proposal*, 30 Seton Hall Legis. J. 383, 394 (2006) (suggesting that congressional retention of power to designate routes contributed to system expansion).

526 *E.g.*, Gary Lawson & Guy Seidman, "A Great Power of Attorney:" Understanding the Fiduciary Constitution 118-24 (2017) (discussing the congressional debate and its implications for the nondelegation principle).

527 *Cf. Mashaw*, *supra* note 1, at 1294 (noting the statute's mixture of prescription and delegation.

528 1 Annals of Cong. 1579 (Apr. 13, 1790) (recording House objections to the Senate bill because of its delegation of power); *id.* at 1743 (Jul. 22, 1790) (recording disagreement in conference committee).

529 *E.g.*, *Currie*, *supra* note 1, at 631-32 (labeling the congressional decision "little short of absurd"). *See also* David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 146-49 (1997) (assessing the controversy).

530 *Currie*, *supra* note 1, at 632.

begs the question at issue: Where does the Constitution draw the line between "most respects" and the lesser number of respects encompassed within the phrase "Congress shall have Power . . . to establish . . .".[531] Here are some of the constitutional[532] factors the Second Federal Congress had to consider:

– The 1782 Confederation postal ordinance authorized the postmaster general to add posts "to and from such other parts of the United States, as from time to time, he shall judge necessary."[533] This precedent argued for the constitutionality of delegation. It was a very weak precedent, however, because in practice Congress retained tight control over creation of new postal routes.[534] The congressional records contain many references to Congress fixing routes[535] and few, if any, to the postmaster general opening routes *sua sponte*.[536] The 1787 draft ordinance would have aligned the law with practice by omitting the postmaster's authority to create new routes. Instead he was to fix them "as Congress shall from time to time direct."[537]

---

531 This was not the only case in which the Constitution granted executive power to Congress. Another was the power to declare war, U.S. Const. art. I, § 8, cl.11, traditionally an executive prerogative. J.L. DeLolme. The Constitution of England 76 (1790).

532 To the constitutional factors were added prudential considerations. *E.g.*, 1 Annals of Cong. 1697-98 (Jun. 15, 1790) & 1734 (Jul. 8, 1790) (recording debates on wisdom of delegating power to designate post roads).

533 23 J. Cont. Cong., *supra* note 1, at 670 (Oct. 18, 1782) (reproducing post office ordinance).

534 Previous writers on the delegation issue seem to have relied on the 1782 ordinance without examining actual practice or the 1787 revision, *e.g.*, *Currie*, *supra* note 1, at 629 & note 133.

535 *E.g.*, 29 J. Cont. Cong., *supra* note 1, at 807-08 (Oct. 5, 1785) (resolution instructing the postmaster general to establish cross posts); 30 *id*. at 15 (Jan. 5, 1786) (resolution directing him to establish a post between Philadelphia and Fort Macintosh); 31 *id*. at 531 (Aug. 21, 1786) (reproducing postmaster general report requesting authorization for cross posts); 34 *id*. at 274 (July 3, 1788) (reproducing congressional resolution instructing the postmaster general to employ posts by a specified route between Philadelphia and Pittsburgh); 34 *id*. at 161-63 (May 20, 1788); *id.* at 174 (May 22, 1788) (reporting congressional debates over proposed routes for Pennsylvania, Massachusetts, and Delaware). Moreover, the resolution of July 3, 1788 contains language assuming Congress had fixed all cross-posts:

> Resolved, That the Post Master General be and he hereby is authorised and instructed to make arrangements for the transportation of the mail for one Year from the first day of January next on the cross roads mentioned in the resolves of Congress passed the 4th Sept 1786 and the 27th of July 1787 on the principles provided in the resolution of the 15th Feby 1787.

536 Of course, it is possible that my research assistant and I missed one or more. We did find one reference to opening a route without clarifying who opened it. 34 *id*. at 82-83 (Mar. 4, 1788) (reproducing postmaster general's letter referring to a post to Portland, Maine).

537 32 *id*. at 46 (Feb. 14, 1787). The draft ordinance did, however, "authorize and direct" the postmaster general to establish cross-posts "between the great post road, and all the ports of entry throughout these United States," *id.* 51-52, but these precise directions are of course different from the 1782 ordinance's grant of power to establish postal roads

- The Constitution seemed to adopt Confederation practice by granting sole authority to *Congress* to "establish Post Offices and post Roads."
- This wording was clearly distinguishable from the Parliament's grants to the *executive* of authority "to establish Post Offices and Post [*sic*] Roads."[538]
- The ratifying public would be justified in assuming that the congressional role under the Constitution would be similar to existing practice. Both advocates and opponents of the Constitution represented the Constitution's postal power as the same as under the Articles of Confederation.[539] If disputants thought the Postal Clause represented a sharp break from the past, it would have been more controversial.
- Contemporaneous rules of legal construction, influenced by fiduciary values,[540] firmly disfavored delegation. The relevant founding-era legal maxims were *delegatus delegare non potest*—one to whom a power is delegated cannot delegate it—and *delegata potestas non delegari*: a delegated power cannot be delegated.

On balance, these factors strongly suggest the Second Congress reached the correct constitutional decision when it refused to delegate authority to designate post roads.[541]

---

wherever the postmaster general "shall judge necessary."

538 7 Geo. 3, c. 50 (1767), § 5 (granting authority in exactly those words to the postmaster general when extending service to the Isle of Man); 5 Geo. i, c. 21 § 11 (granting authority to postmaster general and his deputies to establish "penny post" offices).

539 *E.g.*, CUMBERLAND GAZETTE, Nov. 15, 1787, *in* 4 DOCUMENTARY HISTORY, *supra* note 1, at 245-46; *Plan of the Federal Constitution*, Apr. 2, 1788 *in* 9 DOCUMENTARY HISTORY, *supra* note 1, at 661, 673 (listing the post office power in a list of powers, most of which "the present Congress possess").

540 *See generally* Gary Lawson, Robert G. Natelson, and Guy Seidman, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014) and sources cited therein.

541 Professor Currie argues that the 1792 statute delegated more authority than initially appears, *Currie*, *supra* note 1, at 631 (observing that the statute empowered the postmaster to place deputies "at all places where *such shall be found necessary*," Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, § 3 (emphasis added), and that the postmaster general could "extend the line of posts" by contract. *Id.* § 2). However, the "necessity" referred to could mean merely the necessity of serving posts established by Congress. This language is different from that used for deciding whether to use stages or horses ("as he may judge most expedient"). In founding-era drafting practice, the former wording granted less authority. Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in LAWSON, ET AL., *supra* note 1, at 72-76 (2010) (explaining the variations in founding-era "further-powers" clauses).
With respect to § 2, Professor Currie has a better case. However, there are answers to his rhetorical question of why the difference between direct designation and designation by contract mattered. *Currie*, *supra* note 1, at 631n. 145. Those answers are (1) contractual designations were only temporary commitments, and (2) they were limited to "extensions" of existing post roads. Overall, delegation was narrower than in the 1782 ordinance.

## *C. The Commendable Future of Ebenezer Hazard*

Amid this relative institutional continuity, there was a change in personnel. The administration of Ebenezer Hazard had been marred by the newspaper delivery controversy, but congressional committee reports in 1783 and again in 1788 demonstrated that, overall, he had done a very good job with a defective institutional model.[542] To run a profit despite franking exemptions, a very small staff, and persistent congressional interference was a triumph of management.

Nevertheless, George Washington was angry with Hazard over the ratification-era delivery problems.[543] Just as the Antifederalists suspected Hazard of creating the delivery mess to promote the Constitution, Washington may have suspected him of creating it to defeat the Constitution.[544] When Washington became president he replaced Hazard with treasury commissioner Samuel Osgood.[545] The president did not have the courtesy to inform Hazard that he was being replaced; the poor man learned of it in the streets.[546] So after dedicating much of his adult life to federal service, Ebenezer Hazard found himself without a job or any prospect for one, and with a wife and family to support.

As sometimes happens in the wake of political injustice—the career of Cicero comes to mind[547]—the outcome proved fortuitous. Hazard returned to Philadelphia where he co-founded the Insurance Company of North America.[548] This gave him sufficient financial support to indulge his scholarly disposition. He soon returned to a project he had begun in the 1770s:[549] collecting American historical documents for publication.

Hazard eventually published two volumes of documents, thereby claiming the title of America's first historical editor. His compilations served as a crucial resource for an entire generation of American historians.[550]

---

[542] 24 J. Cont. Cong., *supra* note 1, at 329 (May 5, 1783) (reproducing a laudatory committee report); 34 *id*. at 462, 463 (Aug. 27, 1788) (reproducing a committee report praising certain post office procedures).

[543] Letter from George Washington to John Jay (July 18, 1788), *in* 16 Documentary History, *supra* note 1, at 595 (complaining of Hazard's use of riders rather than coaches).

[544] *Shelley*, *supra* note 1, at 60.

[545] 1 Annals of Cong. 93 (Sept. 26, 1789) (containing Washington's announcement); Leech, *supra* note 1, at 11.

[546] *Shelley*, *supra* note 1, at 60-61.

[547] Cicero's absence from politics during the ascendancy of Julius Caesar (46-44 B.C.E.) was adorned by a written creativity that laid the foundation of philosophy in western Europe. Anthony Everitt, Cicero: The Life and Times of Rome's Greatest Politician 251-59 (2001).

[548] *Shelley*, *supra* note 1, at 68; *Pilcher, supra* note 1, at 8.

[549] *Id.* at 46. Hazard apparently had been able to make some progress on this project while working for the post office, but before he became postmaster general. Letter from Samuel Adams to James Warren (Sept. 22, 1778) *in* 10 Delegate Letters, *supra* note 1, at 680 (recommending Hazard and his document collection project); Letter from Samuel Huntington as president of Congress to Thomas Jefferson (Apr. 27, 1781) *in* 17 Delegate Letters, *supra* note 1, at 188 (containing similar recommendation).

[550] *Shelley*, *supra* note 1, at 71-72. On Hazard's scholarly accomplishments, see also *Pilcher*, *supra* note 1, and Lawrence Shaw Mayo, *Jeremy Belknap and Ebenezer Hazard*, 1782-84, 2 New. Eng. Q. 183 (1929).

The termination of the Confederation Congress freed its long-time secretary, Charles Thomson to labor on a translation of the Septuagint from Greek to English. Ebenezer Hazard acted as Thomson's consultant on the mechanics of book publication. Because Hazard had the benefit of an excellent classical education, he was able to serve as Thomson's editor and translation critic. As Thomson's published correspondence demonstrates, Hazard thereby strongly influenced the first-ever English rendition of the oldest extant version of the Bible.[551]

[551] *Pilcher*, *supra* note 1, at 11. *See generally* Paul Odell Clark, *Letters of Charles Thomson on the Translation of the Bible*, 33 J. Pres. Hist. Soc'y 239, 242-43 (1955) & 34 *id*. 112 (1956).

Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0002

DE G DE GRUYTER OPEN

# Toward Natural Born Derivative Citizenship

John Vlahoplus*

## ABSTRACT

*Senator Ted Cruz's campaign for the Republican presidential nomination again raised the question whether persons who receive citizenship at birth to American parents abroad are natural born and eligible to the presidency. This article uses Supreme Court decisions and previously overlooked primary source material from the Founders, the First Congress and English and British law to show that they are not natural born under the doctrinal or historical meaning of the term. The relevant constitutional distinction is between citizenship acquired by birth or by naturalization, not at birth or afterward.*

*It argues further that a living constitutional theory cannot justifiably interpret the term more broadly because derivative citizenship statutes have long discriminated on grounds including race, gender, sexual orientation, and marital and socioeconomic status. The Supreme Court upholds them even though they would be unacceptable if applied to citizens because they merely discriminate against aliens. Moreover, many who assert presidential eligibility or other constitutional privilege for children born to American parents abroad intend to favor traditionally dominant groups or rely on political theories of bloodline transmission of national character that the Supreme Court used to justify its infamous decision in Dred Scott v. Sandford. No justifiable living interpretation can incorporate such discrimination or discredited political theories in qualifications for the highest office in the land.*

*The article examines the meaning of the term "natural born" in the broader context of similar discrimination in English and British law from which American law developed. It acknowledges the difficulty of reconciling centuries of derivative nationality law and practice with our highest constitutional ideals of equal protection of the law. It concludes by identifying threshold requirements for and a possible approach to developing a justifiable living constitutional interpretation of natural born derivative citizenship.*

## KEYWORDS

*Constitutional Law, Presidential Eligibility, Natural Born Citizen, Legal History, Fourteenth Amendment.*

## CONTENTS

Introduction ........ 73

I. Ineligibility of Derivative Citizens ........ 75

A. U.S. Citizenship ........ 76

B. Natural Born Citizenship "By Birth" ........ 76

C. Citizenship "By Naturalization" ........ 78

* Member, New York State Bar. I am grateful to the Editor, staff and anonymous referees of the British Journal of American Legal Studies for their insightful criticisms and editorial support.

BY-NC-ND © 2018 John Vlahoplus, published by De Gruyter Open.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

D. Fourteenth Amendment....81
E. *Rogers v. Bellei*....82
II. Objections and Alternative Theories....83
A. Alleged Opacity and Ambiguity of the Term "Natural Born Citizen"...83
B. Three Alternative Theories....87
1. Substantive theory....87
2. Procedural theory....95
a. Supreme Court precedents....96
b. Constitutional history and structure....97
c. The Naturalization Act of 1790....99
3. Hybrid theory....101
III. Consistency with English and British Interpretations....104
A. The Common Law....104
B. Naturalization and Non-transmission of Nationality....105
C. Inconsistencies in English and British Interpretations....106
1. Common law rule....106
2. Effect of post-natal naturalization....107
3. Operation and effects of the Acts....108
D. Conclusion....112
IV. Natural Born Derivative Citizenship: Threshold Requirements and a Possible Approach....113

## Introduction

> *"*He cannot be a subject born of one kingdom that was born under the ligiance of a king of another kingdom. 18.a.*"* Thomas Jefferson, *Notes on British and American Alienage*, [1783][1]
>
> *"*A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, . . . as in the enactments conferring citizenship upon foreign-born children of citizens . . . .*"* *United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898)
>
> *"*Citizenship obtained through naturalization . . . carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of eligibility to the Presidency.'" *Knauer v. United States*, 328 U.S. 654, 658 (1946)[2]

Senator Ted Cruz's campaign for the Republican presidential nomination again highlighted the Constitution's natural born citizenship requirement for presidential eligibility.[3] Sen. Cruz was born out of the jurisdiction of the United States.[4] An act of Congress conferred citizenship upon him as the foreign-born child of a citizen parent.[5] Therefore under U.S. constitutional history and Supreme Court doctrine Sen. Cruz is a naturalized citizen who has all of the rights obtained by birth in the United States except presidential eligibility.[6]

Some legal scholars consider the doctrinal and historical meaning of the term *"*natural born*"* to be outdated and suggest that judges could interpret it more broadly to include persons who receive citizenship under congressional statutes because of their birth to American parents abroad (*"*derivative citizenship*"*).[7]

---

1 National Archives [1783], http://founders.archives.gov/documents/Jefferson/01-06-02-0346. Jefferson*'*s citation is to Coke*'*s report of the decision in *Calvin v. Smith* (1608) 7 Co. Rep. 1a, 77 Eng. Rep. 377, 2 St. Tr. 560 [hereinafter *Calvin's Case*], http://hdl.handle.net/2027/nyp.33433009487145. Coke*'*s report *"*is the earliest, most influential theoretical articulation by an English court of what came to be the common-law rule that a person*'*s status was vested at birth, and based upon place of birth*"* and *"*became the basis of the American common-law rule of birthright citizenship . . . .*"* Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin*'*s Case *(1608)*, 9 Yale J.L. & Human. 73, 74 (1997) (citation omitted). For Coke*'*s definition of a *"*subject born*"* and equating it with a *"*natural born subject*" see Calvin's Case*, 7 Co. Rep. at 18a.

2 *Quoting* Luria v. United States, 231 U.S. 9, 22 (1913).

3 U.S. Const. art. II, § 1, cl. 5.

4 *See* Response of Senator Cruz to Petitions at 2, In re Petition of Elliott, Petition of Booth, and Petition of Laity, The State of New Hampshire Ballot Law Commission (Nov. 20, 2015), http://sos.nh.gov/WorkArea/DownloadAsset.aspx?id=8589951054 [hereinafter *Response*].

5 *Id.* at 23-24.

6 *See, e.g.*, Mary Brigid McManamon, *The Natural Born Citizen Clause as Originally Understood*, 64 Cath. U.L. Rev. 317 (2015) and Brief Amicus Curiae of Prof. Einer Elhauge on the Justiciability and Meaning of the Natural Born Citizen Requirement 13 (March 22, 2016), https://ssrn.com/abstract=2748863.

7 *See, e.g.*, Laurence H. Tribe, *Under Ted Cruz's own logic, he's ineligible for the White House*, Boston Globe (Jan. 11, 2016), https://www.bostonglobe.com/opinion/2016/01/11/

These suggestions are problematic because derivative citizenship statutes have long discriminated on grounds including race, gender, sexual orientation, and marital and socioeconomic status.[8] The Supreme Court upholds them even though they "would be unacceptable if applied to citizens" because they merely discriminate against aliens.[9] Moreover, some who assert presidential eligibility for children born to citizens abroad intend to favor traditionally dominant groups. Chief Justice Fuller asserted in his *Wong Kim Ark* dissent that foreign-born children of American citizens must be natural born because "it is unreasonable to conclude that" children born in the United States "of the Mongolian, Malay or other race" are eligible to be president, but "children of our citizens, born abroad," are not.[10] Finally, many of those who assert presidential eligibility or other constitutional privilege for children born to citizens abroad rely on the same political theories of bloodline transmission of national character that the Supreme Court used to justify its infamous decision in *Dred Scott v. Sandford*,[11] that Chief Justice Fuller cited to oppose Wong Kim Ark's citizenship,[12] that nativists rely on to oppose birthright citizenship for children born in America to unlawfully resident aliens,[13] and that "birthers" cited to dispute President Obama's eligibility to the

---

through-ted-cruz-constitutional-looking-glass/zvKE6qpF31q2RsvPO9nGoK/story.html. Citizenship can derive in other circumstances, *e.g.* by the naturalization of a minor's parent.

[8] *See, e.g.*, Kristin A. Collins, *Illegitimate Borders:* Jus Sanguinis *Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134 (2014), and M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to do With It?*, 28 Geo. Immig. L.J. 391 (2014).

[9] *See* Mathews v. Diaz, 426 U.S. 67, 79-80 (1976). *See also* Demore v. Kim, 538 U.S. 510, 521 (2003), and Miller v. Albright, 523 U.S. 420, 434 n.11 (1998) (application to derivative citizenship). *Cf.* Michael McFarland, *Derivative Citizenship: Its History, Constitutional Foundation, and Constitutional Limitations*, 63 N.Y.U. Ann. Surv. Am. L. 467, 468 (2008). This article was written before the Supreme Court's decision in *Sessions v. Morales-Santana*, 582 U.S. __ (2017). That decision held a derivative citizenship statute to be unconstitutional on the ground of gender discrimination. However, the Court declined to recognize the child's citizenship as a remedy for the constitutional violation.

[10] United States v. Wong Kim Ark, 169 U.S. 649, 714-15 (1898) (Fuller, C.J., dissenting).

[11] 60 U.S. 363, 403 (1856) (Taney, C.J.) (limiting opinion to persons descended from imported slaves) and 477 (Daniel, J., concurring) (citing de Vattel to conclude that a child cannot be a citizen if born in the country to a foreigner). For reliance on bloodline transmission of nationality to justify presidential eligibility and other constitutional privilege, *see*, *e.g.*, *supra* note 10 and accompanying text (presidential eligibility) and *Miller*, 523 U.S. at 477, 480 (Breyer, J., dissenting) (citing Roman law and de Vattel to justify a higher level of equal protection scrutiny for the derivative citizenship claim of a foreign-born "American child of American parents"). *See also* the American (Know Nothing) Party's view that children born to "American parents residing temporarily abroad, should be entitled to all the rights of native-born citizens." *American Platform of Principles*, The True American's Almanac And Politician's Manual For 1857 (1857), http://glc.yale.edu/american-platform-principles.

[12] *See Wong Kim Ark*, 169 U.S. at 708-10 (Fuller, C.J., dissenting) (citing de Vattel).

[13] *See, e.g.,* T.L. Coston, *Arizona to Deny Anchor Babies Birth Certificates,* Coston's Complaint (June 23, 2010), http://costonscomplaint.blogspot.com/2010/06/arizona-to-deny-anchor-babies-birth.html.

presidency.[14] No justifiable living or responsive constitutional interpretation can incorporate such discrimination or discredited political theories in qualifications for the highest office in the land. This article details the historical and doctrinal exclusion of those born to citizen parents abroad from natural born citizenship in the context of similar discrimination in English and British law from which it developed.[15] The article concludes by identifying threshold requirements for and a possible approach to developing a justifiable theory of natural born derivative citizenship.

## I. Ineligibility of Derivative Citizens

The Constitution recognizes two types of citizens, natural born and naturalized.[16] Only natural born citizens are eligible to the presidency.[17] Although the Supreme Court has not considered a challenge to presidential eligibility, it has long held that derivative citizens are naturalized and that naturalized citizens are not natural born.[18] Therefore derivative citizens are ineligible.[19] The Court's rulings and American constitutional history reflect the following principles.

---

14 *See, e.g.*, Mario Apuzzo, *Emer de Vattel, Adolf Hitler, America's Youth, and the Natural Born Citizen Clause* (Dec. 11, 2011), http://puzo1.blogspot.com/2011/12/emer-de-vattel-adolf-hitler-americas.html.

15 This article utilizes historical materials up to the debates and actions of the First Congress as well as later writings of the Founders to determine the historical constitutional meaning of the term. It uses judicial decisions beyond that period to determine the doctrinal meaning because the doctrinal theory of interpretation treats judicial decisions as accretive and is not limited to judgments from a particular period. For a general discussion of the two methods of interpretation *see, e.g.,* Robert C. Post, *Theories of Constitutional Interpretation*, 30 Representations 13, 20-22 (1990). Parts I and II discuss the controlling American interpretations of the original English and British sources. Part III considers their consistency with English and British interpretations of those sources. The article does not comprehensively consider lower court cases; to the extent they are inconsistent with Supreme Court precedents, the latter control. The article cites only lower court decisions of special interest in understanding the Supreme Court's controlling doctrine.

16 *See* U.S. Const. art. II, § 1, cl. 5 (natural born citizen) and art. I, § 8, cl. 4 (enumerated congressional power to enact a uniform rule of naturalization). *See also* U.S. Const. amend. XIV, *Wong Kim Ark*, 169 U.S. at 702 and Minor v. Happersett, 88 U.S. 162, 167 (1875).

17 *See* U.S. Const. art. II, § 1, cl. 5.

18 *See infra* notes 30-33 (derivative citizens are naturalized) and 21-24 (naturalized citizens are not natural born). The Court did tangentially consider presidential eligibility in oral argument in *Montana v. Kennedy*, 366 U.S. 308 (1961). Counsel for Montana, who was born in Italy, argued that some statutes confer naturalized citizenship and others natural born citizenship. Justice Frankfurter asked "[y]ou mean a child born in Italy could become the President under this?" and counsel for Montana replied "I -- I think we're going to have to have you interpret that", eliciting hearty laughter. The Court rejected Montana's claim to citizenship. Oral argument at 28:23, 28:36, 28:45 and 1:56:13, Montana v. Kennedy, 366 U.S. 308 (1961), https://www.oyez.org/cases/1960/198.

19 *See, e.g.*, Knauer v. United States, 328 U.S. 654, 658 (1946) (naturalized citizenship does not confer presidential eligibility).

### *A. U.S. Citizenship*

There are only two ways to obtain U.S. citizenship, by birth and by naturalization.[20] The two are distinct.[21] As John Jay stated the principle in 1781, "a person may by Birth or admission become a Citizen . . . ."[22]

### *B. Natural Born Citizenship "By Birth"*

Citizenship "by birth" is obtained by birth within and under the jurisdiction of the United States.[23] It is birthright "natural born" citizenship under the Constitution as recognized by Justice Curtis in dissent in *Dred Scott v. Sandford* and by the Court in *Minor v. Happersett*, *Elk v. Wilkins*, *United States v. Wong Kim Ark*, and *Perkins v. Elg*, the only Supreme Court case declaring a person to be a natural born citizen and directing the federal government to treat her as such.[24] The Constitution

---

[20] *See, e.g.*, *Minor*, 88 U.S. at 167.

[21] *See, e.g.*, Elk v. Wilkins, 112 U.S. 94, 101 (1884).

[22] *See Letter from John Jay to Benjamin Franklin*, National Archives (May 31, 1781) (regarding state citizenship prior to the adoption of the Constitution), http://founders.archives.gov/documents/Franklin/01-35-02-0082. State citizenship then was primary. *See*, *e.g.*, James H. Kettner, The Development of American Citizenship, 1608-1870, at 219-21 (1978).

[23] *See, e.g.,* United States v. Wong Kim Ark, 169 U.S. 649, 702-03 (1898) ("citizenship by birth is established by the mere fact of birth . . . in the United States, and subject to the jurisdiction thereof . . . ."); Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99, 155 (1830) (Story, J., dissenting on other grounds) ("allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign."), *quoted and relied upon by Wong Kim Ark*, 169 U.S. at 659; and McKay v. Campbell, 16 F.Cas. 161, 165 (D. Ore. 1871) ("To be a citizen of the United States by reason of his birth, a person must not only be born within its territorial limits, but he must also be born subject to its jurisdiction—that is, in its power and obedience."). *Cf.* Mandoli v. Acheson, 344 U.S. 133, 134 (1952) (person born in the United States to alien parents is a "citizen by birth" and "a citizen of the United States by virtue of our Constitution"), and Hintopoulos v. Shaughnessy, 353 U.S. 72, 73 (1957) (child born in the United States to unlawfully resident aliens "is, of course, an American citizen by birth."). For a different twentieth century statutory definition and a Supreme Court opinion that appears to follow it, *see infra* note 93.

[24] *See* Dred Scott v. Sandford, 60 U.S. 363, 576 (1856) (Curtis, J., dissenting) ("the Constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language . . . was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth."); *Wong Kim Ark*, 169 U.S. at 662-63 (adopting Justice Curtis's opinion) and 707 (Fuller, C.J., dissenting) ("it is this rule, pure and simple, which it is asserted . . . governed the meaning of the words 'citizen of the United States' and 'natural-born citizen' used in the Constitution as originally framed and adopted. I submit that no such rule obtained during the period referred to, and that those words bore no such construction . . . ."). *See also Minor*, 88 U.S. at 167 (citizenship "by birth" is natural born citizenship; that which results from Congress's power to establish a uniform rule of naturalization is "by naturalization"); *Elk*, 112 U.S. at 101-02 (citizenship "by birth" results from birth within and under the jurisdiction of the United States; it is "art. 2, sect. 1" natural born citizenship; and it is

does not define the term "natural born," but the Court has long held that as a legal term known at the adoption of the Constitution it takes its meaning from English common law and that "at common law in England . . . the rule with respect to nationality was that of the *jus soli* [right of soil],—that birth within the limits of the jurisdiction of the Crown . . . fixed nationality . . . ."[25] The English rule of "citizenship by birth" applied in the colonies and in the United States even before the adoption of the Constitution.[26]

The Court's precedents are consistent with the Founders' understanding. Thomas Jefferson noted in 1783 that the foreign-born child of a natural subject was an alien at common law.[27] John Adams described "the natural subjects, born within the realm" in 1773,[28] and Alexander Hamilton distinguished foreigners from "the natural subject, the man born amongst us" in 1787.[29]

---

distinct from "art. 1, sect. 8" naturalized citizenship); and Perkins v. Elg, 307 U.S. 325 (1939) at 333 (distinguishing citizenship "by birth" from citizenship "by parentage"), 330 and 339 (child born in the United States receives "natural" U.S. citizenship "by birth" with presidential eligibility, but "acquired" German nationality later through his father) (quoting with approval an opinion of Attorney General Pierrepont), and 350 (affirming decree declaring a person born within and under the jurisdiction of the United States "to be a natural born citizen of the United States" and extending the decree to bind the Secretary of State). *Cf.* Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) (issuing writ of *habeas corpus* to free appellant despite evidentiary issues regarding his claimed birth in the United States because "[i]t is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."); Perkins v. Elg, 99 F.2d 408, 410, 414 (D.C. Cir. 1938) (following Justice Curtis's *Dred Scott* dissent and the common law to declare a child born in the United States and subject to its jurisdiction to be a natural born citizen), *aff'd,* 307 U.S. 325 (1939); and Lynch v. Clarke, 1 Sandf. Ch. 583, 663 (N.Y. Ch. 1844) (finding a child to be a citizen under the Constitution because of her birth in New York to sojourning alien parents who had removed her from the United States during her infancy: "I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States . . . is a natural born citizen."). *See infra* note 33 regarding the *Lynch* court's view of birth abroad.

[25] *See, e.g.*, *Minor*, 88 U.S. at 167-68 (common law provides definition), *Wong Kim Ark*, 169 U.S. at 654 (same), and Weedin v. Chin Bow, 274 U.S. 657, 660 (1927) (quoted common law definition). *See also* John Adams equating "natural born Citizens of the United States" with "natural born subjects of Great Britain" in *Letter from John Adams to Thomas Jefferson*, National Archives (July 24, 1785), http://founders.archives.gov/documents/Jefferson/01-08-02-0249; McManamon, *supra* note 6, at 320-21 (English natural born subject) and 330 ("citizen" for "subject" and equivalence of natural born citizen and natural born subject); and Elhauge, *supra* note 6, at 12.

[26] *See, e.g.*, *Wong Kim Ark*, 169 U.S. at 659 (English rule of "citizenship by birth" under colonial law, citing *Inglis*); *Inglis*, 28 U.S. at 126 (Thompson, J.) (applying the common law rule to birth during the Revolutionary War) and 156, 164 (Story, J., dissenting on other grounds) (same); and Murray v. The Schooner Charming Betsy, 6 U.S. 64, 119-20 (1804) (person born in Connecticut before the Revolution who moved abroad after Independence is a United States citizen absent expatriating event).

[27] Jefferson, *supra* note 1.

[28] John Adams, *VII. To the Boston Gazette*, National Archives (Feb. 15, 1773), http://founders.archives.gov/documents/Adams/06-01-02-0096-0008.

[29] 8 Alexander Hamilton, The Works of Alexander Hamilton 20 (1904), https://archive.org/details/worksalexanderh29hamigoog.

## C. Citizenship "By Naturalization"

Any acquisition of citizenship other than by birth in the United States is by naturalization.[30] A person born outside of the United States to an American parent "is an alien as far as the Constitution is concerned, and 'can only become a citizen by being naturalized . . . .'"[31] The Constitution grants Congress only limited powers, and the power to grant citizenship to those born outside of the United States is limited to naturalization.[32] As a result, any statute granting citizenship is a naturalization statute whether it grants citizenship at birth or afterward and regardless of parental nationality.[33] Consequently a person born to American parents abroad must satisfy a statute to acquire citizenship like other aliens,[34] because naturalization applies only to aliens.[35] Although some refer to parents transmitting citizenship to their children under the Roman and continental right of blood (*jus sanguinis*), citizenship does not descend from parent to child "'either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute.'"[36] Foreign-born persons do not receive citizenship from their parents but

---

30 *See, e.g.*, *United States v. Wong Kim Ark*, 169 U.S. 649, 702-03 (1898) and Rogers v. Bellei, 401 U.S. 815, 841 (1971) (Black, J., dissenting on other grounds).

31 Miller v. Albright, 523 U.S. 420, 453 (1998) (Scalia, J., concurring) (citation omitted). *See also* 12 Documentary History of the First Federal Congress of the United States of America 530 (Helen E. Veit et al. eds., 1994) [hereinafter 12 History] (Rep. Sherman) (difference between a citizen and an alien is that a citizen is born in the country).

32 *See, e.g.*, *Bellei*, 401 U.S. at 830. *See also id.* at 840 (Black, J., dissenting on other grounds) and James Madison in 4 Annals of Cong. 1027 (1794) (Constitution only grants Congress the power "to admit aliens."), http://hdl.handle.net/2027/uc1.$c227002.

33 *See, e.g., Bellei*, 401 U.S. at 830. The *Wong Kim Ark* Court explained that all arguments to the contrary are based on two mistakes of law, citing two American decisions as mistaken in claiming that English and British derivative nationality acts declared the common law: Lynch v. Clarke, 1 Sandf. Ch. 583 (1844), and Ludlam v. Ludlam, 26 N.Y. 356 (1860). *See* United States v. Wong Kim Ark, 169 U.S. 649, 669-70 (1898). For a further analysis of the erroneous interpretations *see* McManamon, *supra* note 6, at 347.

34 *See*, *e.g.*, *Bellei*, 401 U.S. at 827-28.

35 *See, e.g.*, Giles Jacob, A New Law Dictionary (1729) (unpaginated) (definition of naturalization: "where a Person who is an *Alien*, is made the King's *natural* Subject by Act of Parliament, whereby one is a Subject to all Intents and Purposes, as much as if he were born so") (emphasis in original), http://hdl.handle.net/2027/mdp.35112203544624. Jacob's law dictionary was the most widely used in the early Republic and was in the personal collections of both Jefferson and Adams. *See* Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 Am. J. Legal Hist. 257, 260-61 and n.25 (2000). The *Elk* Court notes that the Fourteenth Amendment requirement of being "subject to the jurisdiction" relates to the time of birth in the case of birth in the United States and the time of naturalization in the case of naturalization in the United States; it asserts that "[p]ersons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized . . . ." Elk v. Wilkins, 112 U.S. 94, 102 (1884). This might be read to deny that persons receiving citizenship at birth abroad are naturalized citizens. However, the case involved a person born in the United States who did not receive citizenship at birth because he was a Native American and therefore was not born under the jurisdiction of the United States and could only receive citizenship afterward.

36 *See Wong Kim Ark*, 169 U.S. at 665 (quoting with approval Horace Binney); *see also Miller*, 523 U.S. at 434 n.11 (1998).

instead receive it personally from "congressional generosity" under naturalization statutes.[37]

In declaring a person born within and under the jurisdiction of the United States to be a natural born citizen the *Elg* Court relied on an opinion by Attorney General Pierrepont that considered the case of a child born in the United States who received German citizenship under German law.[38] The opinion explains:

> Nationality is either natural or acquired. The one results from birth, the other from the operation of the laws of kingdoms or states. Nationality by birth in some countries depends upon the place of birth, in others upon the nationality of the parents . . . [I]t is clear . . . that by virtue of German laws the son acquired German nationality. It is equally clear that the son by birth has American nationality; and hence he has two nationalities, one natural, the other acquired.[39]

In finding that place of birth determines natural citizenship by birth under the Constitution the *Elg* Court and Pierrepont follow James Madison, who explained in the First Congress "that birth is a criterion of allegiance. Birth, however, derives its force sometimes from place, and sometimes from parentage; but, in general, place is the most certain criterion; it is what applies in the United States; it will, therefore, be unnecessary to investigate any other."[40] In finding that citizenship conferred by positive enactment is not natural, Pierrepont's opinion accords with Supreme Court's distinction in *The Charming Betsy* between a person who acquires citizenship by being "born in the United States" from one "becoming a citizen according to the established laws of the country. . . ."[41] It is also consistent with the Court's precedents holding that natural born citizenship is "by birth" and that any other mode of acquiring citizenship is "by naturalization."

The Court's rulings are also consistent with the views of the Founders that foreign-born children were aliens at common law and only became subjects by naturalization,[42] including James Madison's observation that Britain "naturalizes

---

37 *See, e.g.*, *Bellei*, 401 U.S. at 835, and *Miller*, 523 U.S. at 434 n.11.

38 *See* Perkins v. Elg, 307 U.S. 325, 330 (1939).

39 Steinkauler's Case, 15 Op. Att'y Gen. 15, 16-17 (1875), http://hdl.handle.net/2027/msu.31293012342410. *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 147 (1963) ("Mendoza-Martinez . . . was born in this country in 1922 and therefore acquired American citizenship by birth. By reason of his parentage, he also, under Mexican law, gained Mexican citizenship, thereby possessing dual nationality.").

40 M. St. Clair Clarke & David A. Hall, Cases of Contested Elections in Congress From the Year 1789 to 1834, Inclusive 33 (1834), http://hdl.handle.net/2027/mdp.39015030483294.

41 *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 120 (1804). *See also Elg*, 307 U.S. at 331 (rights from birth within the United States "rest on the organic law of the United States") (quoting with approval Sec. Evarts), and Helen Silving, *The Twilight Zone of Positive and Natural Law*, 43 Cal. L. Rev. 477, 478-79 and 485 n.10 (1955) (organic law is fundamental law and does not rely on legislation). In the United States natural citizenship by birth follows place of birth; the only other mode of acquisition is naturalization by positive law. Under *jus sanguinis*, by contrast, natural nationality follows parentage and does not depend on positive law. *See, e.g.*, Perkins v. Elg, 99 F.2d 408, 410 (D.C. Cir. 1938), *aff'd,* 307 U.S. 325 (1939).

42 *See, e.g.,* Jefferson, *supra* note 1 (stating rules that a foreign-born child of a British natural subject was an alien at common law and that one cannot be a subject born of

persons born of British parents in *Foreign Countries"*.[43] The rulings are also consistent with the understanding of the First Congress in enacting the first federal naturalization act (the "Naturalization Act of 1790").[44] Congress's purpose in enacting that law was to define "the terms on which foreigners may be admitted to the rights of citizens . . . by a uniform rule of naturalization."[45] In debating the bill the Representatives recognized that foreign-born children of American parents are aliens in need of naturalization to be admitted as citizens. Discussing those children, Rep. Sherman stated that the difference between a citizen and an alien is that "the citizen is born in the country."[46] No Representative asserted that the children had any right to citizenship. Reps. Burke and Hartley urged that the act include foreign-born children of American parents,[47] demonstrating that the children required naturalization to be admitted to citizenship. Rep. Livermore suggested only that it "may be useful" to include them, while Reps. Laurance and Sherman stated that doing so could cause many difficulties and inconveniences -- and Rep. White even argued that including them might cause the children themselves great inconvenience.[48] The risks of dual nationality were well known then as now.[49]

---

one kingdom who was born under the allegiance of another, citing *Calvin's Case*, and characterizing English and British derivative nationality acts as naturalizing the foreign-born child) and Jenings, *infra* note 82. The Founders were well aware of Blackstone, who described the first of the eighteenth century British derivative nationality acts as naturalizing children. *See* 1 William Blackstone, Commentaries on the Laws of England 363 (1st ed. 1765), https://archive.org/details/lawsofenglandc01blacuoft.

43 James Madison, *Memorandum on Impressment and Naturalization*, National Archives [1813] (emphasis in original), http://founders.archives.gov/documents/Madison/03-06-02-0165.

44 An Act to establish an uniform Rule of Naturalization, March 26, 1790, ch. 3, 2 Stat. 103 (repealed 1795).

45 *See* 1 Annals of Cong. 933 (charge from Pres. Washington to Congress) and 936 (letter from Congress to Pres. Washington: Congress to enact "a uniform rule of naturalization, by which foreigners may be admitted to the rights of citizens") (1834) [hereinafter 1 Annals], http://hdl.handle.net/2027/nyp.33433081775128.

46 12 History, *supra* note 31, at 530. Sherman was a lawyer; judge; signer of the Constitution, Articles of Confederation, Declaration of Independence, and the Association of 1774; and according to Patrick Henry "one of the three greatest men at the Constitutional Convention." U.S. Government, *Roger Sherman*, https://www.aoc.gov/art/national-statuary-hall-collection/roger-sherman.

47 *See* 1 Annals, *supra* note 45, at 1121 (Burke) and 1125 (Hartley), and 12 History, *supra* note 31, at 529 (Hartley).

48 12 History, *supra* note 31, at 529 (Livermore and White) and 530 (Laurance and Sherman).

49 *See, e.g.,* Blackstone, *supra* note 42, at 358 ("straights and difficulties, of owing service to two masters"). "Accidental Americans" assert the injustice of nonconsensual citizenship imposed because of birth to a citizen parent abroad. Their self-identification as not-American and their felt injustice support the principle that they are by nature aliens to the United States.

> Nothing in my being will make me accept this seeming injustice especially as one of my children also has a developmental disability and would not be allowed to renounce that *deemed acquired US citizenship and all of its consequences*. I maintain my son is Canadian and I want his Canadian government to guarantee that he and others like him have the same rights — *A Canadian is a Canadian is a Canadian*.

The Representatives proposed widely varying terms for naturalizing the children, including upon moving to the United States and becoming resident,[50] upon moving to the United States and becoming resident but only if within a limited time,[51] and at birth but expiring upon reaching majority.[52] By including the foreign-born children in the final act Congress specified the terms for their admission as citizens. Rep. Tucker was the only member of Congress who discussed the constitutional relationship between admission by statute and presidential eligibility in the debates over the bill. He asserted without objection from any other member that the Constitution:

> enables congress to dictate the terms of citizenship to foreigners, yet prevents foreigners being admitted to the full exercise of the rights of citizenship . . . because it declares that no other than a natural born citizen, or a citizen at the time of the adoption of this constitution, shall be eligible to the office of president.[53]

In Tucker's view citizenship conferred by Congress is not natural born citizenship and does not confer presidential eligibility. Similarly, John Jay had previously stated that a person may become a citizen by birth or admission,[54] demonstrating his understanding that those who become citizens by admission are not citizens by birth – and it was Jay who proposed the natural born requirement.[55]

### *D. Fourteenth Amendment*

The only two methods of obtaining American citizenship are by birth and by naturalization. Consequently the Fourteenth Amendment's definition of citizenship

---

calgary411, *Again, *Can the U.S. deem somebody to be a U.S. citizen or (in the FATCA, FBAR and CBT world) forcibly impose U.S. citizenship on a person born outside the USA?**, The Isaac Brock Society (Jan. 16, 2016), http://isaacbrocksociety.ca/2016/01/16/again-can-the-u-s-deem-somebody-to-be-a-u-s-citizen-or-in-the-fatca-fbar-and-cbt-world-forcibly-impose-u-s-citizenship-on-a-person-born-outside-the-usa/.

50 6 Documentary History of the First Federal Congress of the United States of America 1519 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter 6 History] (text of H.R. 40) and 12 History, *supra* note 31, at 529 (Rep. Livermore defending proposal).

51 12 History, *supra* note 31, at 530 (Rep. Scott).

52 *Id*. at 529 (Rep. White).

53 *Id*. at 154. M. Anderson Berry's detailed analysis of eighteenth century American usage of "foreigners" demonstrates that the Founders would have considered the children to be foreigners even if Rep. Sherman had not described them as aliens. *See* M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 Berkeley J. Int'l L. 316, 343 (2009). The Lloyd transcription of Tucker's statement is identical to the quotation above. 3 Thomas Lloyd, The Congressional Register; Or, History of the Proceedings and Debates of the First House of Representatives of the United States of America 218 (1790), http://hdl.handle.net/2027/nyp.33433081774055. The Gales transcription is slightly different and could be read to say merely that the Constitution enables Congress to prevent foreigners from becoming president. 1 Annals, *supra* note 45, at 1116.

54 Jay, *supra* note 22.

55 *See, e.g.*, McManamon, *supra* note 6, at 328-29 (history and result of Jay's suggestion).

is comprehensive and declaratory of original constitutional law.[56] The common law rule was articulated in the 1608 English decision in *Calvin's Case*, which Thomas Jefferson relied on in his *Notes on British and American Alienage*. That case provided "the basis of the American common-law rule of birthright citizenship" that the Fourteenth Amendment merely codified.[57]

### E. *Rogers v. Bellei*

*Rogers v. Bellei* is an instructive example of the Court's precedents. Aldo Mario Bellei was born in Italy to an American mother and an alien father. The applicable naturalization statute granted him citizenship at birth subject to a condition subsequent requiring five years of continuous physical presence in the United States between the ages of fourteen and twenty eight. Bellei was a citizen at birth under the statute and traveled internationally on a U.S. passport.[58] However, he failed to meet the five year presence requirement, and the United States revoked his citizenship. Bellei challenged the revocation.

The Court held unanimously that Bellei had no constitutional right to citizenship and could be a citizen, if at all, only by complying with a naturalization statute. The majority stated that the Constitution's definition of citizenship "obviously [does] not apply to any acquisition of citizenship by being born abroad of an American parent."[59] The Justices who dissented on other grounds agreed, with Justice Black explaining that "naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country."[60] He acknowledged the considerable constitutional history of the definition while recognizing that it differs from popular usage.[61]

The majority then held that Bellei had to comply with all of the requirements of the naturalization statute including the condition subsequent.[62] Because he had

---

[56] *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 73 (1873) (comprehensive), Minor v. Happersett, 88 U.S. 162, 165, 170 (1875) (declaratory as to child of citizen parents), United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898) (declaratory as to child of alien parents), and McKay v. Campbell, 16 F. Cas. 161, 165 (D. Ore. 1871) (declaratory). *Cf.* Kawakita v. United States, 343 U.S. 717, 720 (1952) ("Petitioner was born in this country in 1921 of Japanese parents who were citizens of Japan. He was thus a citizen of the United States by birth (Amendment XIV, § 1) and, by reason of Japanese law, a national of Japan."), and Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting on other grounds) (Fourteenth Amendment is "by birth or naturalization"). *See also* Einer Elhauge, *The Meaning of the Natural Born Citizen Clause*, Originalism Blog (March 28, 2016) (Fourteenth Amendment "distinguishes citizenship by birth in the U.S. from citizenship by naturalization" citing *Wong Kim Ark*), http://originalismblog.typepad.com/the-originalism-blog/2016/03/the-meaning-of-the-natural-born-citizen-clauseeiner-elhauge.html. *But see infra* note 146 (regarding comprehensiveness).

[57] *See* Price, *supra* note 1, at 74, 138-40. *See also* 12 History, *supra* note 31, at 530 (Rep. Smith: child born in the United States is a citizen when born even if father is a foreigner).

[58] *See* Rogers v. Bellei, 401 U.S. 815, 817, 819 (1971).

[59] *Id.* at 830.

[60] *Id.* at 841 (Black, J., dissenting on other grounds). *See also id*. at 845 (Brennan, J., dissenting on other grounds).

[61] *Id.* at 840 (Black, J., dissenting on other grounds).

[62] *Id.* at 830.

no constitutional right to citizenship it did not matter whether Congress granted citizenship at birth subject to a condition subsequent or instead provided citizenship later after meeting a condition precedent. "The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place."[63]

*Bellei* is controlling precedent demonstrating that derivative citizens are not natural born. The Constitution forbids the nonconsensual revocation of natural born citizenship.[64] Yet the Court upheld the nonconsensual revocation of Bellei's derivative citizenship. Therefore derivative citizens are not natural born.

## II. Objections and Alternative Theories

Some assert that derivative citizens like Sen. Cruz are natural born despite contrary Supreme Court precedent and centuries of recognition that a person cannot be a subject born of one sovereign who was born under the allegiance of another. Some object to the common law rule generally, and others assert one of three alternative theories defining natural born citizenship.

### *A. Alleged Opacity and Ambiguity of the Term "Natural Born Citizen"*

Some argue that the term "natural born citizen" is an opaque and dangerously ambiguous enigma because the Constitution does not define it, the Founders never explained its meaning or their reason for including it in presidential qualifications, and federal courts have not considered it, leaving open questions such as whether a person born abroad on a U.S. military facility or to a serving member of the armed forces is eligible to the presidency.[65] These arguments are unpersuasive. The

---

63 *Id*. at 836. The *Bellei* majority upheld the condition subsequent on the grounds that the original Constitution and the Fourteenth Amendment only protect persons born or naturalized in the United States and that Bellei was naturalized outside the United States. *Id*. at 827.

64 *See* Hall v. Florida, 572 U.S. slip op. 6 (2014) ("No natural-born citizen may be denaturalized."). The *Bellei* majority found that the original Constitution recognizes only two types of constitutional citizenship: that by birth within and under the jurisdiction of the United States and that by naturalization within and under the jurisdiction of the United States. *See Bellei*, 401 U.S. at 829-30 (citing Justice Gray's opinion in *Wong Kim Ark*). Because those naturalized outside of the United States are not constitutional citizens, they cannot be natural born citizens within the meaning of U.S. Const. art. II, § 1, cl. 5. *Cf.* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (striking down a condition subsequent for naturalization within the United States because the Fourteenth Amendment does not permit Congress any "power, express or implied, to take away an American citizen's citizenship without his assent.").

65 *See, e.g.*, Charles Gordon, *Who Can Be President of the United States: the Unresolved Enigma*, 28 Md. L. Rev. 1, 17-18 (1968); Sarah Helene Duggin & Mary Beth Collins, *Natural Born in the U.S.A.: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L.

constitutional definition is simply the common law rule codified in the Fourteenth Amendment to bury forever the Court's decision in *Dred Scott*.[66] Federal courts have long adjudicated claims to birthright constitutional citizenship under this standard, including claims based on birth on a U.S. military installation abroad.[67] The Fourteenth Amendment is not an enigma but rather a fundamental part of American constitutional law. No one asserts that it requires reinterpretation except those who seek to apply Roman law and continental legal theories to deny birthright citizenship to minorities born within and under the jurisdiction of the United States.[68] Any ambiguity in the common law rule is ambiguity about birthright constitutional citizenship, which courts continue to clarify when adjudicating general claims to such citizenship.[69]

Moreover, the Founders were well aware of *Calvin's Case* and the common law rule.[70] They relied on *Calvin's Case* as the judicial and natural law basis of colonial independence from Parliamentary authority.[71] They had no need to discuss, justify or

---

Rev. 53, 55 (2005); Lawrence Friedman, *An Idea Whose Time Has Come – The Curious History, Uncertain Effect, and Need for Amendment of the "Natural Born Citizen" Requirement for the Presidency*, 52 St. Louis U. L.J. 137, 139-40 (2008); and Michael Dobbs, *McCain's Birth Abroad Stirs Legal Debate*, Washington Post (May 2, 2008).

66 *See, e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 662, 675-76 and 689-90 (1898).

67 *See, e.g.*, Perkins v. Elg, 307 U.S. 325, 350 (1939) (declaring a person to be a natural born citizen of the United States and directing the federal government to treat her as such); Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99, 126 (1830) (Thompson, J.) (application of the common law rule after the Declaration of Independence); and United States *ex rel.* Guest v. Perkins, 17 F. Supp. 177 (D. D.C. 1936) (denying claim of natural born citizenship from birth to citizen parent abroad). Both Courts of Appeals that have considered the issue of birth abroad on a military facility have denied constitutional citizenship on the ground that such facilities are not within the United States. *See* Williams v. Attorney General, 458 Fed. Appx. 148 (3d Cir. 2012) (*per curiam*) (child's claim to derivative citizenship based on asserted maternal birthright citizenship from birth at Guantanamo Bay), and Thomas v. Lynch, 796 F.3d 535 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016) (birth on a U.S. military facility abroad to a citizen serving in the U.S. armed forces who did not satisfy a statutory parental physical presence requirement). The *Thomas* decision also precludes the claim that birth abroad to a citizen serving in the armed forces confers natural born citizenship, although the court did not directly address the issue. The implicit holding is consistent with the English common law rule. *See, e.g.,* De Geer v. Stone (1883) 22 Ch. D. 243, 253-54 (military service), https://hdl.handle.net/2027/iau.31858012344986, and Laurie Fransman, Fransman's British Nationality Law 132, 134 (3d ed. 2011) (birth abroad to a parent in crown service, other than an ambassador, did not confer subject status under the common law, although practice differed).

68 *See, e.g.*, Publius-Huldah, *Natural Born Citizen and Naturalized Citizen Explained* (Feb. 11, 2016) (citing de Vattel for proposition that natural born citizens are only those born of citizen parents and that "[u]nder some peoples' misreadings of Sec. 1 of the 14th Amendment, illegal alien muslims could come here and drop a baby and the baby could later be President! Our Framers didn't want that!"), https://publiushuldah.wordpress.com/category/vattel/.

69 *See, e.g.*, Tuaua v. United States, 788 F. 3d 300 (D.C. Cir. 2015) (no birthright constitutional citizenship from birth in American Samoa), *cert. denied*, 136 S.Ct. 2461 (2016).

70 *See, e.g.*, *supra* note 42.

71 *See, e.g.*, Alexander Hamilton, *The Farmer Refuted, &c.,* National Archives ([Feb. 23], 1775), http://founders.archives.gov/documents/Hamilton/01-01-02-0057, and John

define the qualification because they had considered restricting lesser federal offices to those who were natural born well before drafting the Constitution[72] and because they were aware that the term "natural born" and its variants were commonly used in the colonies and the early Republic, for example: (a) John Adams describing "the natural subjects, born within the realm" in 1773;[73] (b) Alexander Hamilton distinguishing foreigners from "the natural subject, the man born amongst us" in 1787;[74] (c) John Adams, John Jay and Benjamin Franklin proposing in 1783 to grant British subjects all of the rights "of natural born Citizens" of the United States in exchange for Britain granting U.S. citizens all of the rights of "natural born Subjects" of the crown;[75] (d) Thomas Jefferson substituting "natural born citizens" for "natural born Subjects" in 1776 draft legislation;[76] (e) the Founders claiming the rights of natural born subjects in the Declaration and Resolves of the First Continental Congress;[77] (f) Massachusetts granting naturalized persons the rights of natural born citizens in 1784-85;[78] (g) slaves petitioning Massachusetts for their liberty and for "all the privileges and immunities of its free and natural born subjects" in 1774;[79] and (h) state constitutions from 1776 and 1777 progressively granting foreigners the rights of natural born subjects.[80]

The Founders also understood the operation and effects of naturalization. They ensured that naturalized persons were eligible to hold office in the colonies.[81] They understood the international political implications of dual nationality resulting from naturalizing children at birth abroad.[82] They enacted broad colonial statutes

---

Adams, *VII. To the Inhabitants of the Colony of Massachusetts-Bay*, National Archives (Mar. 6, 1775), http://founders.archives.gov/documents/Adams/06-02-02-0072-0008.

72 *See* the 1781 proposal to restrict the positions of consul and vice-consul to "natural born subjects of the power nominating them" in 21 United States, Journals of the Continental Congress, 1774-1789, at 805 (1912), draft treaty with France, art. I, § 3, https://hdl.handle.net/2027/mdp.39015068547101.

73 Adams, *supra* note 28.

74 Hamilton, *supra* note 29, at 20.

75 *See* John Adams, *Draft Articles to Supplement the Preliminary Anglo-American Peace Treaty*, National Archives (ca. Apr. 27, 1783) (art. 2 and footnote explanation 2 by The Massachusetts Historical Society), http://founders.archives.gov/documents/Adams/06-14-02-0278.

76 *See* Jefferson's revisions to Edmund Pendleton's *Bill for the Naturalization of Foreigners*, National Archives (Oct. 14, 1776), https://founders.archives.gov/documents/Jefferson/01-01-02-0223.

77 Declaration and Resolves of the First Continental Congress, Preamble and Resolutions 2 and 3 (Oct. 14, 1774), http://avalon.law.yale.edu/18th_century/resolves.asp.

78 3 Acts and Laws of the Commonwealth of Massachusetts 1784-85 (1890-1898), at 125 (ch. 43, 1784) and 508 (ch. 43, 1785), https://hdl.handle.net/2027/iau.31858018606149.

79 Petition, *To his Excellency Thomas Gage Governor: – To the Honourable, His Majesty's Council, and The Honourable House of Representatives of the Province of the Massachusetts Bay in General Court assembled; June – Anno Domini 1774*, http://www.masshist.org/database/550?mode=transcript.

80 *See* Pa.Const. § 42 (1776), and Vt. Const. ch. 2 § XXXVIII (1777).

81 *See* Kettner, *supra* note 22, at 77-78 (naturalizations under British law), *but see id*. at 123-26 (limitations under some colonial naturalizations).

82 For example, Edmund Jenings wrote to John Adams in 1784 describing a British proposal "to Naturalize Children born of English women in foreign parts" and the objection of some members of Parliament that the bill would benefit many children born in the United

naturalizing immigrants because naturalization operated retroactively, enhancing security to real property and facilitating economic development although also reducing escheats to the crown,[83] leading to Britain revoking the statutes and in part to the grievance in the Declaration of Independence that the king "has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners . . . ."[84]

In fact it is American derivative citizenship statutes that are opaque, poorly defined and dangerously ambiguous. Interpreting "natural born" to include derivative citizens under a living or responsive constitutional theory would only increase the definitional uncertainties and dangers. Derivative citizenship claims are often technically and factually complex, are typically adjudicated by inhospitable and underqualified administrative bodies rather than federal courts, and for certain claimants involve insurmountable burdens of proof,[85] exemplified by a judge in 2011 demanding documentary evidence like utility bills or co-worker affidavits to prove residence between 1921 and 1959 of a deceased Mexican American citizen father who had been a seasonal farm worker in the Bracero Program.[86] Derivative citizenship statutes rely on terms like marriage, legitimacy, custody, and permanent residency that are often undefined by statute or take their meaning from foreign law. They change frequently and lead to continuing litigation and outcomes that differ depending on the child's place of birth and on the ability of American courts and administrators to understand and apply both domestic and foreign law, exemplified by the dispute over whether the 1937 statute granting Sen. John McCain citizenship from his 1936 birth in the Panama Canal Zone was retroactive or merely declaratory of prior law, and by federal officials repeatedly citing a nonexistent provision in the Mexican constitution to deny citizenship to children born in Mexico to American fathers.[87]

---

States and might be better withdrawn until negotiations with the United States could achieve something for Britain in exchange. *See Letter from Edmund Jenings to John Adams*, National Archives (Feb. 24, 1784), http://founders.archives.gov/documents/Adams/06-16-02-0036, and "Bill for declaring the Children of *British* Mothers natural-born Subjects, though born Abroad" in 39 The Journals of the House of Commons 870 (reprint 1803) (emphasis in original) [hereinafter Journals], https://books.google.com/books?id=0hhDAAAAcAAJ. Note that Jenings characterized declaring the children to be natural born as naturalizing them.

83 Kettner, *supra* note 22, at 33, 117-21. For the extent of retroactivity, *see, e.g.*, Collingwood v. Pace (1661) 124 Eng. Rep. 661, 686-88 (Bridgman, C.J.), http://hdl.handle.net/2027/inu.30000029143645, and Collingwood v. Pace, 86 Eng. Rep. 262, 271 (argument of Lord Hale), http://hdl.handle.net/2027/coo.31924064794096.

84 The Declaration of Independence para. 2 (U.S. 1776). *See also* Kettner, *supra* note 22, at 105, 121 (colonial naturalization provisions, revocation, and grievance).

85 *See, e.g.*, Medina, *supra* note 8, at 407, 417 *ff*.

86 *See id*. at 433-34 (analyzing Vega-Alvarado v. Holder, 2011 U.S. Dist. LEXIS 9218 (C.D. Cal. 2011), *petition for review denied*, No. 08-73551 (9th Cir. 2012)). *Contrast* Leonard v. Grant, 5 F. Cas. 11, 17-18 (D. Ore. 1880) (waiving proof of residence for naturalization of alien white women by marriage to American husbands "notwithstanding the letter of the statute" because years later, when controversy might arise, the proof "may be lost or difficult to find" rendering the naturalization provision "practically nugatory, if not a delusion and a snare.").

87 *See, e.g.*, Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 Mich. L. Rev. First Impressions

Their opacity is nothing new. Congress enacted the original federal derivative citizenship provision despite a disagreement over its clarity,[88] and its scope remains controversial today.[89] A leading State Department advisor acknowledged in 1934 that "[i]t seems to have been the rule, rather than the exception, that nationality laws fail to state in plain, unmistakable terms what is intended."[90]

### *B. Three Alternative Theories*

#### *1. Substantive theory*

The first alternative theory claims that the Constitution grants citizenship by descent because eighteenth century British derivative nationality statutes declared or changed the English common law and therefore control the common law definition of "natural born" that the Constitution incorporates. This theory necessarily includes the corollary claims that American derivative citizenship statutes are declaratory of the same British law, not naturalization statutes, and that the Fourteenth Amendment does not provide the comprehensive definition of American citizenship – the amendment leaves open the possibility of *jus sanguinis* as a third type of constitutional citizenship that is not naturalization. Charles Gordon propounded this theory in an influential 1968 article.[91] He admitted that his conclusion was "clouded by elements of doubt" and stated it in highly qualified terms,[92] and with good reason. The Supreme Court had already rejected all three claims.[93] In *Weedin v. Chin Bow*, for example, the Court considered the derivative

---

1 (2008) (retroactive, citing the statute's text and legislative history and the public advice of a leading State Department advisor), Stephen E. Sachs, *Why John McCain Was a Citizen at Birth*, 107 Mich. L. Rev. First Impressions 49 (2008) (declaratory of prior statutory law, citing Middle English legal drafting conventions and the texts and legislative histories of prior statutes), and Collins, *supra* note 8, at 2221-22 (Mexican provision).

[88] *See* 12 History, *supra* note 31, at 529 (Reps. Burke and Livermore) and Michael D. Ramsey, *A Reply to Saul Cornell on Natural Born Citizens (part 2)*, Originalism Blog (Sept. 15, 2016), http://originalismblog.typepad.com/the-originalism-blog/2016/09/a-reply-to-saul-cornell-on-natural-born-citizens-part-2michael-ramsey.html.

[89] *See, e.g.*, W. Gardner Selby, *Ted Cruz says it's always been that babies born to U.S. citizens abroad are citizens from birth*, Politifact Texas (Sept. 4, 2015), http://www.politifact.com/texas/statements/2015/sep/04/ted-cruz/ted-cruz-says-its-always-been-law-babies-born-us-c/.

[90] Richard W. Flournoy, *Proposed Codification of Our Chaotic Nationality Laws*, 20 A.B.A. J. 780, 781 (1934).

[91] *See* Gordon, *supra* note 65, at 13, 18 (the eighteenth century acts changed the common law or were part of the corpus of common law), 9 and n.69 (there is an equally valid argument that the first federal naturalization act was declaratory), 13 and 17 (there is no evidence that the Fourteenth Amendment is exclusive; Congress believes that *jus sanguinis* rather than naturalization confers citizenship abroad).

[92] *Id*. at 32.

[93] *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 73 (1873) (Fourteenth Amendment comprehensive) and Weedin v. Chin Bow, 274 U.S. 657, 665 (1927) (stating common law rule and characterizing American derivative citizenship statute as a naturalization

citizenship claim of a child born abroad to a citizen father who had also been born abroad. The Court stated the English and American common law rule, which did not apply to Chin because:

> at common law in England and the United States, the rule with respect to nationality was that of the *jus soli* [right of soil],—that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute . . . .[94]

The Court acknowledged that Chin met the terms of a British statute but rejected his claim for failure to meet the more restrictive terms of the American naturalization statute, which included a paternal residency requirement:

> Congress must have thought that the questions of naturalization and of the conferring of citizenship on sons of American citizens born abroad were related.
>
> Congress had before it the Act of George III of 1773, which conferred British nationality not only on the children but also on the grandchildren

---

statute by reference to a British derivative nationality act). Even the first U.S. derivative citizenship provision differed significantly from British law and cannot be interpreted to declare the same law. For example, the U.S. act naturalized foreign-born children of naturalized citizens, but with one late and narrow exception the British derivative nationality acts did not naturalize foreign-born children of naturalized subjects. *See, e.g.*, Sasportas v. De la Motta, 10 Rich. Eq. 38, 48 (S.C. Ct. App. 1858) (interpreting language reenacted from the original U.S. provision), https://hdl.handle.net/2027/mdp.35112102521376; Horace Binney, The Alienigenae of the United States Under the Present Naturalization Laws 21 (1853) (same), http://hdl.handle.net/2027/mdp.35112102633445; and *infra* notes 110 and 123 (British acts). Gordon also relies without justification on a twentieth century statutory definition of "naturalization" as the conferring of citizenship after birth. *See* Gordon, *supra* note 65, at 15-16. Congress adopted the narrower statutory definition even while recognizing that it differed from the Supreme Court's constitutional definition. *See* the Nationality Act of 1940, § 101(c), ch. 876, 54 Stat. 1137, and House Committee Print, 76th Cong. 1st Sess., 1 *Nationality Laws of the United States: Message from the President of the United States* 3-4 (1939) (citing *Minor* and *Wong Kim Ark* for the Supreme Court's definition), http://hdl.handle.net/2027/mdp.39015059519226. Section 401 of the Nationality Act of 1940 refers to citizenship "by birth or naturalization" rather than at birth or afterward. Because the act defines naturalization as occurring only after birth, it appears to use citizenship "by birth" to mean citizenship "at birth." Justice Stevens appears to follow this usage in his *Miller* opinion. *See* Miller v. Albright, 523 U.S. 424, 435 (1998). Twentieth century usage cannot, however, alter the constitutional definition of "naturalization" or of citizenship "by birth." The statutory definition of "naturalization" is also broader than the constitutional definition because the former includes the post-natal grant of non-citizenship nationality. *See, e.g.,* Rose Cuison Villazor, *American Nationals and Interstitial Citizenship,* 85 Fordham L. Rev. 1673 (2017) (non-citizenship nationality differs significantly from both citizenship and alienage and was created in the early twentieth century and codified in the Nationality Act of 1940 as a racially exclusionary tool to avoid granting citizenship to residents of territories acquired from Spain in 1898).

[94] *Chin Bow*, 274 U.S. at 660.

> of British-born citizens who were born abroad. Congress was not willing to make so liberal a provision.[95]

The Court's conclusions are consistent with its subsequent decisions in *Bellei*, *Miller*, *Nguyen v. INS*,[96] and *Flores-Villar v. United States*.[97] If the substantive theory were correct then only a constitutional amendment could deny the right to derivative citizenship.[98] This is flatly inconsistent with Supreme Court decisions upholding narrower derivative citizenship statutes.

Gordon reached his conclusion by reasoning that long-settled British practice reaffirmed in eighteenth century British nationality acts "grant[ed] full status of natural-born subjects to the children born overseas to British subjects."[99] This mischaracterizes British law. The nationality acts did not reflect settled British practice, did not apply to foreign-born children of all British subjects, and did not confer the status of a natural born subject.

The common law forbade aliens to inherit real property in order to protect the wealth and security of the realm.[100] Foreign-born children were aliens, even if born to English parents, so the common law rule excluded children "of many noble and virtuous families from the service of the state, and impoverished the children of opulent parents," and therefore Parliament enacted the "remedial and enlarging"

---

[95] *Id.* at 665 (recognizing that only the person born in Britain is "British-born"). The Court's statutory reference is to The British Nationality Act, 1772, 13 Geo. 3 c. 21, http://hdl.handle.net/2027/njp.32101013154933. Dating conventions vary for older acts of Parliament. This article titles and dates the British derivative nationality statutes enacted under Anne, George II, and George III in accordance with the Short Titles Act, 1896, 59 & 60 Vict. c. 14.

[96] 533 U.S. 53 (2001) (child born abroad to an American father and an alien mother, abandoned by his mother and raised by his father in the United States from age 6, denied citizenship because his father did not meet statutory requirement for acknowledging paternity under oath by child's 18th birthday).

[97] 564 U.S. ___ (2011) (*aff'g* by an equally divided Court United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008)) (child born abroad to an American father and an alien mother denied citizenship because his father did not and could not meet statutory U.S. physical presence requirement).

[98] *See, e.g.*, Alexander Porter Morse, *Natural-Born Citizen*, 31 Wash. L. Rep. 823, 823 (1903) (constitutional right that Congress cannot impair or deny "even if legislation to that end was enacted."), and William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 Drake L. Rev. 457, 465 (2010) (first generation born abroad has "birthright citizenship that Congress has no power to diminish."). James Otis provides the nearest support from a Founder for the substantive theory. Otis cited *Calvin's Case* for the common law rule that one cannot be a subject born of one king who was born under the allegiance of another and described the nationality acts of Parliament from Edward III onward as naturalization acts; however, he also referred to some acts of Parliament, perhaps including the naturalization acts, as declaratory or amendatory of common law and asserted that "[t]he common law is received and practiced upon here . . . and all antient and modern acts of parliament that can be considered as part of, or in amendment of the common law . . ." James Otis, The Rights of the British Colonies Asserted and Proved 71 (1764), http://hdl.handle.net/2027/aeu.ark:/13960/t08w4h35q.

[99] Gordon, *supra* note 65, at 7-8 (footnote omitted).

[100] *See, e.g.*, *Calvin's Case* (1608) 7 Co. Rep. 1a, 18b.

act *De natis ultra mare* (Of birth beyond sea) in 1350 (the "Act of Edw. III").[101] That act prospectively granted inheritance rights to foreign-born children "whose fathers and mothers" were at the faith and ligeance of the king on the condition "that the mothers of such children do pass the sea by the licence and wills of their husbands."[102] Some authorities interpreted the act more restrictively to exclude children of English parents who had gone abroad without the king's license[103] and others more liberally, both to naturalize the children and to apply to children of an English father and an alien mother under the maxim that a wife is *sub potestate viri* (under the governance of the husband).[104] The authorities interpreting the Act of Edw. III depart so far from its terms and are so inconsistent that an Attorney-General for England and Wales remarked in 1763 "that there never was a statute of so doubtful a construction."[105] Courts ultimately read the act *in pari materia* with the first eighteenth century general derivative nationality acts,[106] and it did not have any subsequent meaningful effect.

The first eighteenth century general derivative nationality acts were clause 3 of The Foreign Protestants Naturalization Act, 1708 (the "Act of Ann."),[107] as explained by The British Nationality Act, 1730 (the "Act of Geo. II").[108] These acts naturalized the immediate issue of a married British father who was at the time of the child's birth a natural born subject untainted by specified acts of treason, felony or enemy service.[109] Consequently, all foreign-born children of naturalized British fathers remained aliens – including all foreign-born children of fathers whom the Acts of Ann. and Geo. II had naturalized.[110] In addition, all foreign-born children

---

[101] Francis Plowden, An Investigation of the Native Rights of British Subjects 41-42 (1784), https://archive.org/details/investigationofn00plowuoft, *citing* 25 Edw. 3 stat. 2 (1350), http://hdl.handle.net/2027/mdp.39015065181839. Foreign-born children of English parents could not inherit despite their English blood because they lacked allegiance. *See, e.g.,* Godfrey v. Dixon, Cro. Jac. 539 ("true it is there was a disability, but not in the blood, *viz*. his blood was not the cause of his disability, but the place of his birth; for the law respects not the blood, where there is not any allegiance . . ."), http://hdl.handle.net/2027/nyp.33433009486642.

[102] 25 Edw. 3 stat. 2, cl. 5.

[103] *See, e.g.,* Hyde v. Hill (1582) 78 Eng. Rep. 270, http://hdl.handle.net/2027/inu.30000029143124.

[104] *See, e.g.*, Doe *dem*. Duroure v. Jones (1791) 4 T.R. 300, 308 (Kenyon, C.J.) (Act of Edw. III granted all of the rights of natural born subjects) and 311 (Grose, J.) (maxim), http://hdl.handle.net/2027/njp.32101066467810. Whether Parliament believed that husbands governed wives is doubtful given the statutory exclusion of children born to women who traveled abroad without their husbands' license. Whether the Act of Edw. III naturalized children instead of merely granting them inheritance rights is an issue of recurring controversy. *See, e.g.*, McManamon, *supra* note 6, at 324-25 and 339-40.

[105] Leslies v. Grant (1763) 2 Pat. 68, 74 n.1, http://hdl.handle.net/2027/umn.31951d01952261o.

[106] *See, e.g.*, *Duroure*, 4 T.R. at 308-09 (Kenyon, C. J.) and 311 (Grose, J.).

[107] 7 Ann. c. 5, http://hdl.handle.net/2027/mdp.39015065182050.

[108] 4 Geo. 2 c. 21, http://hdl.handle.net/2027/mdp.39015035134082.

[109] *See* 7 Ann. c. 5, cl. 3, and 4 Geo. 2 c. 21, cls. 1 & 2. *See also* Fransman, *supra* note 67, at 132, and Shedden v. Patrick (1854) 149 Rev. Rep. 55, 90-91 (a non-marital child is *nullius filius* and therefore does not have a British father), http://hdl.handle.net/2027/iau.31858017125307.

[110] *See, e.g.*, Fransman, *supra* note 67, at 132 (Acts of Ann. and Geo. II inapplicable to children of post-natally naturalized subjects and to children of fathers made subjects by

of British mothers and alien fathers remained aliens, as did all those of tainted natural born British fathers and all foreign-born non-marital children (even if both parents were natural born subjects). The purpose of the acts was to increase the wealth of the British state by encouraging those within the narrow statutory class to move into the realm with their families' foreign wealth by allowing them to inherit real property there.[111] The Acts of Ann. and Geo. II did not recognize or establish transmission of nationality by right of blood but rather naturalized a narrow group of children for the economic benefit of the state.

The restriction to the immediate issue of natural born fathers was based on the plain meaning of the term "natural born subjects" in the statutes and on the feared consequences of interpreting the term more broadly. The Acts of Ann. and Geo. II naturalized foreign-born children whose fathers were "natural born subjects." Those acts and all other British naturalization acts deemed their beneficiaries to be natural born subjects. Some asserted that naturalization made one a natural born subject so that the Act of Ann. applied to children of naturalized fathers[112] with the consequence that the act would apply abroad to all posterity. Lord Bacon had claimed that the Act of Edw. III operated the same way on the foreign-born children of English parents with the "strange" consequence that their "descendents are naturalized to all generations: for every generation is still of liege parents, and therefore naturalized: so as you may have whole tribes and lineages of English in foreign countries."[113] However, courts and Parliament rejected this interpretation.

The earliest apparent judicial decision came when the issue "was put to the whole judges in England" in *Leslies v. Grant* (1763),[114] a House of Lords inheritance decision rendered by the most prominent jurists of the time.[115] Counsel for appellants stated that the case turned on whether the term "natural born subjects" in the Act of

---

those acts). Similarly, foreign-born children of fathers who were subjects by annexation were aliens at common law. *See id*. at 132 (noting that it seems that practice differed).

[111] *See, e.g.*, 7 Ann. c. 5, Preamble (purpose to increase the wealth and strength of the nation), and Dundas v. Dundas (1839) 12 Scot. Jur. 165, 167 (report of Lord Cuninghame referring the case to the whole court: Acts of Ann. and Geo. II "appear to have been framed purposely to encourage and bring back persons of British extraction, born aliens, to their allegiance, and still to bestow on them their inheritance in this country, if any descended to them."), http://hdl.handle.net/2027/coo.31924065520599.

[112] *See, e.g.*, 1 George Wallace, A System of the Principles of the Law of Scotland 67-68 (1760) (pre-dating the 1763 and 1772 authorities discussed *infra* notes 120 and 122 and accompanying text).

[113] *See Calvin's Case* (1608) 2 St. Tr. 560, 585 (assuming that no offspring married aliens), http://hdl.handle.net/2027/njp.32101049431156. Chief Justice Bridgman interpreted the Act of Edw. III to the same effect and urged interpreting it strictly to require both parents to be English because otherwise the foreign-born sons of an English father and an alien mother would "be as those born in England, then the sons of those sons should be denizens, and *nati natorum*, &c. [for generations to come]; and so the King have more subjects who shall have the privilege of Englishmen, than is fit or safe for the realm." Collingwood v. Pace (1661) 124 Eng. Rep. 661, 675.

[114] 2 Pat. 68, 74. The Attorney-General's argument in the case refers to an opinion of Lord Hailes on point. *See id*. at 74 n.1. The author cannot find that opinion.

[115] The judges included Lord Pratt, Chief Justice of the Court of Common Pleas; Lord Mansfield, Chief Justice of the Court of King's Bench; Lord Hardwicke, former Lord Chancellor and Chief Justice of the Court of King's Bench; and Lord Wilmot, future Chief Justice of the Court of Common Pleas.

Ann. meant only "persons who were actually born within the king's dominions" and argued that it did not.[116] The Attorney-General for England and Wales explained to the contrary that the act "restrains naturalization within the father as a natural born subject" and that "[n]atural *born subjects* are mentioned in the acts of Parliament to be a subject born in England."[117] Counsel for respondents maintained similarly that "the privilege of a natural born subject" that a foreign-born father is entitled to plead under the Acts of Ann. and Geo. II is a "personal privilege . . . confined to him alone, and does not entitle his issue to the same benefit."[118]

The judges first considered similar statutes including the Act of Edw. III and found that they applied only to the immediate issue of "a natural born subject, in fact and not by fiction."[119] The court rejected the claim that the term included fathers born outside the realm, stating that "[i]f the Parliament had intended this to be the case, they would have expressed it more clearly in the act."[120] The judges also reasoned that including children of those fathers would undermine the Act of Settlement, which restricted the rights of naturalized subjects other than those "born of English Parents" and "would let in all sorts of persons into the family rights, Jews, French, &c., without any test or qualification – without any residence" with the result "in terror" that the law "might naturalize one-half of Europe."[121] Persons born abroad and naturalized under acts of Parliament were not in fact natural born subjects. Their foreign-born children were aliens.

Parliament concurred with the *Leslies* decision in the final statute on which Gordon relies, The British Nationality Act, 1772,[122] (the "Act of Geo. III," together with the Acts of Ann. and Geo. II, the "British nationality acts" or the "Acts"). Parliament acknowledged that no prior law applied "farther than to the Children born out of the Ligeance of his Majesty, whose Fathers were natural born Subjects" and by the act extended naturalization one generation farther, to certain foreign-born children of untainted married fathers who were entitled to the privileges of natural born subjects under the derivative nationality clause of the Act of Ann.[123]

---

116 *Leslies*, 2 Pat. at 74 n.1.

117 *Id.* (emphasis in original).

118 *Id*. at 72.

119 *Id.* at 76-77.

120 *Id*.

121 *Id*. at 77. *See also* An act for the further limitation of the crown, and better securing the rights and liberties of the subject, 12 & 13 Will. 3 c. 2 (1700) (also known as the Act of Settlement) (exemption for children "born of English parents"), http://hdl.handle.net/2027/nyp.33433019370828. The father in *Leslies* was born prior to the enactment of the Act of Ann. *See Leslies*, 2 Pat. at 74 n.1. Nevertheless counsel and the court argued and decided the case on the grounds stated above.

122 13 Geo. 3 c. 21.

123 *See id*., Preamble and cl. 1 (class of fathers) and Shedden v. Patrick (1854) 149 Rev. Rep. 55, 90-91 (married). Some loosely characterize the Act of Geo. III as conferring British nationality on grandchildren of natural born paternal grandfathers, but this is incorrect; the act only naturalized those whose fathers were entitled to the rights of a natural born subject under the Acts of Ann. and Geo. II and who met the other requirements of the Act of Geo. III. *See, e.g.*, *A Question of Nationality*, 27 L. J. 447, 448 (1892), https://hdl.handle.net/2027/iau.31858002992240. It did not naturalize the grandchild, for example, if the grandfather had been tainted or unmarried at the time of the father's birth, or if the father was tainted or unmarried at the time of the grandchild's birth. The grandfather did not transmit British nationality by blood through the father to the grandchild. Rather, the

The purpose of the Act of Geo. III was to entitle the second generation born abroad "to come into this Kingdom, and to bring hither . . . their Capital" so that the state would not lose the benefit of their families' foreign wealth.[124] Because the fathers were not natural born subjects, the Act of Geo. III referred to them in very specific terms:

> Fathers [who] were or shall be, by virtue of a Statute made in the Fourth Year of King *George* the Second, to explain a Clause in an Act made in the Seventh Year of the Reign of Her Majesty Queen *Anne*, for naturalizing Foreign Protestants, which relates to the natural born Subjects of the Crown of *England*, or of *Great Britain*, intitled to all the Rights and Privileges of natural born Subjects of the Crown of *England*, or of *Great Britain* . . . .[125]

Because the fathers were foreign-born Parliament doubted that they were even British for purposes of the parentage exception to the disabilities of the Act of Settlement.[126] Parliament included a special provision in the Act of Geo. III exempting the children it naturalized from those disabilities.[127] Addressing the *Leslies* judges' fears, the act imposed numerous restrictions and qualifications. It did not "repeal, abridge or any ways alter, any Law, Statute, Custom, or Usage . . . concerning Aliens' Duties, Custom or Usage" or grant "any Privilege, Exemption, or Abatement, relating thereto, in favour of any Person naturalized by virtue of" the act unless he moved to the realm, resided there, took and subscribed oaths and a declaration, took the sacrament in the Church of England or another Protestant or reformed church, and filed a witnessed and attested certificate in court.[128] Even then it did not validate any claim to property that had accrued more than five years before the beneficiary satisfied its conditions.[129]

Consequently the Act of Geo. III discriminated against, among others, Catholic, Jewish, nonresident and nonmarital children. British derivative nationality stopped there. No general law naturalized foreign-born children of any other naturalized father. In particular, no law naturalized the foreign-born child of a father whom the Act of Geo. III had naturalized, even though the child's bloodline traced directly through a father, grandfather, and great-grandfather who were all British subjects. The Act of Geo. III did not recognize or establish transmission of nationality by right of blood but rather naturalized an even narrower group of children than the Acts of Ann. and Geo. II, again for the economic benefit of the state.

---

Act of Geo. III conferred British nationality personally on the grandchild if its statutory conditions were met.

[124] *See* 13 Geo. 3 c. 21, Preamble.

[125] *Id*. at cl. 1 (emphasis in original).

[126] This involved the interpretation of "English" parentage in the Act of Settlement independently from the term "natural born subjects" in the Acts of Ann. and Geo. II. *See* Great Britain, Report From the Select Committee on the Laws Affecting Aliens: Together With Minutes of Evidence and Index 13 (1843), http://hdl.handle.net/2027/mdp.35112102556778 [hereinafter Select Committee].

[127] *See id*. and 13 Geo. 3 c. 21, cl. 1.

[128] *See* 13 Geo. 3 c. 21, cl. 3.

[129] *See id*., cl. 4.

Subsequent judicial decisions applied the Acts of Ann. and Geo. II consistently with the *Leslies* decision. Judges continued to rule that the term "natural born subject" in those acts meant only persons who were subjects "from nativity within the realm" and not "from statutes, or patents of naturalization,"[130] reasoning that the plain meaning of the term was a subject "by birth," not a subject by "any other mode."[131] As Chief Judge Abbott concluded for the King's Bench in *Doe* dem. *Thomas v. Acklam*:

> A child born out of the allegiance of the Crown of England is not entitled to be deemed a natural born subject, unless the father be, at the time of the birth of the child, not a subject only, but a subject by birth. The two characters of subject and subject by birth, must unite in the father.[132]

Statutes that deemed persons to be natural born for all purposes did not make them natural born subjects "in fact" or "in the common meaning of the term."[133] The statutes merely deemed them to be natural born by a legal fiction.[134] The Acts of Ann. and Geo. II did not apply to children of naturalized fathers (not even fathers whom those acts had naturalized at birth) because those fathers were "by their birth . . . the subjects of another power, and not the subjects of Britain."[135] The courts interpreted the term "natural born subjects" in accordance with its common law meaning. As the leading twenty-first century British treatise states the common law rule, "birth within the Crown's dominions and allegiance . . . conferred British subject status 'by birth' . . . ."[136]

---

[130] *Dundas*, 12 Scot. Jur. at 170 (Jeffrey and Mackenzie, JJ.). *See also id.* at 171 (Moncreiff, J.) (Acts applied only to children "whose father was *truly and actually* a natural-born subject") (emphasis in original) (Moncreiff disagreed with the majority decision in the case on other grounds); *De Geer*, 22 Ch. D. at 253 (Act of Ann. only applies to child of great grandfather, the last ancestor who was a natural born subject at common law); and The King v. The Superintendent of Albany Street Police Station, or *Ex parte* Carlebach [1915] 3 K.B. 716, 722 (Reading, C.J.) (Acts only apply to children whose fathers are in fact natural born subjects and as a result claimant must rely on later statutes), http://hdl.handle.net/2027/inu.30000022559334.

[131] *See* Doe *dem*. Thomas v. Acklam (1824) 26 Rev. Rep. 544, 556-57, http://hdl.handle.net/2027/pst.000033906621.

[132] *Id*.

[133] *See, e.g.*, *Carlebach*, 3 K.B. at 722 (Reading, C.J.), and *Dundas*, 12 Scot. Jur. at 171 (Moncreiff, J.). *See also* Elhauge, *supra* note 6, at 29.

[134] *See Dundas*, 12 Scot. Jur. at 171 (Moncreiff, J.). *See also* 1 William Blackstone,Commentaries on the Laws of England 373 (7th ed. 1775) (the Acts only deemed persons to be natural born), https://hdl.handle.net/2027/nyp.33433008579496; *infra* note 218; and Eric Posner, *Ted Cruz Is Not Eligible to Be President*, Slate (Feb. 8, 2016) (treating someone as natural born to all intents and purposes is a legal fiction), http://www.slate.com/articles/news_and_politics/view_from_chicago/2016/02/trump_is_right_ted_cruz_is_not_eligible_to_be_president.html.

[135] *Dundas*, 12 Scot. Jur. at 171 (Moncreiff, J.).

[136] Fransman, *supra* note 67, at 130 (emphasis omitted). Some incorrectly characterize citizenship conferred by statute at birth as citizenship "by birth." *See, e.g.*, Michael D. Ramsey, *Seth Barrett Tillman on James Bayard on Natural Born Citizens [UPDATED]*, Originalism Blog (April 6, 2016) (quoting James Bayard), http://originalismblog.typepad.com/the-originalism-blog/2016/04/seth-barrett-tillman-on-james-bayard-on-natural-

Contrary to Gordon's claim, Britain recognized that foreign-born children of British subjects were aliens unless one of the British nationality acts applied to them.[137] Those acts were interpreted or drafted to minimize the number of naturalized foreign-born children lest too many Europeans become British subjects. They were interpreted or drafted to discriminate against children of almost every class of naturalized subjects; those of Jewish, Catholic, French or other disfavored heritage; children of British mothers and alien fathers;[138] nonmarital and nonresident children; and children of tainted fathers. Finally, as described below in Part III.C.3, even when the Acts applied they did not always confer the rights of a British subject under international law and may not have imposed any obligations from birth. From their start in 1350 the English and British statutes incorporated exclusions and limitations absent from the common law rule.[139] For the reasons stated above, the substantive theory cannot provide the doctrinal or historical definition of a natural born citizen.

### *2. Procedural theory*

The second theory claims "that the phrase 'natural born Citizen' has a specific meaning: namely, someone who was a U.S. citizen at birth with no need to go

born-citizensmichael-ramsey.html. *See also* Seth Barrett Tillman, *On Ted Cruz's Eligibility for the Presidency*, The New Reform Club (Mar. 31, 2016, 9:56 AM), http://reformclub.blogspot.ie/2016/03/on-ted-cruzs-eligibility-for-presidency.html, and Selby, *supra* note 89 (quoting Sen. Cruz). This is contrary to the constitutional definition of the term as well as the British definition from which it derives. *See supra* notes 20-21 and 23 (constitutional definition and the distinction between citizenship by birth and by naturalization). The nearest support from a Founder is by George Washington who referred in 1796 to "[c]itizens by birth or choice," perhaps suggesting that naturalization is limited to the post-natal acquisition of citizenship by deliberate choice. *See* George Washington, *Farewell Address*, National Archives (Sept. 19, 1796), http://founders.archives.gov/documents/Washington/99-01-02-00963. *Cf.* V. 1 PT. 2 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; And of the Commonwealth of Virginia 101 (1803) (distinguishing "[a]liens by birth" from "aliens by election" under U.S. law and asserting that persons receiving citizenship from birth to citizen parents abroad under congressional statutes are not "[a]liens by birth"), https://hdl.handle.net/2027/mdp.35112203968369.

137 *See, e.g.*, Dundas v. Dundas (1839) 12 Scot. Jur. 165, 169 (Jeffrey and Mackenzie, JJ.) (after American independence "any British subject who . . . visited their territory, and had children born among them, must have submitted to have seen those children dealt with as aliens in this country, but for the protection of the Statutes now in question . . . .").

138 This was not an unconscious reflection of gender norms but rather a deliberate enforcement of them. Prior statutes naturalized children born abroad during limited periods if either their mother or father was a natural born subject. *See* 29 Car. 2 c. 6 (1676), and 9 & 10 Will. 3 c. 20 (1697-98). In addition, some understood the Act of Ann. to apply if either the mother or the father was a natural born subject before the Act of Geo. II explained it to apply only to children of natural born fathers. *See* Doe *dem*. Duroure v. Jones (1791) 4 T.R. 300, 309 (Kenyon, C.J.).

139 *Cf*. Craw v. Ramsey (1670) 124 Eng. Rep. 1072, 1075 (children born in the king's dominions could purchase and implead in the realm even if born to unmarried or foreign parents), http://hdl.handle.net/2027/inu.30000029143645.

through a naturalization proceeding at some later time."[140] Paul Clement and Neal Katyal make this claim in a Commentary on which Sen. Cruz relies to assert his presidential eligibility.[141] Under this theory if Congress enacted a statute naturalizing at birth all heirs to the British throne then those heirs would be eligible to the presidency.[142] Clement and Katyal argue that the Founders intended this meaning and its application to foreign-born children of citizens because British practice "recognized that children born outside of the British Empire to subjects of the Crown were subjects themselves and explicitly used 'natural born' to encompass" them, because Congress has recognized since the Founding that children born to citizens abroad are generally themselves citizens at birth without the need for naturalization, and because the First Congress explicitly recognized that they are natural born citizens in the Naturalization Act of 1790.[143] Supreme Court precedents, the Constitution's history and structure, and the Naturalization Act of 1790 preclude this interpretation.

### *a. Supreme Court precedents*

First, the rights and capacities of every naturalized person are the same as those of every other. They are inherent in naturalized American citizenship, which Congress may grant but cannot define or differentiate. The Constitution forbids Congress "to give, to regulate, or to prescribe" those capacities or "to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[144] Congress cannot grant more rights to one class of naturalized citizens than to another by specifying different effective dates for their naturalization.[145] The Court's decisions in *Osborn* and *Schneider* reject congressional authority to create hierarchies of citizenship.[146]

---

[140] *See* Paul Clement & Neal Katyal, *Commentary: On the Meaning of "Natural Born Citizen,"* 128 Harv. L. Rev. F. 161, 161 (2015). Earlier articulations of this theory include Cyril C. Means, Jr., *Is Presidency Barred to Americans Born Abroad?*, U.S. News & World Report 26 (Dec. 23, 1955), and Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881 (1988).

[141] *See* Clement & Katyal, *supra* note 140, at 161-62, and *Response, supra* note 4, at 18.

[142] Jill A. Pryor forthrightly acknowledges and defends this consequence of the procedural theory. *See* Pryor, *supra* note 140, at 898-99.

[143] Clement & Katyal, *supra* note 140, at 161-62.

[144] Osborn v. Bank of the United States, 22 U.S. 738, 827 (1824). *See also* Schneider v. Rusk, 377 U.S. 163, 165-66 (1964) (quoting and following *Osborn*).

[145] *Cf.* Barthelemy v. Ashcroft, 329 F.3d 1062 (9th Cir. 2003) (same standard of constitutional review applies to derivative citizenship statutes granting automatic citizenship after birth as at birth).

[146] *See, e.g.*, Rogers v. Bellei, 401 U.S. 815, 839 (1971) (Black, J., dissenting on other grounds). The *Bellei* majority took great pains to deny that the condition subsequent created second-class citizenship for persons naturalized outside of the United States. *Bellei*, 401 U.S. at 835-36. The majority opinion is consistent with the principle that there are only two ways to obtain American citizenship, by birth and by naturalization. However, by distinguishing two types of naturalized citizenship it could conflict with the longstanding principle that the Fourteenth Amendment is comprehensive. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 73 (1873) (Fourteenth Amendment comprehensive), and *Bellei*, 401 U.S. at 827 ("He simply

Second, the Court's *Bellei* decision precludes this theory. Bellei was a citizen at birth without the need to go through a later proceeding, yet the Court upheld the nonconsensual revocation of his citizenship even though no one may denaturalize a natural born citizen. Third, the proposal is inconsistent with the Court's definition of common law citizenship "by birth" in *Minor*, *Elk*, *Wong Kim Ark*, and *Elg*. Clement and Katyal acknowledge that the term should be interpreted in accordance with the common law but inexplicably cite the Acts of Ann. and Geo. II to characterize the common law.[147] Their error is surprising because they concede that "for better or worse, a naturalized citizen cannot serve" as president,[148] and they must have been aware of the constitutional rule that children who acquire citizenship at birth to American parents abroad are naturalized citizens. Katyal asserted the constitutional rule before the Supreme Court as Acting Solicitor General.[149] The constitutional distinction is between citizenship conferred by birth or by naturalization, not at birth or afterward.

### *b. Constitutional history and structure*

British law does not support the procedural theory. As discussed above, Britain recognized that foreign-born children of subjects were aliens and naturalized only narrow categories of them for the economic benefit of the British state. In addition, the British nationality acts did not apply strictly to those who became subjects at birth without later proceedings. The Acts of Geo. II and Geo. III were retroactive, deeming persons to be natural born who were alive at enactment and in some cases already dead -- and the Act of Geo. II even retroactively denaturalized some persons covered by the Act of Ann.[150] The Act of Geo. III did not grant or alter any specified

---

is not a Fourteenth-Amendment-first-sentence citizen.") and 843 (Black, J., dissenting) (majority's decision inconsistent with Fourteenth Amendment as comprehensive definition). *Cf.* United States v. Wong Kim Ark, 169 U.S. 649, 714-15 (1898) (Fuller, C.J., dissenting) (the grant of statutory citizenship at birth abroad is unconstitutional if it is naturalization because the Fourteenth Amendment only applies to those born in or naturalized in the United States). If *Bellei* is good law on this point, however, it stands for the proposition that persons naturalized at birth outside of the United States have fewer rights – not more – than those who are naturalized within the United States afterward.

[147] Clement & Katyal, *supra* note 140, at 161-62. Clement and Katyal even describe the two acts as statutes. *Id*. at 162. *See also* Elhauge, *supra* note 6, at 26.

[148] Clement & Katyal, *supra* note 140, at 164.

[149] *See, e.g.*, Elhauge, *supra* note 6, at 23-24.

[150] *See* 4 Geo. 2 c. 21, cl. 1 (children of fathers who "were or shall be natural-born subjects"), cl. 2 (children of tainted fathers) and cl. 3 (deceased offspring); 13 Geo. 3 c. 21, cl. 1 (children of fathers who "were or shall be" entitled to the privileges of a natural born subject under the derivative nationality clause of the Act of Ann.); De Geer v. Stone (1883) 22 Ch. D. 243, 252 (applying the 1708 Act of Ann. to a father born in 1696 and the 1772 Act of Geo. III to his son born in 1744); Fransman, *supra* note 67, at 133; and Plowden, *supra* note 101, at 143-44 (criticizing the Act of Geo. II for its retroactive effect). The Act of Ann. applied to "the children of all natural-born subjects," which could be interpreted to require both parents to be natural born (which would make the Act of Geo. II retroactively broader). *See* 7 Ann. c. 5, cl. 3. Alternatively, it could be interpreted to apply if either parent was (which would make the Act of Geo. II retroactively narrower, denaturalizing children of natural born mothers and alien fathers). *See* Doe *dem*. Duroure v. Jones (1791) 4 T.R. 300, 309 (Kenyon, C.J.) (it was supposed that the Act of Ann. applied to children of British mothers prior to the Act of Geo. II).

privileges or laws applicable to foreign offspring until they completed post-natal proceedings. The fact that the Acts deemed children to be natural born is irrelevant. All British naturalization statutes deemed their beneficiaries to be natural born. The Act of Geo. III, for example, utilized the same language as the act naturalizing persons who resided in the colonies for seven years, with each deeming its beneficiaries to be natural born and each referring to them as *"*naturalized by virtue of*"* the act.[151]

Moreover, the British and American statutes provide no support for an expansive definition that includes everyone who is a citizen at birth. The Naturalization Act of 1790 only applied to children of American citizens, and the Acts only applied to the immediate issue of married male natural born subjects and to one further generation born abroad. The broader purported definition would include statutes naturalizing children who lack any source of U.S. allegiance such as ones granting citizenship at birth to every heir to the British throne. There is no historical or doctrinal support for such a broad interpretation of presidential eligibility.

Finally, even if the Constitution gave Congress an implied power to differentiate naturalized citizenship the purported definition would violate constitutional principles of separation and limitation of powers.[152] The Constitution forbids members of Congress even to be electors in the Electoral College.[153] It can hardly allow the legislature to define eligibility to the highest office in the executive branch, including unilaterally by overriding a presidential veto.[154] The purported definition would also unconstitutionally allow Congress to impose presidential qualifications beyond those in the Constitution by including them in the statutory conditions for citizenship at birth.[155] For example, the Constitution requires only fourteen years of personal residency for eligibility, but derivative citizenship statutes have included requirements of continuous physical presence between particular ages (as in *Bellei*) and parental residency (as in *Chin Bow*). One danger of this and similar theories is that they assert greater congressional power over citizenship than constitutional doctrine and history authorize.[156]

---

[151] 13 Geo. 3 c. 21, cls. 1 and 3, and 13 Geo. 2 c. 7, cls. 2 and 6 (1740). *See also* Elhauge, *supra* note 6, at 29-30 (demonstrating similar language).

[152] Charles Gordon, who was general counsel of the Immigration and Naturalization Service and author of a twenty volume work on immigration law, considered this theory only a *"*hypothesis*"* in 1968 and acknowledged that it raises *"*the question of whether Congress can enlarge or modify the categories of*"* citizens eligible to the presidency, yet concluded in qualified terms that it was likely correct. *See* Gordon, *supra* note 65, at 9 and 31, and Nick Ravo, *Charles Gordon, 93, I.N.S. Counsel*, New York Times (May 2, 1999), http://www.nytimes.com/1999/05/02/us/charles-gordon-93-ins-counsel.html. *See also* McManamon, *supra* note 6, at 335, and Elhauge, *supra* note 6, at 35.

[153] *See* U.S. Const. art. II, § 1, cl. 2.

[154] *See, e.g.*, The Immigration and Nationality Act of 1952 (The McCarran-Walter Act), Pub. L. 82–414, 66 Stat. 163, which included provisions for citizenship at birth and which Congress enacted by override after Pres. Truman vetoed it because of its discriminatory terms. *See* Department of State, Office of the Historian, *The Immigration and Nationality Act of 1952 (The McCarran-Walter Act)*, https://history.state.gov/milestones/1945-1952/immigration-act.

[155] Qualifications for constitutional offices are limited to those that the Constitution specifies. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 522 (1969), and U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[156] Countering such theories, Justice Curtis recognized that the only express power the Constitution grants Congress over citizenship is to remove *"*the disabilities of foreign

### *c. The Naturalization Act of 1790*

The Naturalization Act of 1790 contradicts the proposed definition. As explained above, the First Congress recognized that foreign-born children of American citizens are aliens who can only become citizens by naturalization that does not confer presidential eligibility. The act only provided that the children shall be "considered as" natural born citizens. That term does not support an inference that Congress meant a citizen at birth or to confer presidential eligibility. The first draft of the final bill, H.R. 40, provided that "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens, on their coming to reside in the United States."[157] The drafters used the term "considered as natural born" for persons who could not become citizens until after their births. It is unlikely that they intended the term to confer presidential eligibility. That would allow foreign-born persons to live to adulthood entirely abroad without any allegiance to the United States and then after moving to the United States and residing for fourteen years become eligible to the presidency.

Rep. White, who recognized the inconvenience of dual nationality, proposed that the children would "be considered as natural born until they arrive at the age of 22 years."[158] He could not have meant the term to confer presidential eligibility because his proposed citizenship would expire thirteen years before the children reached the minimum age for eligibility.[159] Another amendment proposed that every alien naturalized under the act's general provision "shall be considered as a natural born Citizen . . . ."[160] The drafters of that proposal used the term for persons who could not become citizens until after their births and could not have intended to confer presidential eligibility or the natural born requirement would have been meaningless.[161] A final proposal would have considered foreign-born minor children as natural born citizens upon the naturalization of their parents.[162] The drafters of that proposal used the term for persons who could not become citizens until after their births and could not have intended to confer presidential eligibility on those alien-born children of alien-born parents.

---

birth." *See* Dred Scott v. Sandford, 60 U.S. 363, 578 (1856) (Curtis, J., dissenting). For a criticism of theories asserting greater congressional power *see* McManamon, *supra* note 6, at 344-45.

[157] 6 History, *supra* note 50, at 1519. Seven of the nine Representatives on the select committee that produced H.R. 40 were lawyers, including Rep. Sherman, *supra* note 46. *See* 6 History, *supra* note 50, at 1515 (appointing among others Reps. Hartley, Jackson, Laurance, Moore, Sedgwick, Seney and Sherman), and United States, Biographical Directory of the United States Congress 1774-2005, at 1210, 1319, 1423, 1608, 1885, 1888, and 1902 (2005).

[158] 12 History, *supra* note 31, at 529.

[159] *See* U.S. Const. art. II, § 1, cl. 5 (thirty five year minimum).

[160] *See* 1 Documentary History of the First Federal Congress of the United States of America 255 n.22 (Linda Grant de Pauw et al. eds., 1972).

[161] Two other proposals would have granted all of the rights and privileges of a natural born citizen to those naturalized under the act's general provision. *See* 6 History, *supra* note 50, at 1521 n.4 and n.6. The drafters of those proposals could not have intended to confer the privilege of presidential eligibility either, or again the natural born requirement would have been meaningless.

[162] *See id.* at 1521 n.5.

Members of the First Congress did not use the phrase "considered as natural born" to mean eligible to the presidency or a citizen at birth. They simply followed the Act of Edw. III to describe the children as born beyond sea and the Acts of Ann., Geo. II, and Geo. III to deem ("consider") them as natural born for purposes of granting them the general rights of naturalized citizens. Indeed, courts read even the final terms of the act to confer post-natal citizenship upon some foreign-born children of American parents until the Supreme Court interpreted the terms more narrowly in 1927.[163]

The final terms of the act provided that other naturalized persons would be considered as citizens, not as natural born citizens like the children. That difference may reflect an important issue of the debate – whether naturalization should grant the rights of a natural born person under state law, particularly the right to own and inherit land, progressively (as the states generally did prior to the Constitution's adoption) or all at once.[164] Congress may have intended to ensure that the children received all of the rights of a natural born person under state law at once. For these and other reasons,[165] the

[163] *See* Weedin v. Chin Bow, 274 U.S. 657, 664 (1927) (finding it "very clear" that the paternal residency proviso in the legislation at issue had "the same meaning as that which Congress intended to give it in the Act of 1790" with an exception not relevant) and 666-67 (both pre-natal and post-natal paternal residency are possible interpretations of the proviso's requirement, but the former is "more in accord with the views of the First Congress."). Neither the Court's opinion nor any brief filed with the Court in the case even suggested that the term "considered as natural born citizens" in the Naturalization Act of 1790 meant only citizens at birth, which would have made it impossible for post-natal paternal residency to satisfy the proviso. All five courts that previously considered the issue had found that post-natal paternal residency satisfied the requirement as renewed in the subsequent legislation. *See* State v. Adams, 45 Iowa 99 (1876), Johnson v. Sullivan, 8 F.2d 988, 989 (1st Cir. 1925) (affirming lower court ruling and finding that if Congress had intended the paternal residency proviso to require pre-natal residency it would have so provided in the statutory language), and Weedin v. Chin Bow, 7 F.2d 369 (9th Cir. 1925) (affirming lower court ruling), *rev'd*, 274 U.S. 657 (1927) (reversing based in part on reading the act *in pari materia* with 1907 legislation and in part on incomplete legislative history from the First Congress that lacked the history of H.R. 40 cited above). *See also* John Vlahoplus, *On the Meaning of "Considered as Natural Born,"* Wake Forest L. Rev. Online (Apr. 5, 2017) (eighteenth century prescriptive use of "shall be considered as natural born" merely naturalized persons or granted limited rights of the natural born), http://wakeforestlawreview.com/2017/04/on-the-meaning-of-considered-as-natural-born/; and Rob Natelson, *Claims that Senator Cruz is not "Natural Born" Need to be Taken Seriously*, Originalism Blog (Jan. 11, 2016) (Congress may have used "considered as natural born" to confer private rights and benefits, not to explain or define the constitutional term), http://originalismblog.typepad.com/the-originalism-blog/2016/01/claims-that-sen-cruz-is-not-natural-born-need-to-be-taken-seriouslyrob-natelson.html.

[164] *See, e.g.*, 12 History, *supra* note 31, at 149, 158, and 9 Documentary History of the First Federal Congress of the United States of America 220-23, 494 (Kenneth R. Bowling & Helen Veit eds., 1988). For state practices of granting rights progressively prior to the Constitution, *see supra* note 80 and Kettner, *supra* note 22, at 215-19. *See also* McManamon, *supra* note 6, at 332-33 (importance of real property rights to the Naturalization Act of 1790).

[165] In another approach, Clement, Katyal and others argue that it would be absurd to suggest that children born to Americans abroad are not natural born because John Jay suggested adding the natural born requirement, he had children while serving abroad on diplomatic missions, and he would not have intended his own children to be excluded from presidential

procedural theory cannot provide the doctrinal or historical definition of a natural born citizen.

### *3. Hybrid theory*

Michael D. Ramsey asserts a hybrid theory of eligibility under which Congress may confer presidential eligibility by naturalization but only to persons granted citizenship at birth to American citizen parents, arguing that this rule is consistent with British practice and with the purpose of the eligibility clause.[166] He claims that in England with only one exception "[t]he only persons granted full natural born status (including eligibility to office) by statute were those who had material connections to England at birth, namely that their parents or grandparents were English subjects."[167] By the eighteenth century those children "were born under the allegiance and protection of the monarch (what the common law required of a 'natural born citizen') even though not born in the monarch's lands."[168] All other naturalized persons were subject to the disabling clause mandated by the Act of Settlement that prohibited them from holding office. The only exception was the titular provision of the Act of Ann. that naturalized Protestant immigrants without imposing the disabilities, and Parliament quickly repealed that provision, "indicat[ing] that Parliament realized it had overstepped its authority in" that act.[169] Following English practice would also prevent Congress from conferring "natural born status on a particular individual without . . . making all similarly situated persons equally eligible" because "Parliament did not exercise its naturalization power in this way."[170] British and American law and practice preclude this theory.

---

eligibility. *See, e.g.*, Clement & Katyal, *supra* note 140, at 163. This claim fails because Jay's children were natural born under the common law rule. *See, e.g.,* McManamon, *supra* note 6, at 342, Elhauge, *supra* note 6, at 37-38, and House of Lords Journal (Jan. 23, 1667), in 12 Journal of the House of Lords: 1666-1675, at 86-87 (London, 1767-1830) (common law rule and ambassadors), http://www.british-history.ac.uk/lords-jrnl/vol12/pp86-87. Neither of the prevalent justifications involved transmission by right of blood. One understood the house of the ambassador to be the territory of the home sovereign (not the host sovereign). *See, e.g.*, *Letter from John Adams to William Steuben Smith*, National Archives (May 30, 1815), http://founders.archives.gov/documents/Adams/99-03-02-2874, and De Geer v. Stone (1883) 22 Ch. D. 243, 254. The other considered a principle of *postliminium* to deem the child to have been born under the king's allegiance. *See* Blackstone, *supra* note 42, at 361 (referring to ambassadors' children as "natural subjects" at common law). Children born to parents adhering to the United States within but not under its jurisdiction because of hostile foreign occupation become citizens "by a sort of postliminy." *See* Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. 99, 156 (1830) (Story, J., dissenting on other grounds). They might be natural born by analogy to Blackstone's principle of *postliminium*.

[166] *See* Michael D. Ramsey, *The Original Meaning of "Natural Born"* at 33, 36, 38 and n.141 (2016), (unpublished manuscript) (revised version forthcoming 20 U. Pa. J. Const. L. (2018)). For an earlier articulation of the hybrid theory *see* Michael Hennessy, Letter to the Editor, *Gen. Meade's Citizenship*, New York Times (Aug. 1, 1863), http://www.nytimes.com/1863/08/01/news/gen-meade-s-citizenship.html.

[167] Ramsey, *supra* note 166, at 36.

[168] *Id*. at 21.

[169] *Id*. at 22 n.83.

[170] *Id*. at 36.

Parliament could not have overstepped its authority in the Act of Ann. because no Parliament can bind its successors.[171] It repealed the titular provision because destitute Protestant refugees flooded England and built a tent city of some fifteen thousand immigrants around London,[172] not because it thought it had overstepped its authority. It left intact an earlier statute that naturalized sailors without imposing the disabilities.[173] Subsequent acts of Parliament also naturalized particular individuals of high rank without imposing the disabilities.[174] Lord Brougham and Vaux publicly criticized British practice as "absurd and inconsistent" for exempting particular foreigners of high rank who were the most likely to influence the government while enforcing the disabilities against naturalized persons "of the most insignificant station" who could not possibly exert any influence.[175]

In addition, Parliament allowed exemptions from other prohibitions in the Act of Settlement including that of foreigners holding offices or positions of trust and one that the drafter of a later nationality act called the most important – the prohibition on sitting in the House of Commons while holding any office or place of profit under the crown.[176] The threat of crown patronage to parliamentary independence is apparent.

Moreover, foreign-born children of British parents were not born under the allegiance of the monarch in the eighteenth century. The very basis of the Acts was that the children were born out of the monarch's allegiance and therefore could only

---

[171] *See, e.g.*, Blackstone, *supra* note 42, at 90 ("ACTS of parliament derogatory from the power of subsequent parliaments bind not."), and Select Committee, *supra* note 126, at 17 (A.W. Kinglake, Esq.) (the Act of Settlement's provision that purports to bind future Parliaments "is as a legal enactment simply null and void."). Moreover, the Act of Settlement technically did not even purport to apply to naturalizations during Anne's reign. *See* 12 & 13 Will. 3 c. 2, cl. 3.

[172] *See, e.g.*, *The History of the last Session of Parliament, &c.*, 32 The London Magazine, or, Gentlemans's Monthly Intelligencer 240 (1763), http://hdl.handle.net/2027/mdp.39015021269322, and A.H. Carpenter, *Naturalization in England and the American Colonies*, 9 Am. Hist. Rev. 288, 293 (1904).

[173] *See* 6 Ann. c. 37, cl. 20 (1707), https://hdl.handle.net/2027/mdp.39015065182050. This act had no termination date. Clause 20 might have lapsed by 1740, or it might have been repealed by implication in 13 Geo. 2 c. 3 (1740), https://hdl.handle.net/2027/mdp.39015035134090. However, some considered it operative in the nineteenth century. *See* Select Committee, *supra* note 126, at 15-17 (regarding the "6th of Anne"). The continuing validity of this act was important to the Founders, in particular the clause exempting from impressment persons serving on ships employed in America. *See, e.g.*, Keith Mercer, *The Murder of Lieutenant Lawry: A Case Study of British Naval Impressment in Newfoundland, 1794*, 21 Newfoundland and Labrador Studies 255 (2006), https://journals.lib.unb.ca/index.php/nflds/article/view/10153/10455.

[174] *See, e.g.*, 7 Geo. 2 c. 3 & 4 (1733/34) (the Prince of Orange), https://hdl.handle.net/2027/mdp.39015035134082; 4 Geo. 3 c. 4 & 5 (1763) (the Prince of Brunswick), https://hdl.handle.net/2027/njp.32101075729267; 1 William Blackstone, Commentaries on the Laws of England 374 (RI. Burn, LL.D, ed., 9th ed. 1783) (containing Blackstone's final corrections), https://hdl.handle.net/2027/mdp.35112203968070; and Select Committee, *supra* note 126, at 8.

[175] *See* Select Committee, *supra* note 126, at 8.

[176] *See, e.g., id*. at 4, 8-9, 12-13 and 17; A Country Gentleman, Miscellaneous Thoughts, Moral and Political etc. 9, 24 (1745) (placemen sitting in Parliament), https://books.google.com/books?id=ck9gAAAAcAAJ; and 12 & 13 Will. 3 c. 2, cl. 9 (Act of Settlement limitations).

be deemed natural born by a legal fiction.[177] The Acts only applied to those born out of allegiance,[178] and the House of Lords decision in *Leslies* specifically states that *"*[t]he common law right, and the statutory right, are set in opposition to one another.*"*[179] The children's rights (including any right to protection) followed only from statutory grant.[180] And, as described below in Part III.C.3, even when the Acts applied they did not always confer the rights of a British subject under international law and may not have imposed any obligations from birth.

Finally, the Act of Settlement's parental exemption was not limited to persons naturalized at birth. The Act of Settlement predated the British nationality acts, and it was not widely accepted that the Act of Edw. III naturalized foreign-born children of English parents; consequently, many foreign-born children of English parents were post-natally naturalized prior to the Act of Ann.[181]

The First Congress was well aware of British practice including Parliament's attempts to impose the disabilities, its failed general system of naturalization, and the fact *"*that, to this day, even of their meritorious naval and military characters they make an exception, as to sitting in parliament, &c. . . .*"*[182] Contrary to Ramsey's and others' assertions,[183] there was no such thing as *"*full natural born status*"* in British law. There were only natural born subjects in fact (subjects by birth) and persons deemed to be natural born by a parliamentary fiction (subjects by statute). Some subjects by statute could hold office and others could not, depending entirely on the will of Parliament. By overriding the Act of Settlement in subsequent statutes Parliament exercised its supreme authority and properly authorized persons to hold office. If the United States followed British practice then Congress could grant presidential eligibility to anyone at any age, and federal officers could sit in Congress contrary to the constitutional prohibition.[184] However, Congress is not supreme. It cannot alter the constitutional definition of *"*natural born.*"* For these and other reasons, the hybrid theory cannot provide the doctrinal or historical definition of a natural born citizen.[185]

---

[177] *See, e.g.,* Doe *dem*. Thomas v. Acklam (1824) 26 Rev. Rep. 544, 556 (Abbott, C.J.) (out of allegiance), and Dundas v. Dundas (1839) 12 Scot. Jur. 165, 171 (Moncreiff, J.) (fiction).

[178] *See* 7 Ann. c. 5, cl. 3 (*"*born out of the ligeance of her Majesty*"*), 4 Geo. 2 c. 21, cl. 1 (*"*born out of the ligeance of the Crown*"*), 13 Geo. 3 c. 21, cl. 1 (*"*born . . . out of the Ligeance of the Crown*"*), and *Calvin's Case* (1608) 7 Co. Rep. 1a, 4b (*"*Ligeance is a true and faithful obedience of the subject due to his Sovereign.*"*).

[179] Leslies v. Grant (1763) 2 Pat. 68, 77.

[180] *See, e.g.*, *In re* Willoughby (1885) 30 Ch. D. 324, 327-29 (child was *"*born out of the allegiance of the Crown*"* but was *"*entitled by statute*"* to the rights of a natural born subject, including the right to the appointment of a guardian), http://hdl.handle.net/2027/osu.32437121370957, *aff'd*, (1886) 53 LT 926, https://hdl.handle.net/2027/osu.32437121366849.

[181] *See, e.g.*, McManamon, *supra* note 6, at 323-25. The Act of Settlement also exempted denizens who were born of English parents. *See* An act for the further limitation of the crown, and better securing the rights and liberties of the subject, 12 & 13 Will. 3 c. 2, cl. 3 (1700). The monarch made persons denizens after their births.

[182] *See* 12 History, *supra* note 31, at 162-63.

[183] *See, e.g.*, Gordon, *supra* note 65, at 7-8.

[184] *See* U.S. Const. art. I, § 6, cl. 2.

[185] The same judicial precedents, constitutional history, and legislative history that preclude the procedural theory also preclude the narrower hybrid theory.

## III. Consistency with English and British Interpretations

The Supreme Court instructs us to interpret the term "natural born citizen" by reference to English common law, which the Court interprets to mean nationality "by birth" – that is, nationality conferred by birth within and under the jurisdiction of the sovereign.[186] The body of American authorities beginning in the colonial era and including *Inglis*, *Minor*, *Elk*, *Wong Kim Ark* and *Elg* is extensive and should be sufficient to determine the constitutional definition without further reference to English and British authorities and regardless of any disputes over the proper interpretation of those original authorities. However, the lack of a Supreme Court decision on presidential eligibility might allow one to appeal to the original authorities to dispute the Court's rule of construction (that the common law provides the definition) and its specific interpretation of the common law (nationality "by birth"). In any event, comparing the Court's rulings and American constitutional history with the English and British interpretations shows that they are broadly consistent, although it also reveals some significant inconsistencies in English and British doctrine.

### *A. The Common Law*

The Court's rule of construction is consistent with the eighteenth century rule that a known legal term used in an act of Parliament takes its common law meaning, a rule with which the Founders were likely familiar.[187] It is also consistent with the British rulings that the common law provides the definition of "natural born" in the British nationality acts and with Parliament's concurrence in the Act of Geo. III.
The Supreme Court's formulation of the common law rule is consistent with the standard British interpretation. The Court routinely relies on Blackstone to determine English law,[188] and Blackstone defines natural born subjects at common law as those born within the king's dominions and allegiance because of the natural allegiance that they owe him in return for the protection he affords them during their infancy when they cannot protect themselves.[189] The Court's formulation and its definition of nationality "by birth" are also consistent with *Acklam*, the U.K. Home Office's view of the common law, and the leading twenty-first century British nationality

[186] *See supra* notes 23-26.

[187] *See, e.g.*, 4 Matthew Bacon, A New Abridgment of the Law 647 (1759), https://archive.org/details/newabridgementof04baco. John Adams cited rules of construction from volume 4 in 1773. *See* John Adams, *Notes of Statutes and Authorities: Court of Vice Admiralty, Boston*, National Archives (Feb. 1773) (citing 4 Bac. Abr. 652), http://founders.archives.gov/documents/Adams/05-02-02-0006-0009-0002. Bacon's *Abridgment* was often used in the American colonies. *See, e.g.*, William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 Wm. & Mary L. Rev. 393, 416 (1968).

[188] *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999).

[189] Blackstone, *supra* note 42, at 354, 357. *See also* United States v. Wong Kim Ark, 169 U.S. 649, 670 (1898) ("'The acquisition,' says Mr. Dicey, (p. 741) 'of nationality by descent, is foreign to the principles of the common law . . .'"), McManamon, *supra* note 6, at 320, and Elhauge, *supra* note 6, at 16.

treatise.[190] The Court's decisions are also consistent with British understanding of American constitutional law. Britain recognized even before *Minor* that the United States had inherited the English common law rule based solely on place of birth, and it observed that both nations recognized the inconveniences of the rule in the case of children born to their subjects abroad and therefore both enacted remedial legislation to ameliorate its effects.[191]

### *B. Naturalization and Non-transmission of Nationality*

American recognition that the Acts were not declaratory of the common law is consistent with the standard British interpretation.[192] American recognition that they were naturalization acts is consistent with the text of the Act of Geo. III ("any Person naturalized by virtue of this Act");[193] the opinion of Lord Kenyon, Chief Justice of the King's Bench, in *Duroure* (the Acts extend "the privileges of naturalization");[194] Blackstone's *Commentaries* (characterizing the Act of Ann. as "naturalizing the children of English parents born abroad");[195] the House of Lords in *Leslies*;[196] the Home Office;[197] a select committee of the House of Commons;[198]

---

[190] *See supra* note 132 and accompanying text (*Acklam*); FRANSMAN, *supra* note 67, at 130 ("birth within the Crown's dominions and allegiance . . . conferred British subject status 'by birth' (in modern parlance).") (emphasis omitted) and 131 ("children born in foreign countries were aliens at common law *irrespective* of their parents' nationality.") (emphasis in original); and British Nationality: Summary, §§ 1.3.1 ("At Common law, subject status was acquired by birth within the Crown's 'dominions and allegiance'.") and 1.4.2 ("The general position was that children born in foreign countries were aliens regardless of the nationality of their parents."), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/632300/britnatsummary.pdf. The U.K. Home Office confirmed in correspondence with the author that the summary reflects its understanding of the development of British nationality law.

[191] *See* REPORT OF THE ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATION AND ALLEGIANCE xiii (1869), http://hdl.handle.net/2027/umn.31951002090907t.

[192] *See, e.g.*, BLACKSTONE, *supra* note 42, at 354 and 361; Doe *dem*. Duroure v. Jones (1791) 4 T.R. 300, 308 (Kenyon, C.J.); and *Ex parte* Carlebach [1915] 3 K.B. 716, 723. *See also* McManamon, *supra* note 6, at 339, and Elhauge, *supra* note 6, at 28. Both the House of Lords and the Supreme Court have rejected claims that Chief Justice Hussey concluded the contrary in the time of Richard III, finding that he relied on the Act of Edw. III rather than the common law. *See* Leslies v. Grant (1763) 2 Pat. 68, 76, and *Wong Kim Ark*, 169 U.S. at 669.

[193] 13 Geo. 3 c. 21, cl. 3.

[194] *Duroure*, 4 T.R. at 309 (Kenyon, C. J.).

[195] BLACKSTONE, *supra* note 42, at 363.

[196] *Leslies*, 2 Pat. at 77 (fear that a broad interpretation of the Act of Ann. might naturalize half of Europe).

[197] Home Office File HO 45 870 159961, Minutes of Dec. 11, 1907, *Naturalization of Prince Louis and the late Prince Henry of Battenberg* ("children born abroad of persons who are 'naturalized' by the general statute 13 Geo III c. 21 are undoubtedly aliens."), http://www.heraldica.org/topics/britain/TNA/HO_45_870_159961.htm.

[198] The committee categorizes the Act of Edw. III and the British nationality acts as "Naturalization Acts" conferring "Naturalization by birth" that Parliament enacted because of doubts "whether the children of English subjects born out of the liegeance

and other authorities.[199] "Naturalization" applied only to aliens, the word meaning "where a Person who is an *Alien*, is made the King's *natural* Subject by Act of Parliament, whereby one is a Subject to all Intents and Purposes, as much as if he were born so . . . ."[200]

The principle that foreign-born children of American citizens are aliens to the Constitution is consistent with British law under which children born to subjects abroad were aliens and could only be deemed subjects if they met the terms of a nationality statute.[201] The principle that citizenship does not descend from parent to child is consistent with the British rule that "nationality is a status which must be acquired by or conferred upon the individual himself. It is not a status which can be transmitted to him by his parent."[202] Just as the Supreme Court said of common naturalization statutes,[203] a British court explained that the child "does not really acquire his status by reason of his descent."[204] This conclusion is consistent with the stated policy rationale of the Acts. In *Fitch v. Weber* the court rejected a claim that general paternal disloyalty could prevent the Acts from applying to a child, explaining that "[t]he privilege conferred by the statutes . . . is the privilege of the children and not of the father, and is conferred upon the children for the benefit of the state."[205] The Acts conferred a personal privilege; they did not recognize or create a right of blood.

### *C. Inconsistencies in English and British Interpretations*

#### *1. Common law rule*

The standard interpretation of the common law rule is not undisputed. Some believed that the Act of Edw. III declared the common law.[206] Others asserted

---

of the King were entitled by the common law to" the benefit of being English subjects. *See* Select Committee, *supra* note 126, at ix-x. Naturalization by birth would not be necessary if the children were common law subjects by birth. *But see infra* note 238 and accompanying text (Calvin "naturalized" by procreation).

[199] *See, e.g.*, Journals, *supra* note 82 (unpaginated) (indexing under "Naturalization" the 1784 proposed "Bill for declaring the Children of British Mothers natural-born Subjects though born Abroad"). *See also* Elhauge, *supra* note 6, at 28.

[200] Jacob, *supra* note 35 (unpaginated) (emphasis in original).

[201] *See, e.g.*, Dundas v. Dundas (1839) 12 Scot. Jur. 165, 169 (Jeffrey and Mackenzie, JJ.). *See also* argument of counsel in Fitch v. Weber (1847) 6 Hare 51, 55 (foreign-born descendent of a British subject must "show some statute by which he is relieved from the effect of his alien character."), http://hdl.handle.net/2027/uc1.b5063979.

[202] *Ex parte* Carlebach [1915] 3 K.B. 716, 729 (Lush J.). In *Carlebach* a son claimed British nationality arguing that the statute naturalizing his father granted the father all of the rights and capacities that a natural born subject can enjoy or transmit and that the British nationality acts gave natural born subjects the right to transmit nationality to their foreign-born children. The court rejected this argument because nationality cannot be transmitted.

[203] *See*, *e.g.*, United States v. Wong Kim Ark, 169 U.S. 649, 665 (1898), and Miller v. Albright, 523 U.S. 420, 434 n.11 (1998).

[204] *Carlebach*, 3 K.B. at 723 (Reading, C.J.).

[205] *Fitch*, 6 Hare at 62.

[206] *See, e.g.*, cases cited in United States v. Wong Kim Ark, 169 U.S. 649, 669 (1898).

that foreign-born children were natural born at common law if their father was English,[207] so that the Act of Edw. III narrowed the law by requiring both parents to be English. Some even concluded that it was impossible to state the common law rule with precision and defaulted to statutory rules for convenience.[208]

### *2. Effect of post-natal naturalization*

English and British authorities differed on the effect of post-natal naturalization. Naturalization deemed a person to be a natural born subject as if born in the realm. Naturalization in England gave the subject a "civil birth" there; that is, he had "a civil birth given him by Act of Parliament . . . ."[209] Some asserted that this made one a natural born subject. Lord Hale opined that "birth here" and post-natal naturalization of a son "is all one" because naturalization makes him "a natural born son, (for so he is, as I have argued by his naturalization)."[210] Several pre-Revolutionary British statutes stated that a naturalized person became a natural born subject.[211] The well-known *Lex Parliamentaria*, which Thomas Jefferson considered to be the best parliamentary work, explained that Parliament's naturalization of an alien "make[s] him a Subject born."[212] A court even held that post-natal naturalization made one liable to a charge of high treason under a statute that only applied to persons born within the realm.[213]

However, many considered naturalization to be merely a legal fiction that could not make one a natural born subject because one "cannot have two natural Sovereigns . . . no more than two natural fathers, or two natural mothers."[214] The critical feature of a natural born subject was the natural allegiance she owed from her actual birth within the realm in exchange for the monarch's protection there beginning at birth.[215] The king provided protection within his country, and therefore

---

[207] *See* Leslies v. Grant (1763) 2 Pat. 68, 78 (Hardwicke, J.).

[208] *See id*. at 76-78 (Pratt, C.J.).

[209] *See* Collingwood v. Pace (1661) 124 Eng. Rep. 661, 665 and 688 (Bridgman, C.J.). *See also id.* at 686 (naturalization as "legal birth").

[210] *See* Collingwood v. Pace, 86 Eng. Rep. 262, 271.

[211] *See* 13 Geo. 2 c. 7, cl. 6 (1740) ("shall become a natural born subject of this kingdom by virtue of this act"), http://hdl.handle.net/2027/mdp.39015035134090; 20 Geo. 2 c. 44, cl. 5 (1747), http://hdl.handle.net/2027/mdp.39015035134116; and 13 Geo. 3 c. 25 (1773), http://hdl.handle.net/2027/mdp.39015039741080.

[212] *See Letter from Thomas Jefferson to Thomas Mann Randolph, Jr.*, National Archives (May 30, 1790), http://founders.archives.gov/documents/Jefferson/01-16-02-0264 (describing *Lex Parliamentaria*), and George Petyt, Lex Parliamentaria 75 (3d ed. 1748) (Parliament "may Naturalize a meer Alien, and make him a Subject born."), https://books.google.com/books?id=ishCAQAAMAAJ.

[213] *See* The Trial of George Busby at Derby Assizes, for High Treason, being a Romish Priest (1681), 8 St. Tr. 525, 534, 536 (Assiz.) (as an alternative ground for liability in addition to actual birth within the realm, which king's counsel alleged but Busby denied), https://hdl.handle.net/2027/uc1.31175023755872.

[214] Craw v. Ramsey (1670) 124 Eng. Rep. 1072, 1075 (Vaughan, C.J.). *See also* Blackstone, *supra* note 42, at 361 ("every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once.").

[215] *See, e.g., Craw*, 124 Eng. Rep. at 1074-75 (Vaughan, C.J.). Vaughan did not claim that natural law imposed natural allegiance. On the contrary, he asserted that "a man owes no liegeance excluding all civil law . . . ." *Id*. at 1074. Instead, he considered natural

the newborn's place of birth was her natural country and her allegiance to its king was natural allegiance.

### 3. Operation and effects of the Acts

Despite rulings that parents do not transmit British nationality to their children by descent, some refer to parental transmission of nationality by descent for two generations under the Acts.[216] This might raise the question whether the Acts did "in fact make the beneficiaries actual natural born subjects (as opposed to merely giving the rights of natural born subjects)."[217] The only apparent controlling authorities that pre-date the Constitution, *Leslies v. Grant* and the Act of Geo. III, demonstrate that the Acts did not in fact make one natural born or even British. Consistent with those authorities, Blackstone made clear before Independence that the Acts only "deemed" their beneficiaries to be natural born.[218]

Nineteenth century and later general usage of the term "natural born subjects" varies, however. The leading twenty-first century treatise states that "[t]he terminology did not distinguish between acquisition by birth and acquisition by descent; instead, anyone *born* a subject was termed a 'natural-born' subject."[219] Yet the U.K. government's British nationality summary describes only the person born

---

allegiance to be natural in the same sense as "a country where a man is born, is his natural country, or the language he first speaks, is his natural tongue . . . ." *Id*.

216 *See, e.g.*, Fransman, *supra* note 67, at 131-32.

217 *See* Ramsey, *supra* note 166, at 21-22. Ramsey asserts that the Act of Ann. redefined "natural born" so that the Acts actually made the children natural born subjects. *See id.* at 18 and 20.

218 Blackstone originally wrote in 1765 that under "modern statutes" the children "are now natural-born subjects themselves, to all intents and purposes, without any exception" unless their father had been tainted. *See* Blackstone, *supra* note 42, at 361. In 1775 he revised the statement to reflect the authority of the Act of Geo. III, explaining that under "modern statutes" the children "are now deemed to be natural-born subjects themselves, to all intents and purposes" unless their father (or paternal grandfather) had been tainted. *See* Blackstone, *supra* note 134, at 373 (adding "deemed to be" and deleting "without exception"). Subsequent editions retained the revised explanation. *See, e.g.*, Blackstone, *supra note* 174, at 373. Similarly, Francis Plowden initially wrote that the Act of Edw. III made children "in fact and law . . . true native subjects" and that the Acts of Ann. and Geo. II made persons "*natural born subjects* by the statute law" just as others were "*natural born subjects* by the common law". *See* Plowden, *supra* note 101, at 74, 161-62 (emphasis in original). However, after considering the Act of Geo. III further he concluded that the statutes did not make the children natural born subjects; rather, there remained "a strange relict of alienage in them." Francis Plowden, A Supplement to the Investigation of the Native Rights of British Subjects 134 (1785), https://hdl.handle.net/2027/osu.32437121568725. *Leslies*, the Act of Geo. III, Plowden and Blackstone contradict the three alternative claims that the Acts declared existing law, recognized persons to be natural born, or made them in fact natural born. Clement, Katyal and Ramsey rely on the obsolete first edition of Blackstone to argue that the Acts actually made the children natural born. *See* Ramsey, *supra* note 166, at 4 n.20 and 20 (citation dated 1765) and Clement & Katyal, *supra* note 140, at 162 n.7 and accompanying text (undated citation with page references appropriate only to the 1765 edition).

219 Fransman, *supra* note 67, at 131 (emphasis in original).

in the U.K. as a subject born.[220] Some nineteenth century authorities assert that the Acts deemed one to be natural born by a legal fiction.[221] Lord Moncreiff expressed that opinion in 1839:

> All the three Acts necessarily assume, that the persons who are thereby *declared* to be *natural-born subjects* of Great Britain, and to be taken and accounted as such, are really not so in the common meaning of the term. The very basis of the enactments is, that they are *born out of the liegance of the* British Sovereign, and so are *not* naturally his subjects, but, by the laws of nations, the *natural-born subjects* of a foreign state. It is apparent therefore, that the descendants of the first generation *always must* be *ex hypothesi*, in that condition — that, by their birth, they are the subjects of another power, and not the subjects of Britain . . . and the emphatic terms employed in declaring them *to be natural-born* subjects, import a very powerful fiction of the law, but still nothing but a fiction, for effecting the object in apparent consistency with the general principle of the law of alienage.[222]

Lord Cuninghame further explained that the Acts "appear to have been framed purposely to encourage and bring back persons of British extraction, born aliens, to their allegiance, and still to bestow on them their inheritance in this country, if any descended to them."[223] In this view a natural born subject was only one who became a subject by birth, not one who became entitled to the rights of a natural born subject by statute, even by a statute naturalizing him at birth.[224] The latter

---

220 Using "BS" for "British Subject," it describes the grandfather born in the U.K. as "BS - Born" and the father and grandchild born abroad as "BS - Descent". *See* British Nationality: Summary, *supra* note 190, at § 2.4.1. For an equivalent American usage, *see, e.g.*, Lum Man Shing v. United States, 29 F.2d 500, 501 (9th Cir. 1928) (immigration rule applicable to United States citizens "by birth or descent"). Dicey sets forth a rule similar to Blackstone's original explanation, which might support Fransman's interpretation; however, his "Comment and Illustrations" explain that the Acts "deemed" the children to be natural born, quoting the 14th edition of *Stephen's Commentaries*, which quotes Blackstone's revised explanation. *See* A.V. Dicey, A Digest of the Laws of England With Reference to the Conflict of Laws (2d ed. 1908) at xxxix - xxxx (general rule and exceptions), 168-69 ("Comment and Illustrations" on the general rule), 168 n.3, and 169 n.2, http://hdl.handle.net/2027/coo1.ark:/13960/t85h8373k; 2 Henry John Stephen, Mr. Serjeant Stephen's New Commentaries on the Laws of England (Partly Founded on "Blackstone.") 348-49 (14th ed. 1903), https://hdl.handle.net/2027/uc2.ark:/13960/t8gf0xb9t; and *supra* note 218 (Blackstone's original and revised explanations). *Cf.* Elhauge, *supra* note 6, at 17 n.4 (disputing a claim that Dicey supports derivative citizens' eligibility).

221 *See, e.g.*, Dundas v. Dundas (1839) 12 Scot. Jur. 165, 171 (Moncreiff, J.). *Cf. supra* notes 130, 133 and accompanying text (the Acts did not make their beneficiaries natural born subjects truly and actually, in fact, or in the common meaning of the term) and *infra* notes 236-37 and accompanying text (the Acts only made one a British subject in an artificial or technical sense and not in the ordinary meaning of the term or under the law of nations).

222 *Dundas*, 12 Scot. Jur. at 171 (Moncreiff, J.) (emphasis in original).

223 *Id*. at 167 (report referring the case to the whole court).

224 Blackstone made clear before Independence that the Acts "deemed" persons to be natural born, supporting this view. *See supra* note 218.

was by nature an alien and by birth the subject of another power, not a subject of Britain.

A New York court described British law similarly in a decision involving custody of a child born in the United States to a natural born English father. The court explained that the Acts of Ann. and Geo. II were enabling statutes of naturalization that merely deemed the child to be natural born by a parliamentary fiction in order to give her the rights of a natural born subject but could not affect her national character because that would conflict with the fundamental rule that natural allegiance is that which "natural born subjects . . . by natural law owe to the country of their nativity . . . ."[225] Even persons naturalized by the Acts could explain this distinction. The foreign-born Rev. Joseph Blanco White described his paternal grandfather in 1829 as "a natural born subject, a native of Waterford" but himself as only a "British subject" who has the "right to all the privileges of a natural born subject . . . ."[226] He carried copies of the Acts to the polls to prove his right to vote because people considered him to be an alien.[227]

However, other nineteenth century authorities use language that can be interpreted to support both views. Lord St. Leonards writes of the Act of Geo. II that "in order to entitle an alien to be treated as a natural-born subject, he must at the time of his birth, although a foreigner born, be the son of a father who was a natural-born subject,"[228] acknowledging that the child is an alien whom the act merely entitles to be treated as a natural born subject. In the same opinion, however, he writes "[n]obody will dispute that under that Act a legitimate child, the child of a natural-born subject, becomes a natural-born subject from the moment of his birth" – suggesting that naturalization under the Acts actually made one a natural born subject.[229] Lords Jeffrey and Mackenzie write that "*natural-born* is but an adjective, which imports nothing more than the exclusion of those subjects, to whom it cannot be applied. It means those who were *born* subjects, certainly", suggesting that anyone naturalized at birth was natural born.[230] However, they also write in the same opinion that the term "natural born subjects" in the Acts of Ann.

---

225 *See Ex parte* Dawson 3 Bradf. Ch. 130, 136-38 (N.Y. Surr. Ct. 1855), http://hdl.handle.net/2027/mdp.35112102507474. *Cf.* Weedin v. Chin Bow, 274 U.S. 657, 660 (1927) (the Acts of Ann. and Geo. II deemed children natural born, and the Act of Geo. III extended this to the next generation). An English court considered its jurisdiction over an infant born and living in France in *In re* Willoughby (1885) 30 Ch. D. 324, *aff'd*, (1886) 53 LT 926. The child met the paternal requirement of the Act of Geo. III; the court found that although she was "born out of the allegiance of the Crown" she was "entitled by statute to all the rights of a natural-born British subject" including the right to protection by the sovereign acting as *parens patriae*; and it appointed a guardian while acknowledging that it would work in comity with French courts and respect their decision on control over the child. *Willoughby*, 30 Ch. D. at 327-29, relying on Hope v. Hope (1854) 52 Eng. Rep. 340 (same result under the Acts of Ann. and Geo. II), https://hdl.handle.net/2027/inu.30000029142910.

226 *See* 1 Joseph Blanco White, The Life of the Rev. Joseph Blanco White 456 (1845), http://hdl.handle.net/2027/uc1.$b784570.

227 *Id.*

228 *See* Shedden v. Patrick (1854) 149 Rev. Rep. 55, 90.

229 *Id.* at 91.

230 Dundas v. Dundas (1839) 12 Scot. Jur. 165, 170 (emphasis in original). Alternatively, by "*born* subjects" they might have meant "*born subjects*" as in the Attorney-General's *Leslies* argument – that is, a common law "subject born." *See supra* notes 1 and 117 and accompanying text.

and Geo. II means only persons who become subjects from nativity in the realm, not from statutes or patents of naturalization,[231] demonstrating their view that a father who had been naturalized under those acts was not in fact natural born.

The nearest interpretation of British law on point by a Founder is by Thomas Jefferson who wrote that the Acts of Edw. III, Ann. and Geo. II naturalized foreign-born children and that "here are statutes first making the son born abroad a natural subject, owing allegiance."[232] It is unclear whether Jefferson meant to distinguish children naturalized under the Acts from persons naturalized under other acts of Parliament. Post-natally naturalized subjects owed the allegiance of a natural subject, and Jefferson's esteemed *Lex Parliamentaria* states that naturalization by Parliament makes an alien "a Subject born."[233]

Some of the inconsistencies might be explained by the impossibility of reconciling the common law's rationale of natural allegiance with the policy rationale of the Acts (to increase national wealth by attracting limited classes of foreign-born offspring to Britain). The clearest example was the view of some authorities that the Acts did not grant any privileges or impose any obligations until a beneficiary affirmatively exercised the privileges. Until then the beneficiary was at most only technically a British subject, was not entitled to the rights of a British subject under international law, and would not be guilty of treason for bearing arms against Britain in the service of his native country.[234] The Crown asserted in *Drummond's Case*, for example, that the Acts only "confer the benefits of naturalization in Great Britain on those who come there and avail themselves of them" and "cannot be held to naturalize a man who . . . passes his whole life in a foreign country," so that one who never claimed their privileges could not be guilty of treason for bearing arms against Britain.[235] The Crown argued in the

---

[231] *Dundas*, 12 Scot. Jur. at 170.

[232] Jefferson, *supra* note 1.

[233] *See supra* note 212.

[234] *See infra* notes 235-37 and accompanying text.

[235] *See* Drummond's Case (1834) 12 Eng. Rep. 492, 497 (argument of King's Advocate), http://hdl.handle.net/2027/coo.31924064793387. *See also Dundas*, 12 Scot. Jur. at 171 (Moncreiff, J.) (the Acts do not impose involuntary obligations because "neither the Queen nor Parliament can command the allegiance of a man who was *born the subject of another state*"; one could not be guilty of treason for bearing arms against Britain in defense of his native land merely because "he *might*, if he had chosen, have enjoyed the privileges of a natural-born British subject" under the Acts) (emphasis in original), and 190 Great Britain, Hansard's Parliamentary Debates 2006 (1868) (Sir Roundell Palmer) (the Acts confer benefits but do not impose burdens absent consent; to construe them to make persons "in every respect" natural born is "absurd"), https://hdl.handle.net/2027/osu.32435069737625. Two other Members of Parliament agreed with Palmer; one believed that "some doubt exists" on the question; and one asserted that the Acts of Ann. and Geo. II imposed allegiance and that the equivalent U.S. statute made foreign-born children of citizen fathers eligible to the presidency. *See id*. at 1984-2005. Palmer had served as Attorney-General for England and Wales. *See* 2 Roundell Palmer, Memorials 445 (1896), https://hdl.handle.net/2027/uc2.ark:/13960/t6833sb9f. *Cf.* 13 Geo. 3 c. 21, cl. 1 (describing those within the Act of Ann. as "intitled to all the rights and privileges of natural-born subjects"), and W. Wilkinson, A Compleat History of the Trials of the Rebel Lords in Westminster-Hall 247 ([1749]) (Lord Chief Justice's charge to jury: "those who acted under the *French* King's Commission, and not born in *British* Dominions, were to be esteemed as Prisoners of War") (emphasis in original),

alternative that if the Acts did apply to Drummond, who was born and domiciled in France, then he was a British subject only in an artificial sense and not within the ordinary meaning of the words or under the law of nations.[236] The Privy Council found Drummond to be in form and substance a French citizen and denied him treaty benefits due to British subjects, describing him as only "technically a British subject" and finding it "difficult to believe" that Britain would have executed him for treason if it had captured him fighting against it on the side of the French.[237]

Yet this cannot entirely explain the inconsistencies in English and British law and practice. Coke's report in *Calvin's Case* explains that birth within the dominions and allegiance of the king "naturalized" Calvin by procreation,[238] and George II pardoned a natural born subject convicted of treason after the jury recommended mercy because he had been removed from Britain in his early infancy and had thereafter resided entirely abroad.[239]

### *D. Conclusion*

The Supreme Court's controlling precedents and American constitutional history are consistent with the applicable eighteenth century British rule of construction, the standard British interpretation of the common law rule of nationality "by birth," the British characterization of a subject's foreign-born children as aliens by nature, and the non-transmission of nationality. In particular, they are consistent with *Leslies v. Grant* and the Act of Geo. III, the only two apparent controlling authorities interpreting the effect of the Acts on natural born status that pre-date the Constitution. Consequently, only a morally and politically justifiable living or responsive theory of constitutional interpretation can grant derivative citizens eligibility to the presidency.[240]

---

https://hdl.handle.net/2027/nnc1.cu54371317. *But cf.* The Trial of George Busby at Derby Assizes, for High Treason, being a Romish Priest (1681), 8 St. Tr. 525, 534 (Assiz.) (rejecting claim that a similar post-natal naturalization statute granted privileges without imposing penalties in a case involving an offspring who had moved to England).

236 *See Drummond's Case*, 12 Eng. Rep. at 496-97 (argument of King's Advocate) and 500 (Wynford, V.C.) (domicile).

237 *Id*. at 500 (Wynford, V.C.). *Contrast* the guardianship cases *Hope* and *Willoughby*, discussed *supra* note 225, finding that children born and living abroad were entitled to the rights of natural born subjects under the Acts without qualification and without regard to their foreign residence, foreign law, the law of nations, and the courts' inability to enforce their guardianship orders abroad.

238 *See Calvin's Case* (1608) 7 Co. Rep. 1a, 14b.

239 *See* Proceedings against Aeneas Macdonald (1747) 18 St. Tr. 858, 860, https://hdl.handle.net/2027/pst.000018429084, and Kettner, *supra* note 22, at 51. The king also pardoned the post-natally naturalized George Busby; the case report does not provide the reason. *See Busby,* 8 St. Tr. at 550.

240 *Cf*. Lord Ellesmere's opinion in *Calvin's Case*:

> [S]ome laws, as well statute law as common law, are obsolete and worn out of use: for, all human laws are but *leges temporis*: and the wisdom of the judges found them to be unmeet for the time they lived in, although very good and necessary for the time wherein they were made. And therefore it is said "leges humanae nascuntur, vigent, et moriuntur, et habent ortum, statum, et occasum."
>
> By this rule also, and upon this reason it is, that oftentimes ancient laws are changed

Other English and British authorities that interpret the effects of naturalization at birth and afterward reveal deeply conflicting visions of national identity and allegiance based on characteristics like residency, gender, religion, age, and spousal heritage. They even question whether the Acts required any allegiance to Britain from birth. Those authorities do not justify departing from the American doctrinal and historical definition of a natural born citizen. Rather, they stand as an example of the difficulty of developing a coherent theory of nationality and allegiance that could justify granting presidential eligibility to derivative citizens.

## IV. Natural Born Derivative Citizenship: Threshold Requirements and a Possible Approach

Some assert that the natural born citizenship requirement is inconsistent with democratic government and is racially prejudiced given the scale and sources of contemporary immigration.[241] Expanding the definition to include derivative citizens would only compound the problem. The same intense nativism and gender bias that animated British nationality statutes drove even more restrictive American derivative citizenship laws and practices that to this day reinforce traditional gender roles and include requirements deliberately enacted to reduce the number of persons gaining citizenship at birth to American parents abroad, particularly persons of Asian, Southern and Eastern European, and Mexican American heritage.[242] Seven centuries of Anglo-American legal history illustrate the difficulty of reconciling derivative nationality law and practice with our highest constitutional ideals of equal protection of the law.

Any proposal to treat derivative citizens as natural born should meet the following threshold conditions. First, the derivative citizenship statutes should not discriminate against any children of any American citizens in practice or intent. They should not impose substantive or procedural conditions or constraints that favor children of some parents over those of others. Second, the proposal should be based on a theory of moral values and political allegiance that does not

---

by interpretation of the judges . . . .

*Calvin's Case* (1608) 2 St. Tr. 560, 674 (spelling modernized).

241 *See* Duggin & Collins, *supra* note 65, at 137-38.

242 *See, e.g.*, Collins, *supra* note 8, at 2191-95 (generally) and *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings Before the Comm. on Immigration and Naturalization on H.R. 6127 superseded by H.R. 9980*, 76th Cong. 301, at 40-41 (Chinese Americans and Mexican Americans), 58 (stricter physical presence requirements in cases of mixed nationality parents), 137 (*"*utterly absurd*"* that Italian Americans and Hungarian Americans should be *"*breeding citizens of the United States*"* abroad whom the nation cannot exclude) and 41, 58, 185 (asserting that naturalization of children within the United States is *"*real naturalization*"* and that foreign-born children of certain citizens are not *"*really American*"*) (1945) (statements of Richard Flournoy, Department of State), http://hdl.handle.net/2027/mdp.39015019148942. *Cf.* Sasha von Oldershausen, *Western Block: One Woman's Quest for Citizenship*, Texas Observer (Nov. 13, 2015), https://www.texasobserver.org/derivative-citizenship-customs-officers/ (federal procedural impediments to Mexican Americans proving derivative citizenship).

undermine birthright citizenship inherited from the common law, incorporated in the original Constitution, and codified in the Fourteenth Amendment. Third, the federal government should respect such values and allegiance generally, not merely in presidential eligibility. The nation cannot rely on the importance of parents to justify presidential eligibility for some citizens while deporting those of natural born minors.[243]

One possible approach to a constitutional theory of natural born derivative citizenship may be to recognize and respect rights of the family as a unit, as its members define their family, rather than the rights of only individual members. Domestic and international law provide significant precedent for recognizing rights of family unity that could provide the moral basis for the foreign-born child's citizenship.[244] The allegiance of the child to the family and of the family to the nation could provide the necessary political basis for the child's citizenship and presidential eligibility, particularly if the nation respects and protects the family as a unit in its general laws as well as in its rules of presidential eligibility.[245] Such a theory might support natural born derivative citizenship without undermining birthright constitutional citizenship. Family unity can skip generations, does not require the parent to be an American citizen, and does not require a bloodline relationship. Congress has considered foreign-born grandchildren and unrelated adopted children of American citizens and resident aliens to be their *"natural-born"* children in order to allow the children preferential entry into the country.[246]

The challenges of meeting these thresholds will be great. There is no certainty that a morally and politically justifiable theory can be developed, and Congress is unlikely to yield its historical power to discriminate in derivative citizenship law. However, courts might in time reach the result by striking down discriminatory provisions of current law under a well-constructed and morally justifiable living or responsive theory of constitutional interpretation that meets the threshold conditions and thus our highest constitutional ideals of equal protection of the law.

---

243 *Cf.* Erynn Elizabeth Reitmayer, *When Parents Get Deported Citizen Children Fight to Survive*, ASU News 21 (Aug. 2010), http://asu.news21.com/2010/08/children-of-deported-parents/ (deportation of parents of Mexican American natural born citizen minors). *Contrast Non-EU parents may have EU residence right, ECJ rules*, BBC News (May 10, 2017), http://www.bbc.com/news/world-europe-39868868.

244 *See, e.g.*, Giovanna I. Wolf, *Preserving Family Unity: The Rights of Children to Maintain the Companionship of their Parents and Remain in their Country of Birth*, 4 Ind. J. Global Legal Stud. 207 (1996). *Cf.* Miller v. Albright, 523 U.S. 420, 472 (1998) (Breyer, J., dissenting) (*"The family whose rights are at issue here . . ."*).

245 Lord Moncreiff stated that a foreign-born child is born out of the allegiance of the British parent. *See* Dundas v. Dundas (1839) 12 Scot. Jur. 165, 171. A living or responsive theory might find that members of a family have allegiance to each other and consequently to the nation of the citizen member.

246 *See, e.g.*, H. Rep. No. 2439, Relief of Certain Aliens, to accompany H. J. Res. 649, 84th Cong. 2d Sess. (June 26, 1956) at 9-10 (citizen grandparents and alien grandchild) and 12-14 (resident alien parents and adopted alien orphan).

Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0003

DE G DE GRUYTER OPEN

# Felix Frankfurter and the Law

Thomas Halper*
*Baruch College & CUNY Graduate Center*

## ABSTRACT

*Felix Frankfurter, renowned as a public intellectual fighting for justice, became as a member of the Supreme Court a figure proclaiming his devotion to the rule of law and its corollary, judicial self restraint, even when its results conflicted with his deepest beliefs. Yet an analysis of several of his leading opinions suggests that his famous balancing tests had little to do with law. In sacrificing his policy and ethical goals in the service of law, he often failed to serve the law, and in that sense, his well publicized sacrifices were for nothing.*

## KEYWORDS

*Frankfurter; judicial review; judicial self restraint; balancing tests; Thayer.*

## CONTENTS

I. Introduction .......... 116
II. Frankfurter the Man .......... 116
III. Minersville School District v. Gobitis .......... 120
IV. Colegrove v. Green .......... 125
V. Dennis v. United States .......... 127
VI. Rochin v. California .......... 130
VII. Closing Thoughts .......... 133

* Thomas.Halper@baruch.cuny.edu.

(cc) BY-NC-ND © 2018 Thomas Halper, published by De Gruyter Open.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

## I. Introduction

Americans may not be able to agree on the meaning of greatness when they discuss public figures, but it always seems to entail a strong urge for power. Lincoln's willingness to sacrifice portions of the Constitution to save the whole system,[1] for example, or Lyndon Johnson's stretching the reach of the Senate majority leader beyond anything that had existed before[2] are essential to their reputations. It is not simply that we celebrate their goals, abolishing slavery or fighting racial discrimination; we also celebrate the bare knuckle means they employed because we understand that without them, the goals would have remained unfulfilled. Putting the matter baldly, we accept that the ends justify the means.

The central fact of Felix Frankfurter's judicial career was a very public refusal to accept that justification and that practice. As he often explained in his opinions, this was not always easy, for far from being a Holmesian philosopher uninterested in the world, Frankfurter was highly engaged politically and temperamentally given to constant, often intrusive, activity. Results mattered deeply to him. But as he repeatedly observed, the law mattered more. Indeed, it is his devotion to the law that he considered the most valuable part of his career and his most important legacy.

## II. Frankfurter the Man

Frankfurter was born in 1882 in Vienna, the capital of the declining Austro-Hungarian empire, into a Jewish family that for generations had produced rabbis. As a result of widespread anti-Semitism, many Jews in the empire had come to the more cosmopolitan Vienna, which itself then became more aggressively anti-Semitic, with the creation in 1885 of a student union at the University of Vienna based on hostility toward Jews, with the state in 1887 formally prohibiting foreign Jews from emigrating to the country, and with the election in 1894 of the virulently anti-Semitic mayor, Karl Lueger, whose "followers wore an effigy of a hanged Jew on their watch chains."[3] Hitler, born elsewhere in Austria in 1889, lived for six years in Vienna and later declared in *Mein Kampf* that because of this experience, he "became an anti-Semite."[4]

Frankfurter's father came to Chicago for its world's fair in 1893, decided to stay, and the following year sent for the rest of his family. They settled in a cold water flat in the famous Jewish ghetto on the Lower East Side of Manhattan, after a while moving to a more comfortable uptown German neighborhood, Yorkville. From the earliest days, "certainly in the early teens,"[5] young Felix was a brilliant student deeply involved in social and labor issues. At nineteen, a mere seven years after he came to this country speaking no English, he graduated from City College

---

1 Letter to Albert G. Hodges, April 4, 1864, Abraham Lincoln, 10 Complete Works 66 (John Nicolay & John Hays eds. 1913).

2 Robert A. Caro, Master of the Senate: The Years of Lyndon Johnson (2002).

3 J. Sidney Jones, Hitler in Vienna, 1907-1913 111 (1982).

4 Adolf Hitler, Mein Kampf 66-84 (1941).

5 Harlan B. Phillips, Felix Frankfurter Reminisces 5 (1960).

third in his class, then worked for a year with the city's Tenement House Department to help pay for law school, and at twenty was admitted to Harvard, where he edited the *Law Review* and compiled a stunning record, graduating first in his class. After graduation, he was hired by a prestigious law firm – he was their first Jewish hire and they asked him to change his name – but a few months later, left to work at the U.S. Attorney's office in New York under Henry Stimson, an establishment figure renowned for his integrity and commitment to fairness,[6] where he helped to prosecute various corporations. With the change of administrations in Washington, Stimson returned to private practice, taking Frankfurter with him, but Stimson shortly decided to run for governor of New York as a Republican, with Frankfurter as his chief aide. Stimson lost, but was later appointed Secretary of War by President Taft, and brought Frankfurter to be law officer in his department's Bureau of Insular Affairs, focusing on overseas possessions. In this capacity, Frankfurter came into extended contact with the military, saw the establishment's racial hierarchy views at first hand, and argued several cases before the Supreme Court. When Taft was succeeded by Wilson, Frankfurter remained in Washington, turning to issues of federal licensing and regulation.

By this time, Frankfurter had developed his fabled networking skills, befriending liberal intellectuals, like Walter Lippmann, Horace Kallen, and Herbert Croly, as well as such establishment figures as Holmes, Learned Hand, and Newton Baker. In a few years, former President Theodore Roosevelt, future President Herbert Hoover, Justice Louis Brandeis, and future president of Israel, Chaim Weizmann, among many others, would be added to the list. As Stimson put it, "You have the greatest facility of acquaintance – for keeping in touch with the center of things – for knowing sympathetically men who are doing and thinking."[7] Barely thirty-two, Frankfurter joined the faculty at Harvard Law School in 1914 as its first Jew, specializing in administrative law and public utilities, a position having been created for him by Jacob Schiff, a wealthy New York financier. He also advised Florence Kelley's National Consumers League, and helped create and wrote for the *New Republic*. In 1917, Secretary of War Baker appointed him to a position supervising war time courts martial, and later that year President Wilson named him counsel to the Mediation Commission set up to settle disputes that might interfere with war production. In this role, he became immersed in labor issues and the radicalism they spawned, convinced that labor merited far better treatment not only as a matter of equity but also, prudentially, to forestall the growth of revolutionary movements. His public defense of the radical labor leader, Tom Mooney, whose murder trial was a cause célèbre, won him admirers on the Left, though it infuriated Theodore Roosevelt. He also made the acquaintance of the Assistant Secretary of the Navy, Franklin Roosevelt.

In the 1920s, Frankfurter was involved with the founding of the American Civil Liberties Union, and drew public attention with his denunciation of the Palmer Raids, directed at radicals and immigrants, and his campaign to spare the lives of Sacco and Vanzetti, anarchists controversially convicted of bank robbery

---

6 David F. Schmitz, Henry L. Stimson: The First Wise Man (2001).

7 Joseph P. Lash, *A Brahmin of the Law*, in From the Diaries of Felix Frankfurter 12 (Joseph P Lash ed., 1975).

and murder.[8] The absence of due process in this case and the *Mooney* case made a profound impact upon him.[9] Named to an endowed chair at Harvard Law School, he spoke out against the university's President's plan to establish a quota for Jewish students, provoking vitriolic animosity, and during the 1930s, he provided legal advice to the NAACP.

On Roosevelt's election in 1932, Frankfurter assumed a backstage role in the New Deal, offering advice to the President, placing former students in the administration, and behind the scenes advocating for policies supported by his friend and mentor, Brandeis. He had turned down positions on the Supreme Judicial Court of Massachusetts and as United States Solicitor General, choosing to remain at Harvard, apparently unconcerned that many of his colleagues disapproved of his liberal activism.

By his fifties, in sum, Frankfurter could point to an extraordinary career as a lawyer, public intellectual, and political actor. Much of what he did – his defense of radicals, his attacks on government suppression, his Zionism – were highly publicized, and he seemed to enjoy the attention he received. At the same time, much of what he did – advising officials, lobbying for policies, operating "a nerve center of the apprenticeship network"[10] – was hidden from view, and he also seemed to enjoy exercising influence in this way. Highly intelligent, ethically and ideologically committed, extraordinarily well connected, Frankfurter was one of the most prominent lawyers in the nation, and certainly the lawyer most highly esteemed by liberals.

It was at this time, in 1938, that Benjamin Cardozo died, leaving the Court without a Jewish justice. Roosevelt, fulfilling an informal promise made years earlier, waited six months and chose Frankfurter to replace him. The liberal press was delighted. "Frankfurter's whole life has been a preparation for the Supreme Court," wrote *The Nation*. "No other appointee in our history has gone to the Court so fully prepared for its great tasks."[11] Archibald MacLeish predicted that with Frankfurter, "liberal democracy will be defended on the Supreme Court in the next generation as it has rarely been defended in the history of this country."[12] Harold Ickes, the Interior Secretary, told Roosevelt, "If you appoint Felix, his ability and learning are such that he will dominate the Supreme Court for fifteen or twenty years to come."[13]

Traditionally, nominees had not appeared in person before the Senate Judiciary Committee during the consideration process. Indeed, six years earlier when Judge John J. Parker asked to appear before the committee to rebut serious charges against him, the committee had refused.[14] But Frankfurter's opponents, perhaps hopeful of winning favorable press attention, asked him to speak. Though he was confirmed

---

8 Felix Frankfurter, The Case of Sacco and Vanzetti (1927).

9 *Supra* note 5, 130-39; Holmes and Frankfurter: The Correspondence, 1912-1934, 130-31 (Robert M. Mennel & Christine L. Compston eds. 1996).

10 G. Edward White, The American Judicial Tradition 326 (1976).

11 *Justice Frankfurter*, The Nation, Jan. 14, 1939, p. 52.

12 Archibald MacLeish, *Foreword*, in Law and Politics, xxiv (Archibald MacLeish & E. F. Prichard eds., 1939).

13 *Supra* note 7, 64.

14 William C. Burris, Duty and the Law: Judge John J. Parker and the Constitution 84-85 (1987).

without dissent, he was given a grilling by Pat McCarran, an anti-Semitic Senator from Nevada, who questioned his citizenship, and was attacked by witnesses as a Jew,[15] an immigrant,[16] and a Communist.[17]

In addition to their bigotry and ignorance, Frankfurter's critics were notable for their total inability to grasp his judicial philosophy, notwithstanding his many efforts to set down and justify that philosophy. Its origins go back to Holmes and further to Thayer,[18] and are founded on a conviction that democracy is America's governing ideal. Democracy here is conceived in Schumpterian terms as a contest for power exercised through the ballot.[19] It is not Lincoln's government by the people nor is it rote majority rule, but rather a system aiming at accountability. Frankfurter, more generous in his view of the people than Holmes or Thayer, believed that the public's instincts normally would drive them to support what they thought was best for their country. But he was mindful of Thayer's warning that aggressive courts, too eager to declare laws invalid, could inculcate passivity among the public, who would then conclude that "these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives"[20] that there would be no need of their protecting themselves.

Will the voters sometimes make choices one may regard as foolish, unworkable, wasteful, even immoral? Yes, of course, for they are, as human beings, radically imperfect. But courts, comprised of unelected judges, also radically imperfect, should defer to the lawmakers' decisions unless they can demonstrate that they constitute a clear mistake, that is, that they violate the Constitution in obvious ways that almost any reasonable person could comprehend. Not many statutes will fall under this rationale, it is true, and many laws that one may believe bad will survive. But that is the price of democracy. And the cost is reduced somewhat by the confident belief that the people will not make too many mistakes, that these mistakes will not be too serious, that nearly always the mistakes they do make can be rectified, and that the people will not fail too often to take advantage of these opportunities. Democracy, then, is not flawless, but merely, as Churchill once famously observed, "the worst form of government, except for all those forms that have been tried from time to time."

In terms of Frankfurter's judicial review, the power of courts to pass on the constitutionality of acts of lawmakers, the role of courts – and, consequently, of judges – therefore, is not very robust. For Holmes, "essentially the philosopher [unconcerned with] the evanescent events of the day,"[21] this would not be a major sacrifice. Viewing humanity from his Olympus as engaged in a ceaseless struggle for advantage, he prided himself on his lack of interest in the results and professed

---

15 Allan A. Zoll, executive vice-president of the American Federation against Communism, *Senate, Subcommittee on the Judiciary, Hearings on the Nomination of Felix Frankfurter to Be an Associate Justice of the Supreme Court,* 76th Congress, 2d sess. 76 (1939).

16 Elizabeth Dilling, *id.* at 41.

17 John Bowe*, id.* at 89.

18 James Bradley Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). Frankfurter called this "the most important single essay" on constitutional law and "the great guide for judges." *Supra* note 5, 301, 300.

19 Joseph Schumpeter, Capitalism, Socialism and Democracy ch. 22 (1942).

20 James Bradley Thayer, John Marshall 104 (1901).

21 Felix Frankfurter, Mr. Justice Holmes and the Supreme Court 55 (2d. ed. 1961).

not to read the daily newspaper. As he wrote to Laski on the day Warren G. Harding was inaugurated, "if my fellow citizens want to go to Hell, I will help them. It's my job."[22] Frankfurter, on the other hand, an immigrant who by pluck and luck had risen to the heights, was deeply committed to a wide range of policies and social values. When he deferred to a legislative policy choice he abhorred, he could not respond with a Holmesian shrug of indifference. On the other hand, for Frankfurter, deference to the political process did not mean bowing to power, but rather facilitating self government. His faith in people was not boundless – like all Progressives, he exalted experts – but it lacked the dismissive cynicism that Holmes cultivated. From this it followed that the Supreme Court, "having such stupendous powers,"[23] should be very parsimonious in using them. Of course, not all Justices, he believed, possessed his stern will power, and he clearly disdained those, like Douglas, Murphy, and Black, whom he regarded as result oriented. "Only the conscious recognition [of the temptation to] read their economic and social views into the neutral language of the Constitution" will suffice.[24]

Behind this lay not simply Thayer's abstract arguments, but decades of experience with courts as principal obstacles to the policies Frankfurter supported. *Lochner v. New York*,[25] *Hammer v. Dagenhart*,[26] and *Adkins v. Children's Hospital*[27] were among the best known of numerous instances of activist Courts striking down Progressive legislation. Judicial self restraint, he was convinced, would have saved these laws, benefited the nation, and spared the Court years of well earned criticism.

This essay examines Frankfurter's commitment to the law in light of four of his best known opinions, *Minersville School District v. Gobitis*, *Colegrove v, Green*, *Rochin v. California*, and *Dennis v. United States*.

## III. Minersville School District v. Gobitis

Among the best known illustrations of Frankfurter's self restraint views were a pair of flag salute cases decided in the early 1940s, *Minersville School District v. Gobitis* (1940)[28] and *West Virginia State Board of Education v. Barnette*.[29] In the interest of avoiding duplication, this essay will focus on *Gobitis,* decided a year after his appointment, which concerned young Lillian Gobitas (the Court misspelled her name), who as a Jehovah's Witness refused to salute the flag and recite the Pledge of Allegiance at her public school because "The Bible says at Exodus chapter 20 that we can't have any other gods before Jehovah God."[30] The school board expelled Gobitas, denying that the salute and pledge were religious acts protected

---

22 Mark De Wolfe Howe, 1 Holmes-Laski Letters 249 (1953).

23 Felix Frankfurter*, The Supreme Court of the United States*, 14 The Encyclopedia of the Social Sciences 424, 425 (1934).

24 *Id.* at 432.

25 198 U.S 45 (1905).

26 247 U.S. 251 (1918).

27 261 U.S. 535 (1923).

28 310 U.S. 586 (1940).

29 319 U.S. 624 (1943).

30 Lillian Gobitas, *The Courage to Put God First*, Awake! July 22, 1993, at 13.

by the First Amendment and charging that she had been indoctrinated by her father. She wanted to return to school but be freed from the salute and pledge. The case was appealed to the Supreme Court, which granted certiorari.

Chief Justice Hughes assigned the opinion to Frankfurter because of his "moving statement at conference on the role of the public school in instilling love of country in our pluralist society,"[31] perhaps recalling his own childhood experience as a young boy from Austria. "Not even you," he had written to President Roosevelt a few months earlier, "can quite feel what this country means to a man like me, who was brought here an eager sensitive lad of twelve."[32] Writing for the 8-1 majority, Frankfurter begins by celebrating the freedom of religion, but then adds that "no single principle can answer all of life's complexities,"[33] and that an absolute right to follow one's conscience would undermine religious tolerance itself. "Conscientious scruples [do] not relieve the citizen from the discharge of political responsibilities."[34] Indeed, "adjustment [may be] deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[35] The "ultimate foundation of a free society is the binding tie of cohesive sentiment," he observes, and as "We live by symbols,"[36] the school board may inculcate national cohesion with the flag salute. Schools are tasked with teaching citizenship; saluting the flag is a widespread and generally accepted means to that end.

Having failed to show that "there is no basis"[37] for the rule, Gobitas cannot then seek relief from the courts. Frankfurter entertains the possibility that the law may be a "folly,"[38] but answers that "it is not the personal notion of judges of what wise adjustment requires which must prevail;"[39] "courts possess no marked and certainly no controlling competence;"[40] "The wisdom of training children in patriotic impulses . . . is not for our independent judgment;"[41] "the court-room is not the arena for debating issues of educational policy."[42] The Supreme Court, lacking the authorization and the expertise, is not a national school board. If the Gobitas family opposes the policy, they should look to the legislature for relief, not the unelected Supreme Court. For "the legislature no less than . . . courts is committed [to] the guardianship of deeply cherished liberties."[43] The struggle to change the policy, regardless of the result, is valuable, he says, because "to fight out the wise use of legislative authority . . . serves to vindicate the self-confidence of a free people." [44]

---

[31] Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 Harv. L. Rev.4, 41 (1967).

[32] Roosevelt and Frankfurter: Their Correspondence, 1928-1945 511 (Max Freedman ed. 1967).

[33] *Supra* note 28, at 594.

[34] *Id*.

[35] *Id*. at 595.

[36] *Id*. at 596.

[37] *Id.* at 600.

[38] *Id.* at 598.

[39] *Id*. at 596.

[40] *Id*. at 597-98.

[41] *Id*. at 598.

[42] *Id.*

[43] *Id*. at 600.

[44] *Id*. Justice Harlan Fiske Stone, the sole dissenter, thought the school board's requirement invalid because it "seeks to coerce these children to express a sentiment, which, as

Frankfurter's *Gobitis* opinion is studded like raisins in a pound cake with historical and philosophical observations. He speaks of "Centuries of strife over the erection of particular dogmas"[45] and "the ultimate mystery of the universe and man's relation to it;"[46] he quotes Lincoln[47] and footnotes, in addition to the usual citing of precedents, Jefferson, Roger Williams, Bagehot, Santayana, and the treatment of the flag by the Continental Congress.[48] The display of erudition has a look-at-me quality that is only heightened by the recognition that little of this is really essential to the argument. Why, then, is it there? To bully the reader into submission? To distract her from weaknesses in the argument? To add gravitas to the conclusion? One can only speculate.

When we dig a little deeper, we come across tired tricks. One involves repeatedly restating the question, each time moving from a more neutral to a more biased perspective. Thus, first Frankfurter writes, "We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment;"[49] next, "the question remains whether school children . . . must be excused from conduct required of all the other children in the promotion of national cohesion;"[50] finally, "The precise issue . . . for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious."[51] By the end, the reworded question answers itself.

The second trick is saying one thing and doing another. Thus, announcing that "every possible leeway should be given to the claims of religious faith,"[52] precedes a refusal to grant that leeway; thus, claiming that "parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote,"[53] precedes a defense of a law whose purpose is precisely that; thus, asserting that "personal freedom . . . is best maintained . . ., when it is engrained in a people's habits, and

---

they interpret it, they do not entertain, and which dominates their deepest religious convictions." *Id.* at 601. As for deferring to the legislature, this "seems to me no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will." *Id*. at 606. Where Frankfurter looked to the political process to resolve the dispute, Stone maintained that the Constitution required that legislation that represses religious freedom can stand only if it meets the stiff test of strict scrutiny, that is, there must be a compelling state interest and the law must be narrowly tailored. The flag salute requirement failed this test. *Id.* at 607. (Two years earlier, Stone had written the famous footnote four in *United States v. Carolene Products*, in which he proposed the strict scrutiny test. 304 U.S. 144, 152, n.4 [1938].)

45 *Supra* note 28, 592.

46 *Id*. at 593.

47 *Id*. at 596.

48 *Id.* at 601.

49 *Id*. at 592-93.

50 *Id.* at 595.

51 *Id.* at 597.

52 *Id*. at 594.

53 *Id*. at 599.

not enforced against popular policy by the coercion of adjudicated law,"[54] precedes justifying a policy of naked coercion .

What is most striking is this: notwithstanding Frankfurter's insistence on setting aside personal preferences as legally irrelevant, he relies on the irrelevant himself, for Frankfurter's argument at its core is extralegal. The central issue, as he defines it, is a conflict between a constitutional guarantee and the general good, but "general good" is not a constitutional term at all. Why, then, is it a "task" of the Court to "reconcile two rights,"[55] when only one has a legal basis? He counts "national cohesion" as "inferior to none in the hierarchy of legal values,"[56] but on what basis may it be called a legal value? Platitudes misdirect us away from the action.

If for Frankfurter the flag salute was saved by the school district's plausible defense of the rule, it is obvious that his famous self restraint was poorly articulated. Instead of speaking of Thayer's "clear mistake,"[57] he insisted that Gobitas needed to show that there was "no basis" for the law. But this will nearly always be impossible because laws are not random acts of nature, like Brownian motion, but the results of human acts with purposes. If "no basis" was a reworking of "clear mistake," it was a very sloppy job.

The emptiness of the legal claims extends even to Frankfurter's citations. He cites three cases as examples of religious claims bowing to laws that "were manifestations of specific powers of government,"[58] when, in fact, the cases did no such thing. *Reynolds v. United States*[59] upheld a federal anti-bigamy statute on the ground that bigamy was no more a religious practice than was human sacrifice; *Davis v. Beason*[60] upheld a state statute requiring voters to swear an oath that they were not polygamists or members of organizations that promoted polygamy on the ground that polygamy was not a religious practice but instead one that "offend[s] the common sense of mankind";[61] *Hamilton v. Regents*[62] upheld a state law requiring male students enrolled in public universities to take military courses on the ground that "every citizen owes the . . . duty, according to his capacity, to support and defend government against all enemies."[63] None of these cases, in short, was decided on the basis of a specific constitutional power of government; instead, the Court was driven by certain moral beliefs that appeared so obviously correct that it was necessary only to utter them – no justification was required. In that odd sense, they are relevant to the *Gobitis* case, for when Lillian Gobitas first refused to salute, there existed no legal requirement that she do so, not from the school board or the state legislature or Congress. It was simply a matter of custom.[64] To be sure, once she refused, an infuriated school board formally mandated the salute, but a reading

---

[54] *Id*.
[55] *Id.* at 594
[56] *Id*. at 595.
[57] *Supra* note 18, at 18.
[58] *Id*.
[59] 98 U.S. 145 (1879).
[60] 133 U.S. 333 (1890).
[61] *Id*. at 342.
[62] 293 U.S. 245 (1934).
[63] *Id.* at 262-63.
[64] David Manwaring, Render Unto Caesar 83 (1962).

of the opinion would not disclose this. Instead, there are multiple references to the legislature.

Frankfurter also makes empirical claims that, once one strips away the sonorous language, are exposed as highly problematical. For example, "the enjoyment of all freedom presupposes the kind of ordered society which is summarized by the flag,"[65] when arguably it is better summarized by Gobitas' refusal to salute the flag, for virtually all societies applaud saluting their flags but only those that are free permit citizens to refuse to salute. Normally, that is, we consider freedom more the option of disagreeing than of going along. Citing a coercive law that enjoys nearly unanimous public support is a strange example of the order that presupposes freedom, particularly, since at the time, popular hostility to the Witnesses' refusal to salute the flag was expressed in beatings, kidnappings, and shootings. "Nothing parallel to this extensive mob violence has taken place . . . since the days of the Ku Klux Klan," reported the American Civil Liberties Union a few months after the decision.[66] Of course, the rule of law that punishes conventional crime may be a prerequisite for freedom, but requiring flag salutes hardly approaches that in importance. Indeed, much of the country did not require the salute, and it was not noticeably less free than the part that did.

How to account for Frankfurter's decision? Writing barely a year before joining the Court, he declared, "The Court is the brake on other men's actions, the judge of other men's decisions."[67] Why in *Gobitis* was there no inclination to apply the brake or exercise the judgment? The most obvious answer is that, despite his famous preoccupation with legality, Frankfurter was driven by an immigrant's patriotic fervor made overwhelming by the war in Europe. The same month his *Gobitis* opinion was handed down, France fell to the Germans, the British fled from Dunkirk, and Hitler seemed well on his way toward conquering Europe. Frankfurter had frequently counseled Roosevelt on the necessity of intervention. By this time, he considered it inevitable. Hence, it was essential to prepare the public for this eventuality by stoking patriotism by, for example, instituting patriotic exercises in public schools. Frankfurter, as Harold Ickes said in his diary, "is really not rational these days on the European situation."[68] Legalistic Frankfurter, in short, was responding to extralegal foreign policy concerns. Two years later, when the Court was ruling on a high profile case involving German saboteurs, he urged his colleagues to speak with one voice, imagining soldiers in combat asking, "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power. . .?[69] This was not the kind of memo a judge obsessed with legalisms would write.

---

65 *Supra* note 28, at 600.

66 American Civil Liberties Union, The Persecution of the Witnesses 1-3 (1941).

67 *Supra* note 12, at 71.

68 Harold Leclair Ickes, 3 The Secret Diary of Harold Ickes: The Lowering Clouds, 1939-1941 199 (1955) (entry for June 5, 1940).

69 G. Edward White*, Felix Frankfurter's "Soliloquy" in* Ex parte Quirin, 5 Green Bag 2d 423, 440 (2016).

## IV. Colegrove v. Green

*Colegrove v. Green* (1946)[70] raised issues of considerable democratic significance. The case involved three qualified voters in an Illinois congressional election, who complained that their districts had much larger populations than certain other districts, that their vote was therefore worth less than the vote of citizens in these other districts, and that this violated the Fourteenth Amendment's Equal Protection and Privileges and Immunities clauses, Article 1, section 2's provision that members of the House shall be chosen by the people through elections, and the Reapportionment Act of 1911 that requires approximate equality in district population. Colegrove saw the Illinois situation as obviously anti-democratic. If elections are the central democratic mechanism, surely there is something amiss when the value of individual votes varies so widely. At the same time, Illinois saw the effort to have non-elected judges resolve the dispute as obviously anti-democratic, as well. A commitment to democracy entails a willingness to seek answers to issues of this kind through the democratic and not the judicial process.

In a four-three decision, Frankfurter wrote for two other justices, his opinion standing as the opinion of the Court. The relevance of the Reapportionment Act he dismissed easily, as it was amended in 1929 with no mention of district equality. The larger issue concerned constitutionality, and the answer, as often happens, turns on the question. Colegrove, seeing his vote diluted, conceived the question as a private wrong; Illinois, maintaining that the wrong affected the entire state, conceived it as a public wrong. Frankfurter, siding with Illinois, held that the "basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity," since it amounted to "an appeal to the federal courts to reconstruct the electoral process of Illinois."[71] He, therefore, focused not on the constitutional provisions offered by the plaintiffs, but instead on Article 1, section 4 that gave state legislatures control over congressional elections, subject to potential congressional control, and section 5 that made the House the judge of the qualifications of its own members. The import of these provisions, he argued, was that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States . . . and left to that House determination whether States have fulfilled their responsibility."[72] The dispute's "peculiarly political nature" means that it "is beyond [the] competence [of the Court] to grant" relief.[73] In short, in holding that the dispute must be resolved by another branch of government, he invoked the doctrine of political questions.

Frankfurter also noted powerful practical reasons for deferring to the House. First, "It is hostile to a democratic system to involve the judiciary in the politics of the people."[74] Unelected justices should not exalt their views over those of elected lawmakers. Second, entering "this political thicket"[75] would be imprudent for the Court, as it would embroil it in political conflicts, thereby undermining the apolitical appearance that is central to its authority. Suppose the Court declares the "existing

---

70 328 U.S. 549.
71 *Id.* at 552.
72 *Id.* at 554.
73 *Id.* at 552.
74 *Id.* at 553-54.
75 *Id.* at 556.

electoral system invalid,"[76] for example. What then? The Illinois legislature might not act, leaving its Congressmembers elected at large, counter to congressional law and a "worse"[77] result than the malapportionment system that preceded it. With this example, Frankfurter plainly pointed to the enforceability problem. Courts, lacking as Hamilton noted, both the powers of the purse and of the sword are dependent upon the political branches to implement their decisions.[78] So long as courts do not aggressively intrude onto their turf, this will be no problem. But if they overstep their bounds, the other branches may resist implementation, revealing the vulnerability of courts for all to see and leaving them damaged and weakened. The answer, therefore, lies "ultimately, on the vigilance of the people in exercising their political rights."[79] Illinois may be obligated to apportion its congressional seats properly, but this is not the only constitutional duty that "cannot be judicially enforced." [80]

Oddly, though Frankfurter cited precedents, he neglected to point to a history that demonstrates that not only population but also interests, groups, and regions have affected representation.[81] The Senate, of course, is not based on population at all. The plain inference is that equal representation is not the only constitutionally defensible system, for as an eminent scholar observed, the Constitution seeks a "government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern."[82]

Yet it is not difficult to imagine situations where Congress' authority over representation would give way to other constitutional considerations. If a state law banned voters who were African American[83] or declared that only whites could be elected to Congress, no justice, even then, would rule this a political question beyond the Court's purview. Colegrove's position was that the dilution of his vote was no less a private wrong, and therefore no less invalid; the duty to defer to Congress is not absolute.

In the years preceding *Colegrove*, the political questions doctrine was far more potent than it is today. The conduct of foreign relations, the Court said, belongs to the political branches,[84] as does determining the validity of constitutional amendments[85] and enforcing the clause guaranteeing states a "republican form of government."[86] Frankfurter clearly considered his opinion in accord with this dominant school of thought.

But the future would not treat this view kindly. The Warren Court saw a willingness to embrace malapportionment as justiciable,[87] and this was followed by

---

76 *Id.* at 553.
77 *Id.* at 553.
78 Alexander Hamilton, Federalist 78, in The Federalist 402 (Alexander Hamilton, James Madison, & John Jay 2001/1787).
79 *Supra* note 70, at 556.
80 *Id*.
81 Willard Hurst, The Growth of American Law: The Law Makers 39-45 (1950).
82 Herbert Wechsler, The Political Safeguards of Federalism, in Principles, Politics and Fundamental Law 49, 50 (1961).
83 The Supreme Court struck down Texas' white primary system in Smith v. Allwright, 321 U.S. 649 (1944), with Frankfurter voting with the majority.
84 Oetjen v. Century Leather Co., 246 U.S. 297, 302 (1918).
85 Coleman v. Miller, 307 U.S. 433, 450-55, 456-60, 460-70 (1939).
86 Marshall v. Dye, 231 U.S. 250, 256-57 (1913).
87 Baker v. Carr, 369 U.S. 186 (1962).

a willingness to review the House's refusal to seat a member,[88] as well as Congress' acceptance of the line-item veto.[89] All of these, in Frankfurter's day, would have routinely been disposed of as unsuitable for judicial determination. The new view was that worries about the political thicket, if taken seriously, would banish the Court from taking any unpopular decision. The key area was civil rights. Had the Court maintained its allergy to controversy, anxiety about enforcement, and deference to the elected branches, the desegregation cases would never have come to pass. Once they were decided, the Court seems to have taken political questions as less a doctrine than a confession of timidity. When finally *Colegrove* was overturned,[90] there was a period of organized political efforts to undo the decision, by, for example, calling a national constitutional convention, but these were more exercises at letting off steam than at truly changing things, and they expired quickly. Timidity lost its rationale.

What Frankfurter never confronted was the obvious riposte to his reliance on the vigilance of the people. The problem that Colegrove complained of was that malapportionment itself rendered the vigilance impotent. Those who were underrepresented could not vote to change the system precisely because they were underrepresented, and those who were overrepresented plainly would not agree to reduce their own power or in the case of Congressmembers, to substantially reduce their reelection prospects. Frankfurter's advice, naïve on one level, was insulting on another, for its message to Colegrove from his perspective was: accept your inferior position.

What can we say about Frankfurter's reliance on political questions? The Constitution states that certain governmental actions are not judicially reviewable: Congress' power to impeach and convict and to declare war, for example, and the Senate's power to consent to treaties and appointments. These matters are left to the political branches. The application of political questions to other areas is not mandated by the Constitution, but instead has developed as a consequence of judicial decisions. On what are they based? Frankfurter answers, "the wisdom of the Court defines its boundaries."[91] A judge preoccupied with legality and opposed to judicial power might be expected to favor a narrower political questions application more clearly rooted in the Constitution over a broader one, but this was not the position Frankfurter adopted.

## V. Dennis v. United States

*Dennis v. United States* (1951)[92] arose out of a spectacular nine month trial of top Communist leaders that occurred at the peak of the Cold War. The case generated tremendous publicity, the *Washington Post* calling it, "the most important reconciliation of liberty and security in our time."[93] Eugene Dennis, the general

---

88 Powell v. McCormick, 395 U.S. 486 (1969).
89 INS v. Chada, 462 U.S. 919 (1983).
90 *Supra* note 87.
91 *Supra* note 23, at 430.
92 341 U.S. 494.
93 *Freedom and Security*, Wash. Post, June 6, 1951.

secretary of the Communist Party of the United States, and his ten top aides were accused of knowingly or willfully advocating the violent overthrow of the government as prohibited by the Alien Registration Act of 1940, popularly known as the Smith Act.[94] The Supreme Court upheld their convictions in an opinion written by Chief Justice Fred Vinson.[95]

Frankfurter joined the majority with an extraordinary concurring opinion. It was extraordinary, first, in its length. At thirty-nine pages plus five pages of appendix, it was seventeen pages longer than Vinson's majority opinion, and longer than Frankfurter's own majority opinions in *Gobitis* (thirteen pages), *Colegrove* (seven pages plus a fourteen page appendix), and *Rochin* (eight pages) combined.

Notwithstanding its length, the argument was familiar and not very complex: It is up to the political branches to weigh the competing claims of free speech and national security, and courts should respect their judgment. Along the way Frankfurter brushes off, like crumbs on a tablecloth, the principal claims of free speech proponents. To the absolutists – here, he was anticipating the views soon to be made famous by his well known adversary, Justice Black[96] – he devoted a sentence, "Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."[97] To the defenders of preferred position, he allotted two sentences, noting that it presumes that legislation appearing to abridge expression be presumed invalid and discarding these "attractive but imprecise words."[98] Most of his attacks were directed at the clear and present danger test, perhaps the best known item in his hero, Holmes,' legacy. It is not that Frankfurter objects to the term, he claimed, but only to its "oversimplified"[99] or "wholly out of context"[100] use or if it is taken to "mean an entertainable 'probability.'"[101] Of course, no one could favor an oversimplified use of any test nor its being taken out of context; by definition, they are wrong. But if the reference to probability alludes to the time element – is the danger so near that there is no opportunity for the marketplace of ideas to operate? – then it plainly counters the rationale Holmes himself offered in his most famous free speech opinion.[102] Never does Frankfurter trouble to apply Holmes' test to the set of facts before him to see if it fits.

Celebrated for his gift at statutory interpretation[103] – "No judge before him . . . arrived at the task of statutory construction so well prepared," concluded a distinguished federal judge[104] – Frankfurter devotes exactly none of his thirty-nine

---

94 A decade earlier, the Party had called for Smith Act prosecutions of Trotskyists. Philip J. Jaffe, The Rise and Fall of American Communism 24-28 (1975).

95 Vinson rested his argument on Holmes' clear and present danger case, though he conceded that the danger was not imminent, but rather would appear when the Communists "feel the circumstances permit." *Supra* note 91, at 509.

96 Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

97 *Supra* note 92, at 518.

98 *Id.* at 527.

99 *Id.* at 542.

100 *Id.* at 543.

101 *Id.* at 527.

102 Abrams v. United States, 250 U.S. 616, 630 (1919).

103 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527 (1947).

104 Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Felix Frankfurter the Judge, 30, 32 (Wallace Mendelson ed. 1964).

pages to this subject, though arguably it was central to the case. Did the statute's ban on knowingly or willfully advocating the violent overthrow of the government mean, "Don't urge someone with a gun to shoot members of Congress" or, instead, "Don't teach from a century old text, *The Communist Manifesto*, that is easily available and lawful to own, to read, and to discuss"? These were questions Frankfurter never entertained. There are references to the Communist menace, to be sure,[105] but none to the specific actions of Dennis and his comrades, and it was they, not the Communist conspiracy, who were on trial.

Frankfurter's opinion is notable not only for what it slights or omits, but also for what it includes. In his use of precedents, for example, Frankfurter does not wince at citing some of the Court's most disparaged decisions, like the *Chinese Exclusion Case,*[106] which upheld a racist treaty excluding Chinese laborers from emigrating to the United States, or *United States ex rel. Turner v. Williams*,[107] which upheld the administrative exclusion of an alien because he was an anarchist, or *Debs v. United States*,[108] which upheld a twenty year jail term for the leader of the Socialist Party for giving an anti-war speech, or *Frohwerk v. United States*,[109] which upheld the conviction of a journalist who wrote antiwar editorials.

Moreover, among the cases he discusses, Frankfurter attaches considerable significance[110] to a brief opinion of Holmes in *Fox v. Washington*,[111] a case decided four years before *Schenck v. United States*, which is almost universally regarded as the Supreme Court's first important free speech case.[112] Fox was prosecuted for violating a law that punished speech that encouraged or advocated disrespect for the law by ridiculing a ban on nudity. In a perfunctory opinion, Holmes upheld the law, and Frankfurter treats this minor and obscure case as the wellspring for the major Espionage Act cases that followed, even though those cases failed to cite *Fox*. Similarly, to illustrate that speech may be limited in the interest of the "maintenance of a free society,"[113] he chooses to cite a case about a man driving through a neighborhood in a sound truck.[114]

Frankfurter also quotes John Stuart Mill, who almost certainly would strongly differ from his views,[115] and joins the originalist/living Constitution debate, advocating for both sides. He speaks as an originalist discussing the historical antecedents of the Bill of Rights, state experiences in the 1790s, Jefferson,[116] and in the next paragraph, speaks of the Constitution as "not as barren words [but] as a living instrument."[117]

---

105 *Supra* note 92, at 542, 547.

106 103 U.S. 581 (1889).

107 194 U.S. 279 (1904).

108 249 U.S. 211 (1919).

109 249 U.S. 204 (1919).

110 *Supra* note 92, at 533.

111 236 U.S. 273 (1915).

112 Vinson in his opinion wrote, "No important case involving free speech was decided by this Court prior to *Schenck v. United States*." *Supra* note 91, at 503.

113 *Id.* at 526.

114 Kovacs v. Cooper, 336 U.S. 77 (194)

115 *Supra* note 92, at 553.

116 *Id.,* at 522.

117 *Id.* at 523.

Yet at the same time, Frankfurter seeks to separate himself from the Smith Act, which liberals had widely condemned. A "judge does not remotely imply that he favors the implications that lie beneath the legal issues,"[118] he wrote, going on to quote four paragraphs from a George Kennan article in the *New York Times Magazine* downplaying Communism as an internal threat.[119] The inference is self celebratory: I disapprove of the law as policy, but will display my professionalism and integrity by doing my duty as judge and vote to uphold it.

The opinion, so bloated by repetition, platitudes, pomposities, and irrelevant citations, drones on and on, so that even an admirer acknowledges that it "becomes almost monotonous."[120] But in it, there is no appreciation of the overwhelming power of the state, armed with what Weber called a *"monopoly of the legitimate use of physical force* within a given territory."[121] Instead, Frankfurter seems to see it merely as Dennis' adversary, as if they are roughly equal combatants, certainly far removed from the puny leftist foes jailed around the time of the First World War.[122] Though Frankfurter may not approve of the Smith Act, he clearly has no use for the Communist party, taking judicial notice of its role as agent of a foreign hostile power.[123] Archives examined following the collapse of the Soviet Union have confirmed the widespread assumption that the party was "an instrument of Soviet espionage."[124] On the other hand, the *Dennis* prosecutors lacked direct evidence tying the defendants to espionage or conspiracy to attempt a violent revolution. Condemning them simply for being Communists, moreover, ignored the fact that their ideology was a source of a broad range of economic, social, and political ideas, whose expression is clearly protected by the Constitution. This fact Frankfurter simply failed to address, as if skipping over it would ensure that it went unnoticed.[125]

## VI. Rochin v. California

*Rochin v. California* (1952)[126] proved to be controversial for a variety of reasons. Three Los Angeles sheriff's deputies, having "some information" that Antonio Rochin sold drugs, burst into his home without a warrant, spied capsules in plain view on a table next to his bed, and asked Rochin, "Whose stuff is this?" Rochin responded by grabbing the capsules and putting them in his mouth, and though the police struggled with him, even putting their fingers down his throat, he managed to swallow the pills. At this point, they took him to a hospital and had a doctor pump

---

118 *Id.* at 553.
119 *Id.* at 541-42.
120 Arthur E. Sutherland, *All Sides of the Question*, *Felix Frankfurter and Personal Freedom*, in Mendelson ed., *supra* note 103, at 109, 128.
121 Max Weber, *Politics as a Vocation*, in From Max Weber 78 (H.H. Gerth & C. Wright Mills eds. 1958). Italics in original.
122 *Supra* note 92, at 542.
123 *Id.* at 546.
124 Harvey Klehr, Earl Haynes & Fridrikh Igorevich Firsov, The Secret World of American Communism 323 (1995).
125 Douglas, J. noticed it. *Supra* note 92, at 581-83.
126 342 U.S. 165.

his stomach, which produced vomiting and two of the sought after capsules, which contained morphine. On the basis of this evidence, he was charged and convicted of possessing morphine.

Was the evidence admissible? Frankfurter, speaking for the Court, conceded that "the administration of criminal justice is predominantly committed to the care of the states,"[127] but state discretion is not unlimited but is confined by the Due Process clause. This clause may imply an "absence of formal exactitude,"[128] a "want of fixity in meaning,"[129] "vague contours,"[130] or "indefinite and vague . . . standards of justice [that] are not authoritatively formulated anywhere as though they were specifics."[131] Yet it "does not leave us without adequate guides"[132] nor does it "leave judges at large"[133] or "make due process of law a matter of judicial caprice."[134]

How, then, to determine its meaning? The answer lies not in a "resort to a revival of natural law,"[135] but rather in judicial "self-discipline and self-criticism,"[136] which "requires an evaluation based on a disinterested inquiry pursued in the spirit of science . . . reconciling the needs both of continuity and change in a progressive society."[137] Examining the facts here, it is obvious that the police "conduct . . . shocks the conscience [and] is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." [138] The methods "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples "[139] and "offend a sense of justice [and] the community's sense of fair play and decency." To hold otherwise would be "to discredit law and thereby to brutalize the temper of society."[140]

There can be no question that his early experience with Mooney, Sacco, and Vanzetti left Frankfurter with great sensitivity toward due process issues. In those cases, official misconduct seemed to him to have infected highly publicized prosecutions and poisoned the trials. *Rochin*, on the other hand, was not a high profile case with heavy political implications. It is hard to read his argument here without suspecting that what disturbs Frankfurter is the "yuck" factor. Pumping a stomach to retrieve evidence seems to him simply disgusting and barbaric. Thus, Frankfurter does not pause even to consider the role of an obvious precedent decided only three years earlier, in which he wrote the opinion. In *Wolf v. Colorado* (1949),[141] the Court considered a case where the state had unlawfully searched an abortionist's office and seized his records, which were then used to convict him.

---

[127] *Id.* at 168.
[128] *Id.* at 169.
[129] *Id.*
[130] *Id.* at 170.
[131] *Id.* at 172, 169.
[132] *Id.* at 169.
[133] *Id.* at 170.
[134] *Id.* at 172.
[135] *Id.* at 171.
[136] *Id.*
[137] *Id.* at 172.
[138] *Id.*
[139] *Id.* at 169.
[140] *Id.* at 174.
[141] 338 U.S. 25.

The search and seizure were unlawful, the Court ruled, but the evidence could be used at trial because it did not compromise the defendant's right to a fair trial. The absence of the yuck factor perhaps explains why Frankfurter refused to see the relevance of a case that, in other respects, seems on point.

Still, we may examine the various propositions that constitute Frankfurter's argument. Does the police conduct offend even hardened sensibilities? Evidently not, for it did not offend the hardened sensibilities of the police or the doctor. Is it really like the rack and screw? Hardly, as they cause permanent, debilitating, disfiguring injury and have no therapeutic uses. Does it, then, offend a sense of fair play and decency? To what extent are police required to play fair? Crime, after all, is not a game where police are obliged to give suspected criminals equal chances to win on some level playing field. Police are free to lie to suspects, and when, say, a SWAT team attacks a kidnapper, it is not expected to give him fair warning or to provide him with weapons and manpower comparable to what they possess. Considerations of fair play simply do not enter into discussions of how to respond. And why focus on the notions of the English-speaking people, many of whom live far from the United States and are not governed by the Constitution? Why should the notions of people in Lagos or Liverpool control the Constitution?

Despite his insistence that judges "may not draw on our merely personal and private notions," Frankfurter offers no standard but flimsily disguised subjectivity. Because stomach pumping strikes us as so extreme, we may conclude that nothing more precise is necessary, for he is certainly not alone in finding it revolting and intolerable. And yet when we recall his famous preoccupation with legality, we may ask what is the basis of the shock the conscience rationale, for subjectivity is the very essence of conscience. In *Louisiana ex rel. Francis v. Resweber*, decided five years before *Rochin*, Frankfurter's conscience was not shocked when, after botching an execution by electrocution, Louisiana asked for a second chance. On the contrary, he wrote, such "an innocent misadventure" does not offend a principle of justice;[142] to rule differently, "I would be enforcing my private view."[143] On the other hand, in *Solesbee v. Balkcom*, decided two years before *Rochin*, Frankfurter dissented from a ruling that permitted the execution of a man who had become insane after sentencing. The reason, he explained, was that "the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."[144] Does *Solesbee* offend these principles more than *Resweber*? What constitutional principles, indeed, is Frankfurter applying? His answer: "The more fundamental the beliefs are, the less likely they are to be explicitly stated."[145]

How, then, to shock the conscience? If conscience, in the old formulation, is simply God speaking to us, it is obvious that He does not say the same thing to everyone, and indeed, to some, He apparently says nothing at all. Hence, when Frankfurter in *Rochin* points to a "disinterested inquiry pursued in the spirit of science," the reader is bewildered, for a disinterested inquiry seems entirely unrelated to the subjective conscience. Indeed, if the spirit of science is the guide,

---

[142] 329 U.S. 459, 470 (1947).
[143] *Id.* at 471.
[144] 339 U.S. 9, 16.
[145] *Id.*

the evidence obtained from the stomach pump should have been admissible, for there is no question that it was reliable, and science is concerned with reliability, not morality; refusing to admit the evidence constituted a barrier to truth-seeking, though it might be fully justified on other grounds, like the ban against self-incrimination and the principle of privileged communications.[146] Again, what we find are principles of amoeboid contours applied in unpredictable ways floating aimlessly in a sea of advice to shun merely personal preferences and other extralegal considerations.

## VII. Closing Thoughts

Frankfurter came to the Court known by friend and foe as a liberal activist, a man committed to causes, a person of deeply held political and social beliefs and the drive to work relentlessly to apply them to the world. This is who he was as a teen-aged immigrant on the streets of New York, as a young Harvard law professor speaking out on the great political topics of the day, and as a disciple of Brandeis and an advisor to Roosevelt. Perhaps no other public intellectual in the first half of the twentieth century matched his record in this regard. Yet the great irony of his career was that his profound commitment to judicial self restraint meant that the confident predictions that accompanied his appointment would be negated by a philosophy that confined the role of the judge and elevated purely legal concerns to the exclusion of other issues. Again and again, in opinion after opinion, he declared his policy and ethical views irrelevant. Only the law mattered.

The chief rationale for self restraint was democracy. If we truly value democracy as much as we routinely claim, he cautioned, we the judges should declare acts of democratically elected officials invalid only when we cannot help it, when we literally have no other choice. There are other arguments – that an activist court will find itself embroiled in political controversies that will undermine the nonpolitical appearance on which its authority is based; that activism will "mutilate the educative process of responsibility"[147] and encourage passivity among the public; and that, in the end, activism cannot do much good because courts are simply not that powerful[148] – but democracy is central. No wonder Frankfurter returns to it over and over and over again.

But whether because this philosophy was sanctioned by his heroes (Holmes, Hand, and Brandeis) or because he lived through decades of activist courts invalidating Progressive reforms, there is no evidence that he ever revisited the topic, except to repeat the familiar mantra. Like an ecclesiastical dogma, its mere enunciation decided the question.

---

[146] The leading treatise at the time maintained that the only reason to exclude evidence was unreliability. John H. Wigmore, A Treatise on the Anglo-American System of Evidence at Trials at Common Law, Sec. 822 (3d ed. 1940) (1904). Similarly, another scholar predicted, "The manifest destiny of evidence law is a progressive lowering of the barriers to truth." Charles McCormick, Handbook of the Law of Evidence 165-66 (1954).

[147] Felix Frankfurter, *The Supreme Court as Legislator*, 46 New Republic 158 (1926).

[148] Learned Hand, The Spirit of Liberty: Papers & Addresses of Learned Hand, 189 (Irving Dilliard ed., 3d ed. 1960).

Yet there is another side to the argument. In the first place, judicial activism may be indispensable when the democratic process produces an anti-democratic result. When the authorities ignored Gobitas' religious beliefs, it was absurd to advise a young girl belonging to an unpopular sect to ask a school board or legislature to abolish its mandatory flag salute policy – months before America's entry in World War II. In the legislative malapportionment cases, it was fatuous to urge the voters to correct the defect, when the point was that underrepresented voters lacked the power to do so.[149] Similarly, to the extent that democracy presupposes freedom of speech, the Smith Act was not democratic because it punished political speech. If the democratic process produces an anti-democratic result, sometimes only an institution outside the democratic process can address it. In these circumstances, is self restraint, which preserves and validates the status quo, the proper reaction? There is no sign that Frankfurter ever considered the question. For him, self restraint applied to all laws equally and without distinctions.

Nor, despite his vast political experience, did he stoop to examine how laws are actually made. Frankfurter was very familiar with a series of cases, in which the Court had voided high profile Progressive laws that possessed widespread public support. In such situations, perhaps it is possible to speak of the public's strong preferences being vetoed by an unelected judicial elite. But most laws are smaller affairs, known only to the factions they affect; majorities in legislatures may have voted for them, but in truth only minorities truly cared. To claim that these laws reflect popular majorities that must be respected is not realistic.

Further, the workings of the legislative process suggest a kind of rough division of labor. Lawmakers, preoccupied with getting bills through multiple decision points, naturally focus on the substance of the bill and the political maneuvering necessary to get it adopted; constitutionality is ordinarily a distant side issue. Thus, if courts fail to take constitutionality seriously, probably, no one else will, but the subject is obviously far too important to ignore. In any case, the constitutional system, with its famous checks and balances, is very far from a pure democracy, and so the counter-majoritarian nature of judicial review in the larger context does not represent a great departure from standard practice.

However, even leaving aside arguments against self restraint as a philosophy, Frankfurter's execution of this philosophy was often fatally flawed. Far from setting aside extralegal concerns, Frankfurter frequently allowed them to trump competing legal claims. In *Gobitis*, it was national unity; in *Colegrove,* fear of entering the political thicket; in *Rochin*, disgust at stomach pumping; in *Dennis* anxiety about espionage and an attempted revolution in the distant, unforeseeable future.

Typically, Frankfurter reached his decision after more or less explicitly balancing the competing claims. In ordinary life, we engage in balancing on a regular basis. Shall I eat this piece of pie? I balance the pleasure it will give me against the calories it will give me. Shall I buy this shirt? It looks good, but it's very pricey. At the extremes, balancing is easy. I won't buy a $500 shirt, no matter how well I look in it nor will I buy a $10 shirt that shows off my belly. But otherwise, I sense an arbitrariness. Shall I buy a $50 shirt that makes me look pretty good? It may depend on how I feel today, and may change tomorrow, and in either case, my reactions may be quite different from yours.

149 Frankfurter conceded this in a white primary case, but was unwilling to apply the principle elsewhere. *Supra* note 83.

Balancing is necessary, Frankfurter writes, because, as he put it in *Dennis*, the "conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is, in fact, only a euphemistic disguise for an unresolved conflict."[150] In *Gobitis*, too, he speaks of weighing "the conflicting claims of liberty and authority,"[151] and in *Colegrove*, the issue is balancing the benefits from ensuring "standards of fairness"[152] against the risks attaching to judicial activism. But who is to do the balancing? His most extensive treatment of balancing is in *Dennis*. Here, as a spokesman for judicial self restraint, he says, "Full responsibility for the choice cannot be given to the courts;"[153] "How best to reconcile competing interests is the business of legislatures and the balance they strike is not to be displaced by ours, but to be respected unless outside the pale of fair judgment;"[154] "It is not for us to decide how we would adjust the clash of interests which this case presents"[155] But then he announces, "The demands of free speech in a democratic society, as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process"[156] So, who is to do the balancing: the lawmakers or the courts?

More fundamental is the question: how are the competing claims to be balanced? Frankfurter warns that they should not be balanced dogmatically.[157] Of course, as the term suggests a mechanical absence of thought, nearly everyone would agree with that advice. On the other hand, his denunciations of rigidity inescapably call to mind Shaw's famous declension: "I am firm, you are stubborn and he is a pig-headed fool," for one person's dogmatism will be another's stand on principle. If Frankfurter refuses to stand on principle – not on absolutism or preferred position or clear and present danger – what does he stand on? How does he avoid "the risk of an *ad hoc* judgment influenced by the impregnating atmosphere of the times"?[158] The innumerable references to carefully weighing the competing interests offer no answer. Indeed, the reliance on balancing may simply be a device to avoid answering. "These are my principles," said Groucho Marx, "and if you don't like them . . . well, I have others."

For balancing is a metaphor with particular power in the legal context, immediately evoking as it does the image of a blindfolded Lady Justice holding a pair of scales. But the image is insidiously misleading. In the real world, we would place weights on each scale, and the objective force of gravity would determine which was heavier by lowering that scale. Anyone, smart/stupid, learned/ignorant, virtuous/evil, could accurately report which side that was, and there would be no opportunity for disagreement. But in the law, there is no objective way to determine which claim is "heavier," and so apart from the extreme cases, disagreements will be inescapable. Frankfurter's own prose reinforces this point. On the one hand, he

---

[150] *Supra* note 92, at 519.
[151] *Supra* note 28, at 591.
[152] *Supra* note 70, at 553.
[153] *Id.* at 525.
[154] *Id.* at 539-40.
[155] *Id.* at 550.
[156] *Id.* at 524-25.
[157] *Id.* at 519.
[158] *Id.* at 528.

concedes in *Dennis* that "both [claims] are supported by weighty title-deeds"[159] that "are not subject to quantitative ascertainment,"[160] and he repeatedly rejects the strawman argument that "freedom of expression requires subordination of all conflicting values."[161] But on the other, he declares, "On any scale of values which we have hitherto recognized, speech of this sort ranks low."[162] Weighty or low value? Even Frankfurter has problems with calibration. Rejecting available tests as too rigid, he is left with subjectivity tied on a long leash. Which recalls the old maxim, You can't beat something with nothing.

It is worth noting, therefore, which of the competing claims Frankfurter tended to find weightier. Prior to joining the Court, of course, his preoccupation was protecting the underdog, and this is how he made his formidable reputation. Tom Mooney. Sacco and Vanzetti. African Americans. But once named to the Court, he most often favored the state. In *Gobitis,* it was the state's claim to national unity that prevailed, in *Colegrove*, its assertion that malapportionment was none of the Court's business, and in *Dennis*, its fear of revolution. Perhaps, only the noxious character of stomach pumping saved *Rochin* from a similar result. Nor were *Gobitis*, *Colegrove*, and *Dennis* atypical. In *Harisiades v. Shaughnessy*,[163] for example, he wrote an opinion upholding the deportation of resident aliens, on the ground of former membership in the Communist party. It was irrelevant, he said, whether the government's policies were "crude and cruel" or "reflected xenophobia in general or anti-Semitism or anti-Catholicism."[164] In *Korematsu v. United States,* he wrote a concurring opinion justifying the government's World War II internment of West Coast residents of Japanese descent as not "transcend[ing] the means appropriate for conducting war."[165] Always, he expressed sympathy for the person he is about to condemn; always, he displayed the moral agony he bravely confronts. As theatre, it may have at first been winning, but repetitions made the recitations seem mechanical gestures.

Thus the irony, which did not crown Frankfurter's achievements but instead contributed so powerfully to undermining his waning once towering reputation and replacing it with neglect[166] In sacrificing his policy and ethical goals in the service of the law, he often failed to serve the law. His sacrifices in these cases were for nothing.

---

[159] *Id.* at 519.

[160] *Id.* at 525.

[161] *Id.* at 529; *see also* 532.

[162] *Id.* at 545.

[163] 342 U.S. 582 (1952).

[164] *Id.* at 597.

[165] 323 U.S. 214, 225 (1944).

[166] Few today rank Frankfurter as a great justice. Cass R. Sunstein, *Home-Run Hitters of the Supreme Court*, Bloomberg View Sept. 23, 2014; Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 Am. Bar Ass'n. J. 1183 (1972). Most do not. John P. Frank, The Marble Palace: The Supreme Court in American Life 43-44 (1961); George E. Currie, *A Judicial All-Star Nine*, 1964 Wis. L. Rev. 3; Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. Ill. L. Rev. 405 (1979); James E. Hambleton, *The All-Time, All-Star All-Era Supreme Court*, 58 Am. Bar Ass'n J. 463 (1983). A quantitative study omitted his name from top ten lists of writers of significant majority opinions, signers of significant majority opinions, and writers of dissents that overturned majority opinions; Frankfurter did, however, rank sixth as a subject for articles and books. Lee Epstein et al., *Rating the Justices: Lessons from Another Court*, paper presented at the annual meeting of the Midwest Pol. Sci. Ass'n, April, 1992, 18, 19, 22, 23.

Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0004

DE G DE GRUYTER OPEN

# Fundamental Rights in Early American Case Law: 1789-1859

Nicholas P. Zinos*
*Independent Researcher*

## ABSTRACT

*Fundamental Rights Law is a ubiquitous feature of modern American jurisprudence. Where did the term "Fundamental Rights" come from, and how was it applied in early American case law? This article outlines the genesis of fundamental rights law in early 17th century England and how this law developed and was applied over time. The English Bill of Rights of 1689 was the first attempt to codify these rights in English law. When the English legal system emigrated to America along with the early American colonists, it included the English conception of fundamental rights. The framers of the United States Constitution incorporated and expanded these rights. Early American Case law kept strictly within this tradition for the most past, and used the term "fundamental rights" usually for rights which had long been recognized in Anglo-American society. This article notes the concordance between the application of fundamental rights in early American case law and the long tradition of fundamental rights which ripened in the Anglo-American legal tradition.*

## KEYWORDS

*Originalism; Natural Law & Fundamental Rights; Anglo-American Heritage; Bill of Rights; Corfield v. Coryell.*

## CONTENTS

Introduction ........ 138

I. The Origin of the Term "Fundamental Rights" in English Law ........ 139

II. Fundamental Rights Cross the Atlantic with the Colonists ........ 140

III. Fundamental Rights: 1800-1820 ........ 144

IV Fundamental Rights: 1820-1829 ........ 146

V. Can the Government have Fundamental Rights? ........ 150

VI. Fundamental Rights and Natural Law ........ 152

VII. The Statistical Frequency of Specific Rights ........ 159

VIII. Conclusion ........ 166

---

* Attorney working in private practice in St. Paul, Minnesota. This article was made possible in part by the Bakken Fellowship from the Hamline University School of Law.

(cc) BY-NC-ND © 2018 Nicholas P. Zinos, published by De Gruyter Open.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

## Introduction

Although the concept that some rights are fundamental has become indispensable in modern American jurisprudence, relatively little research has been published on the use of the term "fundamental rights" in early American case law. Aside from a monograph and a handful of articles, the information regarding courts' understanding of the term in the late 18th and early 19th century must be gleaned from tangential sources, such as discussion on the Privileges and Immunities Clause, the Ninth Amendment, or philosophical or historical works on natural law.[1]

The purpose of this article is partially to fill this gap by analyzing early American courts' use of the term "fundamental right". First, we will consider in what instances the courts used the term "fundamental rights" and what they considered those rights to be. Secondly, we will look at what the courts perceived to be the source of fundamental rights. Were the rights bestowed upon the individual person by the Constitution, by the natural or the common law, or by something else?

For this article I have used cases from every type of court, state and federal, as well as the Supreme Court. I have restricted myself to looking only at the

---

[1] *See, e.g.,* Milton R. Konvitz, Fundamental Rights. History of a Constitutional Doctrine (2001) (the only historical survey on the use of the term "fundamental rights" in American jurisprudence. Its heavy emphasis on the past one hundred years, however, makes it of only limited value to the historian of the early Republic); Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 Tex. L. Rev. & Pol. 225, (1999) (considers the notion of fundamental rights as based on a "higher" or natural law through the work of 19th century American jurist John Norton Pomeroy); Jason S. Marks, *Beyond Penumbras and Emanations: Fundamental Rights, The Spirit of the Revolution, and the Ninth Amendment*, 5 Seton Hall Const. L.J. 435, (1995); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. 305, (1987); David Crump, *How Do The Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv..J.L. & Pub. Pol'y 795 (1996). More plentiful are studies dedicated to the history and development of the Privileges and Immunities Clause or the Ninth Amendment. *See*, *e.g.*, The Rights Retained by the People: The History and Meaning of the Ninth Amendment (Randy E. Barnett ed., 1989) (a collection of essays submitted by various scholars regarding the Ninth Amendment); Bennett B. Patterson, The Forgotten Ninth Amendment. A Call for Legislative and Judicial Recognition of Rights Under Social Conditions of Today (1955) (arguing that the Ninth Amendment protects men from acts of government inconsistent with fundamental human rights and that these rights are not necessarily fixed in time, but are discovered "as the race becomes more evolved, and as the respect for the dignity of human life increases."); David Skillen Bogen, Privileges and Immunities. A Reference Guide to the United States Constitution (2003). studies dedicated to the history and development of the Privileges and Immunities Clause or the Ninth Amendment. *See*, *e.g.*, Randy E. Barnett, The Rights Retained by the People: The History and Meaning of the Ninth Amendment (1989), (a collection of essays submitted by various scholars regarding the Ninth Amendment); Bennett B. Patterson, The Forgotten Ninth Amendment. A Call for Legislative and Judicial Recognition of Rights under Social Conditions of Today (1955), (arguing that the Ninth Amendment protects men from acts of government inconsistent with fundamental human rights and that these rights are not necessarily fixed in time, but are discovered "as the race becomes more evolved, and as the respect for the dignity of human life increases."); David S. Bogen, Privileges and Immunities. A Reference Guide to the United States Constitution (2003).

cases from the first seventy years following the ratification of the United States Constitution. As might be imagined, fundamental rights jurisprudence during the first half of the 19th century is relatively scant. Most of early fundamental rights jurisprudence dwells covertly in the dicta of obscure cases, now long forgotten. But there is a reason for undertaking an analysis of this era nevertheless. Although the mention of the term fundamental rights in case law between 1789-1859 is few and far between, this scarcity is compensated by the unparalleled access that the early courts had to the thought and intentions of the Founding Fathers. Therefore, if for no other reason than its antiquity, some type of purview of fundamental rights in this era is necessary to fill the lacunae of scholarship, even if it turns out that the fruit harvested from such an undertaking is relatively modest.

## I. The Origin of the Term "Fundamental Rights" in English Law

The pedigree of fundamental rights in Anglo-American legal history is long and complicated. The first mention of the term "fundamental right" in print is in a 1611 pamphlet entitled: *A record of some worthy proceedings in the honourable, wise, and faithfull Howse of Common in the late Parliament*.[2] It was, however, the Puritans of England who popularized the use of the term around the time of the English Civil War.

William Prynne, a Puritan and lawyer, inveighed against the trampling of fundamental rights by Cromwell's Commonwealth in his work: *A summary collection of the principal fundamental rights, liberties, proprieties of all English freemen*.[3] He argued that although the abuses of law and right under the monarchy were bad, the violations of fundamental rights under Cromwell's Protectorate were far worse.[4] Prynne then goes on to enumerate four fundamental laws as the cornerstones of the English legal system:

---

2 England And Wales, Parliament, House Of Commons, A Record Of Some Worthy Proceedings In The Honourable, Wise, And Faithfull Howse Of Common In The Late Parliament (1611). This pamphlet numbers forty-eight pages and was possibly printed in Amsterdam by one G. Thorp (this is a conjecture from Pollard and Redgrave's: A Short-Title Catalogue of Books Printed in England, Scotland, and Ireland and English Books Printed Abroad (1473-1640). There is evidence that it includes a record of a speech given by Sir Francis Bacon to the King laying out certain grievances.

3 William Prynne, A Summary Collection of the Principal Fundamental Rights, Liberties, Proprieties of All English Freemen (1656). Reprinted in Stuart E. Prall, The Puritan Revolution: A Documentary History 268-279 (1968).

4 "The Grievances these Martial Reformers of our Laws have introduced, under pretext of reforming some petty Abuses in the practice of the Law and Lawyers, are of a far more grievous, general, and transcendent nature, subverting the very Fundamental Laws and Liberties of the whole Nation; and burdening them with two or three Millions of extraordinary Taxes, Expenses every year, whereas all the abuses in the Law if rectified, amount not above 5 or 6 thousand pounds a year at the most, and those voluntarily expended by litigious persons, not exacted from, or imposed upon any against their Wills, as Taxes, Excises, Imposts, Tunnage and Poundage now are by the Soldiers, without Act of Parliament against our Laws." *See* Prynne, *supra* note 3.

1) The Privileges and Freedom of their Parliaments and their Members; 2) The safety and liberty of their Persons; 3) The property of their Estates; and 4) The Free course of Common Law, Right, and Justice.[5]

Arguing from the opposite perspective is the pro-Cromwellian Puritan Isaac Penington who discusses fundamental rights in his work: *The fundamental right, safety, and liberty of the people.*[6] In it he argues that there are three basic fundamental rights of the people: "In the people's choice of their government and governors - in the establishment of that government and governors whom they shall choose - and in the alteration of either as they shall find cause."[7] It is not difficult to perceive echoes of these sentiments in the founding documents of the United States of America.

As is clear from the preceding examples, when the judges of early America referred to fundamental rights they were not inventing a new term, but were recalling an aspect of their own great Anglo-American legal tradition. When lawyers arguing before the modern Supreme Court invoke the term fundamental right in order to win their client's case, it is unlikely that they realize the historical foundation upon which the term and idea lay. Even the Court itself may not always be fully cognizant of the term's ancient pedigree or the historical conditions which served to shape and define it. The passage of time inevitably leads to a certain degree of memory loss unless one deliberately seeks to revisit that which one once had a clear idea. This article's purpose is to revisit some of the ancient ideas pertaining to fundamental rights through the lens of early American caselaw. The modern development of fundamental rights jurisprudence can then be measured by some historical standard and, if one is persuaded by historical evidence, judge it according to its conformity or deviation from this standard.

## II. Fundamental Rights Cross the Atlantic with the Colonists

The use of the term "fundamental right" makes its first appearance on the stage of American jurisprudence in 1793 in the Virginia case *Kamper v. Hawkins*.[8] This case is replete with allusions and useful observations for the issue at hand.

The question presented to the court was whether an act passed by the General Assembly granting the lower district courts power to provide certain equitable

---

[5] This list is consistent with William Blackstone's understanding of the fundamental laws of the English nation 130 years later; *see, infra* note 43.

[6] Isaac Penington, The Fundamental Right, Safety, and Liberty of the People (1651).

[7] *Id.* For other uses of the term "fundamental right" in early English texts *see,* Henry Care, English Liberties, or, The Free-Born Subject's Inheritance Containing, I. Magna Charta, the Habeas Corpus Act, and Divers Other Useful Statutes (1682); James Tyrrell, Bibliotheca Politica: Or, an Enquiry into the Ancient Constitution of the English Government Both in Respect to the Just Extent of Regal Power, and the Rights and Liberties of the Subject(1694).

[8] 1 Va. Cas. 20 (1793). This case was decided in the General Court of Virginia. For a brief history of this court *see,* Hugh F. Rankin, *The General Court of Colonial Virginia: Its Jurisdiction and Personnel*. The Virginia Magazine of History and Biography. Vol. 70, No. 2, Apr., 1962.

relief was unconstitutional and therefore void. Predating *Marbury v. Madison*[9] by ten years, Spencer Roane in his opinion essentially anticipates the basic holding of Chief Justice John Marshall, namely, that the judiciary branch of government has the right and the duty to review legislative acts and to determine whether such acts are consistent with the Constitution.[10]

Ultimately, the court held that the act violated the judicial structure instituted by the Virginia Constitution and deemed that the district court was unable to grant injunctive relief. What makes this case so pertinent for our purposes, however, aside from its interesting holding on judicial review, is its mention of fundamental rights. Judge James Henry, a former delegate to the Continental Congress, writing his own opinion in the case, is the first judge to use the term fundamental rights in an American judicial opinion. Referring to the deputies of the Constitutional Convention, he states:

> Our deputies, in this famous convention, after having reserved many fundamental rights to the people, which were declared not to be subject to legislative control, did more; - they pointed out a certain and permanent mode of appointing the officers who were to be instrusted [sic] with the execution of the government.[11]

Henry refers to the Constitution as having *reserved* fundamental rights to the people. This type of language is very common in early case law. For example, courts and advocates refer to *reserving, securing,*[12] and *recognizing*[13] fundamental rights. Never does a judge refer to the Constitution as *bestowing* or *creating* a fundamental right. This fact is important. As stated earlier, the notion of fundamental rights precedes the establishment of the American Republic, and the Constitution was seen as a written instrument necessary to safeguard these pre-existing rights. As Randy E. Barnett points out, a certain degree of controversy existed as to whether it was necessary to enshrine some of these rights in the Bill of Rights, the fear being that by listing some, it would be assumed that only those existed and no others.[14] This

---

9 5 U.S. 137 (1803).

10 Kamper v. Hawkins, 1 Va. Cas. 35-40 (1793). *See* John Radabaugh, *Spencer Roane and the Genesis of Virginia Judicial Review*. 6 Am. J. Legal Hist. 63, 65-66 (1962). Interestingly, Roane vigorously criticized Chief Justice John Marshall's expansion of judicial review for the federal courts, believing that such power ought only be exercised within the states. Notwithstanding their differences, however, their idea of the role of the judiciary in arbitrating conflicts between legislative law and state or federal constitutions was the same.

11 Kamper v. Hawkins, 1 Va.Cas. 48 (1793).

12 *See* State v. Sheriff of Charleston Dist., 1 Mill Const. 145, 72 (1817); Stokes v. Scott County, 10 Iowa 166, 172 (1859); Commonwealth v. Milton, 12 B. Mon. 212, 220 (1851).

13 *See* Kilham v. Ward, 2 Mass. 236, 260 (1806).

14 *See,* Barnett, *supra* note 1, Randy E. Barnett. *Introduction: James Madison's Ninth Amendment* ("Enumerating rights in the Constitution was seen as presenting two potential sources of danger. The first was that such an enumeration could be used to justify an unwarranted expansion of federal powers...The second potential source of danger was that any right excluded from an enumeration would be jeopardized. In his speech to the House explaining his proposed amendments, James Madison stressed the danger of enumerated rights: It has been objected also against a bill of rights, that, by

fear gave rise to the inclusion of the Privileges and Immunities Clause of the Ninth Amendment, but as we know after more than two-hundred years of jurisprudence, this Clause has hardly been a useful mechanism in resolving the controversy and clearing up the ambiguity surrounding unenumerated rights.

Judge Henry in *Kamper* also refers to certain rights that are *inherent* in the people, such as the right to a trial by jury, and the right to worship freely without the interference of government.[15] Henry notes that although under the British system of government the Parliament was omnipotent and that its powers were beyond control, the Constitution limits government's power, thereby making space for those inherent fundamental rights.[16]

Another important case from the 18th century that refers to fundamental rights is *Zylstra v. Corporation of the City of Charleston.*[17] *Zylstra* was decided in 1794 in the trial court of South Carolina. It examines the case of a chandler prosecuted and fined 100 pounds without the benefit of a jury trial by the Court of Wardens for violating a by-law, passed by the City Council, prohibiting the making of soap and candles within the city limits. Judge Burke voids the penalty on the grounds that the court acted without authority when it levied the fine without legislative mandate.[18]

---

enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against." 1 The Debates and Proceedings in the Congress of the United States 456 (J. Gales & W. Seaton ed. 1834) (Speech of Rep. J. Madison).)

15 Kamper v. Hawkins, 1 Va. Cas. 47.

16 *Id.* at 47-48. ("There is a proposition which I take to be universally true in our constitution, which gentlemen whose ideas of parliament, and parliamentary powers, were formed under the former government, may not be always obvious; it is this -- We were taught that *Parliament* was *omnipotent*, and their powers beyond control; now this proposition, in our constitution, is limited, and certain rights are reserved as before observed."). Henry is not exaggerating on this score regarding the English view of the sovereignty of Parliament. Blackstone notes in his Commentaries: The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said, '*Si antiquitatem, est vetustissima*; *si dignitatem*, *est honoratissima*; *si jurisdictionem*, *est capacissima'*. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. William Blackstone, Blackstone's Commentaries. (Philadelphia: William Young Burch, 1803), Book I, 160. This edition includes extensive commentary by St. George Tucker with notes of reference to the Federal and Virginia State Constitutions.

17 Zylstra v. Corporation of the City of Charleston, 1 Bay 382 (S.C. 1794).

18 *Id.* at 381-82 (J. Burke) ("Thus therefore, the bye-law under which Zylstra was prosecuted, was utterly void; for the Corporation [of the City of Charleston] was not vested with competent legislative authority; and they had as little judiciary power to try a cause and give judgment for 100l as they held as legislators: therefore, for the Court of Wardens to hear and determine such a cause, without the intervention of a jury, was

His fellow colleague, Judge Waites, states that even if such power were present, the conviction was void because it was contrary to the Constitution of the State of South Carolina, which guarantees to every freeman a trial "by the judgment of his peers, or by the law of the land" in every case in which he is in jeopardy of losing life, liberty, or property.[19]

Judge Waites then proceeds to offer a lengthy and interesting note on the meaning of *the law of the land* in the State Constitution, in the course of which he cites Dr. Francis Sullivan's Commentary on the Magna Carta.[20] He concludes that the jury can be dispensed with only in cases in which judgment without a jury was authorized under the courts of common law in England, such as the Court of Chancery, the Courts Ecclesiastical, Maritime, and Military.[21] In the case of South Carolina, only the courts of equivalent character and judicial power can dispense with a trial by jury, namely, the Court of Equity, the Court of Admiralty, the Courts Ordinary, Courts Martial, and the Courts of the Justices of the Peace.[22] In all other cases, including that of the Court of Wardens, a trial by jury is a fundamental right.[23]

Judge Waites then responds to the objection that the Court of Wardens was created prior to the making of the Constitution of South Carolina, and therefore can not be bound by it:

> If the constitution was the first acquisition of the rights of the people of this country; if then, for the first time, the trial by jury was ordained, and the right then commenced, there would be some ground for this conclusion. But the trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors in succession from that period to our own time.[24]

---

what no Court in the State durst presume; it being repugnant to the genius and spirit of our laws, all of which recognize jury trial, which is also guaranteed to us expressly by our constitution.")

19 *Id.* at 383-84.

20 *Id.* at 383-85. (J. Waites) ("The words *the law of the land*, mean the *common law*, or parliament down to the time of Edw. 2d which are considered as part of the common law: vide *Hales's H.C.L.* 7 which doth not in all cases require a trial by peers." It will be sufficient to point out in general, the principle cases where this *lex terrae*, or, as Lord Coke calls it, the *due process of law*, superseded the trial *per pares*. "First then, if a man accused of a crime pleads guilty, so that there is no doubt of the fact, it would be absurd and useless delay to call on a jury to find what is already admitted; accordingly, *by the law of the land*, judgment is given on the confession. So in a civil action, if the defendant confesses the action, or makes default, (in a suit on a bond) no jury is requisite. So, if both parties plead all the matters material in a case, and a demurrer is joined, the Judges shall try the matter of right depending on the facts admitted, and give judgment *according to law*, without a jury." "The inflicting of punishment at the discretion of Courts for all contempts of their authority, is also part of *the law of the land*, being founded in the necessity of enforcing due respect and obedience to the courts of the justice, and supporting their dignity."

21 *Id.* at 384-85.

22 *Id.* at 386.

23 *Id.* at 388.

24 *Id.* at 388-389.

This passage is pregnant with meaning concerning the origin and import of fundamental rights. First of all, Waites states emphatically that the Constitution did not create this fundamental right - it existed before the creation of the Constitution. Its origin is in the *common law*, of which the people of America are direct descendants.

Furthermore, the common law is not only the law that existed at the time that the colonists revolted against their mother country, but is the law from time immemorial.Therefore, in order to ascertain the origin of fundamental rights - in this case the right to a trial by jury - Waites peers into the dawn of English history, and finds there the basis for the people's rights of his own time.

## III. Fundamental Rights: 1800-1820

The use of the term "fundamental rights" was slow to proliferate in early American case law. In the entire first half of the 19th century the term was only used in twenty-seven court opinions, compared to 412 opinions in the latter half of the century.[25] Its first appearance in the 19th century comes in 1804 in the Supreme Court of New York in the celebrated case of *People v. Croswell*,[26] a criminal prosecution against one Harry Croswell for allegedly defaming the president, Thomas Jefferson, in a publication entitled "The Wasp."

Justice Kent, in his discussion regarding the freedom of the press, states:

> But, whatever may be our opinion on the English law, there is another and a very important view of the subject to be taken, and that is with respect to the true standard of freedom of the American press. In England, they have never taken notice of the press in any parliamentary recognition of the principles of the government, or of the rights of the subject, whereas

[25] This count was accomplished after searching for the term "fundamental right" on Westlaw during the pertinent periods. Such a count would have been well-nigh impossible prior to a computerized database.

[26] People v. Croswell, 3 Johns. Cas. 337 (1804). This criminal prosecution was precipitated by the violent tempers still flaring as a result of the Federalist-sponsored Sedition Act of 1798 and the election of Republican President Thomas Jefferson in 1800. The printer, Croswell, published his four-page weekly in Hudson, New York and was largely responsible for the contents of the journal, which took as its motto "To lash the Rascals naked through the world." The name, "The Wasp", was taken in contradistinction to "The Bee", edited by Charles Holt, an ardent anti-Federalist who was convicted in 1800 for his attacks on Alexander Hamilton. One of the bases of indictment against Croswell was an article entitled: "A Few ‚Squally' Facts," printed in No. 4 of *The Wasp* (August 12, 1802). In it, he attacks Jefferson's conduct prior to becoming President, and accuses him of trampling the Constitution and rights of American citizens, by, for example, displacing "honest patriots of this country and appoint[ing] to succeed them foreigners and flatterers, who have always shewn themselves hostile to it, one of whom was prime agent, in raising an insurrection to oppose the constituted authorities." Coming to Croswell's defense was a team of lawyers, including William W. Van Ness, Elisha Williams, Jacob Rutsen Van Rensselaer, and later, Alexander Hamilton himself. *See,* Julius Goebel, Jr., The Law Practice of Alexander Hamilton 775-806, (1964).

> the people of this country have always classed the freedom of the press among their fundamental rights.[27]

This passage is interesting because it acknowledges the right of the freedom of the press as a fundamental right of purely American origin, with no legal precedent in English law. This insight will be discussed later on when we show that the American fundamental rights tradition not only incorporates but develops beyond the English one.[28]However, one could argue that there was at least the germ of this freedom in English law, since, for example, the English Bill of Rights declares that: "The freedom of the speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament,"[29] thereby protecting the free flow of ideas, if not among the general public, at least within Parliament.

After declaring that the freedom of the press is a fundamental right, Kent goes on to illustrate by way of example:

> The first American congress, in 1774, in one of their public addresses, enumerates five invaluable rights, without which a people cannot be free and happy, and under the protecting and encouraging influence of which these colonies had hitherto to amazingly flourished and increased. One of these rights was the freedom of the press.[30]

Another interesting case from this era is the 1818 case *Juando v. Taylor*.[31] What is noteworthy about this case from our point of view, is that the opinion declares

---

27 People v. Croswell, 3 Johns. Cas. 390-94 (1804). Although Kent considers the freedom of the press as a fundamental right, he also considers this right strongly circumscribed for the sake of the common good. For example, false and malicious writings published with intent to defame those who administer the government, or writings tending toward sedition, irreligion, and impurity are not protected under this right. Having such a wholly unregulated and unchecked right would be a "Pandora's box" and the "source of every evil." Rather, he proceeds, adopting the argument of defendant's council, Alexander Hamilton, "the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals."

28 *See infra* Part VII.

29 English Bill of Rights, Article IX.

30 People v. Croswell, 3 Johns. Cas. 391 (1804). The public address he is referring to was directed to the people of Quebec and was essentially an apologia to explain the reasons for the success of the American Colonies and to encourage the people of Quebec to stand firm in demanding the same freedoms. Besides the freedom of the press, the Congress also listed as "grand" and "inviolable" rights the right to be represented by government; the right to a trial by jury; the right to petition for a writ of habeas corpus; and the right to hold lands by the tenure of easy rents. *See,* Journals of the Continental Congress, Vol. 1, 57.

31 Juando v. Taylor, 13 F. Cas. 1179 (1818. In this case, Commodore Thomas Taylor, formerly a citizen of the United States, claimed to have renounced his citizenship and sworn allegiance to the government of Buenos Aires. Therefore, he argued, he could not be placed in custody pending a legal suit against him regarding the capture of Spanish property on the open seas against whom Buenos Aires was at war. Judge Van Ness agreed and released him on bail.

expatriation, or the renouncing of one's American citizenship, to be a "fundamental right."[32] In other words, no man is forced to remain an American citizen against his will. Citizenship is a voluntary allegiance to the country. However, this unusual definition of a fundamental right is not found in any other early case law.

To round out this discussion of fundamental rights in this era we can briefly mention the 1802 case *Harris v. Huntington*.[33] The opinion summarizes the history of English law regarding the right to petition the King and Parliament for a redress of grievances.[34] It furthermore adds that the English Bill of Rights of 1689 declared fundamental rights inherent in Englishmen (of which this right was one of them).[35] The court then acknowledges that the American people, as descendants of Englishmen, reduced into writing the fundamental right of petitioning the government for the redress of grievances in the Declaration of Rights of the Vermont Constitution.[36]

A few interesting observations can be gathered from the use of the term "fundamental right" in this opinion. First of all, we see here an echo of what was said in *Zylstra*, namely, that a fundamental right is a common law right planted deep in the soil of English history. The rights enumerated in these two opinions - the right to a trial by jury and the right to petition for a redress of grievances - are both found in some form in the Magna Carta.[37] Here there is agreement between the two cases that great is the antiquity of certain fundamental rights which far precede temporally the creation of the United States and its Constitution.

## IV Fundamental Rights: 1820-1829

The 1820s is the first decade that the U.S. Supreme Court uses the term "fundamental right." It comes about in a rather uneventful way in the case of *Green v. Biddle*,[38] decided in 1823, only a month prior to Supreme Court Justice Bushrod Washington's

---

[32] *Id.* at 1181. Interestingly, Blackstone, while declaring that the right to remain in one's country absolute, in the same breath notes that the king can prohibit his subjects from traveling to foreign parts in times of necessity. St. George Tucker, the American commentator of Blackstone's 1803 American edition notes that, contrary to English law, the laws of Virginia "expressly admit the right of expatriation." *See,* Blackstone, *supra* note 16, at137.

[33] Harris v. Huntington, 2 Tyl.129, 1802 WL 777, (Vt.1802).

[34] *Id.* at 140-43. The court states: "Our English ancestors have ever held the privilege of petitioning the King and Parliament for redress of grievances as an inherent right; and their Courts of Law have ever, excepting in a solitary instance, discountenanced prosecutions declarative of such petitions as libels."

[35] *Id.* at 141.

[36] *Id.* at 143.

[37] *See,* A. E. Dick Howard, Magna Charta. Text and Commentary, clause 39: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." And clause 52: "If anyone has been disseised or deprived by Us, without the legal judgment of his peers, of lands, castles, liberties, or rights, We will immediately restore the same, and if any dispute shall arise thereupon, the matter shall be decided by judgment of the twenty-five barons mentioned below in the clause for securing the peace."

[38] Green v. Biddle, 21 U.S. 1 (1823).

famous decision in *Corfield v. Coryell*.[39] The Court held that the State of Kentucky had no power to substitute a trial by jury for trial by a Board of Commissioners in a United States court. It further remarked that this right was fundamental and was protected by the U.S. Constitution.[40]

However, the more important and interesting case from this era is *Corfield,* decided by Bushrod Washington, nephew of George Washington, while riding the circuit in the federal courts. This case has become an indispensable citation in discussions regarding the Privileges and Immunities Clause.[41] Just as important, however, is its utility in defining and better understanding fundamental rights in the American tradition. Indeed, judging from the passage above, it appears that Washington did not readily distinguish between privileges and immunities and fundamental rights, but saw them as essentially the same thing.

This case is justly famous for several reasons. For one, it is the first time that a Supreme Court justice addressed at length the significance of the Privileges and Immunities Clause.[42] Secondly, the opinion includes an extensive enumeration of fundamental rights that are not mentioned in the Bill of Rights, thereby offering a glimpse into what our judicial Fathers considered to be some of the unenumerated fundamental rights.

The case was about whether an act prohibiting non-residents of New Jersey from fishing and taking oysters within the State was a violation of the Privileges and Immunities Clause. Washington's reflection on the meaning of this clause, though often repeated, is worth reproducing here in full:

> What are the privileges and immunities of the citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of the citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the

---

39 Corfield v Coryell, 4 Wash. C .C. 371 (1823).

40 Green v. Biddle, 21 U.S. 1106 (1823).

41 Bogen, *supra* note 1, 23-27 (noting that although Washington's enumeration of various privileges and immunities was dicta, his list "became the reference point for courts and congress for almost a century.").

42 David R. Upham, The Meaning of the "Privileges and Immunities of Citizens" on the Eve of the Civil War, 91 Notre Dame L. Rev. 1117 at 1127 (2016).

> other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned are, strictly speaking privileges and immunities, and the enjoyment of them by the citizens of every state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of the confederation), the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.[43]

What can be inferred from this extensive discussion on fundamental rights? In order to do justice to this rich paragraph, it is necessary to analyze it from a number of different angles. Washington separates his enumeration of rights into two groups, one that is made up, as he puts it, of *general heads*, and another that consists of individual specific rights that are presumably derived from the first group. The general heads that Washington identifies are:

1. Protection by the Government
2. Enjoyment of Life and Liberty
3. Right to Acquire and Possess Property of Every Kind
4. Right to Pursue and Obtain Happiness and Safety

These rights are essentially an echo of the terms Life, Liberty, and the Pursuit of Happiness that are found in the Declaration of Independence. If any rights are fundamental, these are, and provide the cornerstones not only to the American legal tradition, but to the English one as well.[44] It therefore comes as no surprise that

[43] Corfield v. Coryell, 4 Wash C.C. at 551-552 (1823).

[44] *See* Blackstone, *supra* note 16, 122-145. Blackstone, in his Commentaries on Laws of England, delineates a similar scheme in his chapter on “The Absolute Rights of Individuals.” He begins by distinguishing absolute from relative rights of persons. Those rights are absolute “which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other.” Furthermore, unlike other civil rights, absolute rights are intrinsic to man even in a primitive state, and regardless of whether he is a part of society or out of it. “And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property.” Blackstone considers these rights rooted in the natural law, and belong to man as “one of the gifts of God to man at his creation, when he endued him with the faculty of free-will.” Interestingly, however, he also declares these prerogatives as the “absolute rights of every Englishman” and thus enshrined in English statutes and common law. The fact that there is an overlap between the natural law and the law of England should come as no surprise, given that in Blackstone’s time it was held that the civil law was a reflection and more particular application of natural principles established by God. Indeed, in Section the Third, of the Laws of England, Blackstone notes that a law contrary to reason or divine law, is not law at all and need not be followed, even when it has *stare decisis* in its favor. “For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that is it not the established custom of the realm, as has been erroneously determined.”

Washington reiterated them when enumerating the fundamental rights of American citizens.

If Washington had merely recited the general rights already found in the Declaration of Independence, however, later courts would not have taken much notice. The fact that he was willing to expand on his idea of privileges and immunities and give them a specific content ensured that later courts and scholars would continually return to *Corfield* while discussing issues such as privileges and immunities and fundamental rights.[45]

Although Washington clearly states that his list is not exhaustive of those fundamental rights that exist, he does explicitly mention the following:

1. The right to travel and change residency
2. The right to the benefit of a writ of Habeas Corpus
3. The right of access to the courts
4. The right to own and manage private property
5. The right to equal protection with regard to taxation
6. The right to vote[46]

---

Following his enumeration of the three absolute rights, Blackstone proceeds to explain their contents and derivatives. For example, under the heading of the right to personal security, Blackstone notes that this includes the right to life and its sustenance thereof (including the right of necessary support for the poor), the right to be free of practices that compromise one's health, and the right to the security of one's reputation or good name. Under the heading of personal liberty, Blackstone includes the right of changing one's place of residence, the right to due process in criminal proceedings (including trial by one's peers), the right to petition for a writ of *habeas corpus*, and the right to be free from unreasonable arrest and excessive bail. Finally, under the heading of property, Blackstone includes the right to possess, use and dispose of one's possessions, the right to be fairly compensated for property appropriated by eminent domain, and the right to be taxed only at that rate established by one's own representatives. Beyond these three absolute rights and their derivatives, Blackstone adds a few more rights which he deems "auxiliary" because, without them, the absolute rights would be "dead letters" and unenforceable. These include: the established limits to the king's powers, the right to apply to the courts of justice for redress of injuries, the right to petition the government for a redress of grievances, and the right to bear arms. These many rights all fall under the umbrella of absolute and well summarize the content and theory of this article, encompassing, as they do, almost every single right raised by the early American courts to the level of fundamental. The courts are almost always unwilling to go beyond Blackstone. The rare exceptions are the right to freedom of the press and worship, the right to expatriate, and the right to vote, which are absent in Blackstone's chapter. The right to bear arms, while noted by Blackstone, was not explicitly mentioned as a fundamental right by any early American court, although it certainly appeared in numerous State Constitutions and of course the Federal Constitution.

45 *See, e.g.,* Slaughter-House Cases, 83 U.S. 36, 75 (1872); McCullough v. Brown, 41 S.C. 220, 480 (1894); State v. Palko, 122 Conn. 529, 325 (1937).

46 The one thing that Washington cannot claim in his enumeration of fundamental rights is originality. It is abundantly clear that most of these rights appear in Blackstone's commentary on the absolute rights of Englishmen. Only the right to equal protection with regard to taxation and the right to vote are absent, although even the former could be said to be quasi-enshrined in the right to be taxed by one's own representatives in Parliament. *See* Blackstone, *supra* note 43 and accompanying text.

After reviewing this list of rights, what is noteworthy about them is that only one of them, the right to a writ of Habeas Corpus, is found in the Constitution, and none of them are in the Bill of Rights. Was Washington's selection deliberate? Did he assume, perhaps, that every citizen could take for granted that the Bill of Rights was an enumeration of their fundamental rights, and therefore considered it redundant to repeat them here? Did he perhaps omit mention of the Bill of Rights because *Coryell* was a case concerning state law? Or was his intention, in drafting this opinion, to specifically identify and give some shape and form to those unenumerated rights of the American people, thereby trying to breathe life into a largely ignored Clause of the Constitution?

However the case may be, Washington was confident that fundamental rights did exist beyond the perimeter of the Constitution and was capable of defining some of them. In Washington's list, it is difficult not to see Blackstone at work, and in all likelihood Washington was trained in the law using Blackstone's text.[47] But Washington was not slavishly copying Blackstone. He was drawing from the well of the ancient Anglo-American legal tradition to which Blackstone himself was indebted.[48]

Washington's opinion is an important moment in the history of fundamental rights jurisprudence because it dispenses from any strictly positivist interpretation of such rights, and acknowledges a kind of American *lex non scripta*, which, in many ways, echoes the absolute rights jurisprudence of English law

## V. Can the Government have Fundamental Rights?

Until now we have only read about fundamental rights vesting in the individual person, either by way of his citizenship or because of his intrinsic dignity as a member of the human race. One may be surprised to know that starting in the 1840s there are several cases that see fundamental rights vesting also in the government, which according to several opinions has the fundamental right to appropriate property by means of eminent domain.

---

47 *See, infra* Part VI.

48 *See* Blackstone, *supra* note 16, 127-28. Blackstone considers the absolute rights deeply rooted in ancient English law, both *lex non scripta* (unwritten or common law) and *lex scripta* (written or statutory law). "First, by the great charter of liberties [the Magna Charta], which was obtained, sword in hand, from king John, and afterwards, with some alterations, confirmed in parliament by king Henry the third, his son. Which charter contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law." Following the Magna Carta, these rights were reiterated and further confirmed in the Petition of Right under King Charles I in 1628; by statutory laws, including the Habeas Corpus Act in 1689; by the English Bill of Rights under William and Mary of Orange in 1689; and lastly under the Act of Settlement in 1701 "whereby the crown was limited to his present majesty's illustrious house: and some new provisions were added, at the same fortunate aera [sic], for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England," according to the antient doctrine of the common law."

In *Proprietors of the Cemetery of Spring Grove v. The Cincinnati, Hamilton, and Dayton Railroad Company*[49] the plaintiff sought an injunction barring the railroad from appropriating its land in order to build a railway, arguing that it had been specifically exempted by the legislature from any type of appropriation for public use. The Superior Court of Cincinnati held, however, that such an exemption was void by virtue of the fundamental and ancient law of eminent domain, which preceded any constitution, and which overshadowed all individual rights to private property. Not that the Court disregarded the individual's right to hold private property inviolate; rather, quoting the constitution of Ohio, it states: "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation be made to the owner."[50] It also notes that where there is sovereignty, "two great and fundamental rights exist. The right of eminent domain in all the people, and the right of private property in each. These great rights exist over and above, and independent of all human conventions, written or unwritten."[51] It then eloquently opines:

> I know of no limit to the right of eminent domain. In practice these matters should always be cautiously considered with reference to the wants of the public, as being of greater or less importance, to the nature of the property to be taken, as being of greater or less value. But when decided in the right forum, that the public welfare outweighs the private inconvenience, I know of no article of property so sacred, no rood of ground so holy, that it may not be swept away by the right of eminent domain.[52]

Another right that makes its appearance on the stage of American case law starting around this time is the right that each citizen have, as Judge Read of the Supreme Court of Ohio puts it, his "day in court."[53] This right was already alluded to in *Corfield*[54] (and indeed, is one of the auxiliary absolute rights in Blackstone's Commentaries).[55] It appears in two of Judge Read's dissents from the same year in which he declares that the loss of property without giving the owner the opportunity to appear in court violates a fundamental right.[56]

Similarly, in the 1859 case of *Phelps v. Rooney,*[57] decided in the Supreme Court of Wisconsin, Chief Justice Dixon echoes Judge Read's opinion in a dissent of his own, in which he states, quoting the Wisconsin constitution, that "every person is entitled to a certain remedy in the laws, for all injuries or wrong which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and

---

49 Proprietors of the Cemetery of Spring Grove v. The Cincinnati, Hamilton, and Dayton Company, 1 Ohio Dec.Reprint 316 (1849).

50 *Id.* at 321 (quoting Ohio Constitution, 4th section, Article 8).

51 *Id.* at 320-321.

52 *Id.* at 321.

53 Robb v. Irwin's Lessee, 15 Ohio 689, 711 (1846).

54 *Corfield,* 4 Wash. C.C. at 552.

55 *See,* Blackstone, *supra* note 16, 141-142.

56 *Id.* and Doe ex dem. Heighway v. Pendleton, 15 Ohio 735, 769 (1846).

57 Phelps v. Rooney, 9 Wis. 70 (1859).

without delay, conformably to the always."[58] The Chief Justice declares that this is a fundamental right. He is speaking in this case of the right of the creditor to obtain relief by means of the courts on a debtor's debts and takes issue with the homestead exemptions then in force which incidentally placed certain of the debtor's property outside of the creditor's reach.

Chief Justice Bartley of the Supreme Court of Ohio, in his own dissent in *State ex rel. Evans v. Dudley*,[59] agrees with Judge Read and Chief Justice Dixon with regard to access to the courts, but he adds two other fundamental rights. He states: "The right of suffrage, the right of representation in the General Assembly of the state, and the right to the use of the judicial tribunals for the administration of justice, are fundamental rights guaranteed by the constitution to all the citizens of the state."[60] The right to vote is also mentioned in *Barker v. People*[61] as a fundamental right (along with the right to worship freely and the right to a trial by jury) and was one of the enumerated privileges and immunities in *Corfield*.[62]

## VI. Fundamental Rights and Natural Law

Having discussed some of the enumerated fundamental rights of this era, some of which we had already been familiar, and some which appear to be voiced for the first time in a court opinion, we turn to the question that we introduced at the beginning of this article: what do the courts consider to be the origin of fundamental rights? As we saw earlier, the judges from the early days of our Republic did not shy away from addressing this topic.[63] In a similar manner, some fifty years later, the judges are still willing to proffer an opinion as to the source of fundamental rights.

In the case of *Stokes v. County of Scott,*[64] decided by the Supreme Court of Iowa in 1859, the court addressed the question of whether the counties of Iowa have the constitutional power to subscribe aid for the construction of railroads in the counties. The court declares that allowing the majority to tax the minority for a purpose that is unrelated to the direct ends of government (i.e. welfare and safety of the public) would violate their fundamental rights "which are secured to us by the natural law, and which no legislation can take from us."[65]

What is most interesting about this case is the court's reliance on natural law as the basis of a fundamental right.[66] Although mention of the natural law in connection

---

58 *Id.* at 701 (quoting Wisconsin Constitution, Section 9, Article I.). *See* Magna Carta, *supra* note 37, clause 40. "To no one will we sell, to no one deny or delay right or justice." Sir Edward Coke, commenting on this clause, states that: "any subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the court of law, and have justice and right for the injury done to him, freely without sale, fully without denial, and speedily without delay." Coke, 2 Inst. 55. Also, *see infra* note 118.

59 State ex rel Evans v. Dudley, 1 Ohio St. 437 (1853).

60 *Id.* at 452.

61 Barker v. People, 3 Cow. 686, 706 (1824).

62 *Corfield,* 4 Wash C.C. at 551-552 (1823).

63 *See, e.g., supra* note 24 and note 34.

64 Stokes v. County of Scott, 10 Iowa 166 (1859).

65 *Id.* at 172.

66 The idea of a natural law or a law of nature is as ancient as Western Civilization itself. Edwin S. Corwin. *The "Higher Law" Background of American Constitutional Law.* 42

to fundamental rights in case law is not unheard of, neither is it common, and it is helpful to note that well into the 19th century, courts still referred to the natural law as a source of man's fundamental rights and were willing to apply that law in their judicial opinions.[67]

The Ohio Supreme Court in 1853 expands upon the notion of the natural law being the foundation upon which fundamental rights are built. In *The Bank of Toledo v. City of Toledo*[68] it philosophizes about the origin of the right to private property, stating that:

> The right of private property is an original and fundamental right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are derivative, - mere incidents to the political institutions of the country...Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection -the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property.[69]

---

Harv. L. Rev. 149, 155 (1928). "Building on Socrates' analysis of Sophistic teaching and Plato's theory of Ideas, Aristotle advanced in his *Ethics* the concept of "natural justice."" It was, however, the writings of Cicero that codified the concept of natural law as a part of the West's permanent legal heritage and in which form it was transmitted to the Medieval schoolmen. *See, Id.* at 157-158; J. M. Kelly, A Short History of Western Legal Theory 60-61, (1992). Following the intellectual syntheses of the Middle Ages, the West suffered the trauma of intellectual disunity as a result of the division of Christendom. However, even following the Protestant Reformation the idea of natural law was retained, albeit subjected to widely different interpretations. For example, the Protestant jurists Hugo Grotius and Samuel Pufendorf, uncoupled the natural law from its theological underpinnings and conceived of it as a purely secular law. This prompted Grotius to famously state that even if God did not exist, the natural law would still exist by virtue of man's nature. By the time the United States was founded, the ideas circulating regarding natural law were so splintered that one cannot be sure that two men writing about the natural law meant the same thing at all. Yet despite its varying interpretations, most jurists, and indeed the Founding Fathers themselves, found it expedient to invoke the authority of natural law in order to justify their laws and their acts. *See, e.g.,* Jeffrey D. Jackson. *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights.* 62 Okla. L. Rev. 167, 179-180 (2010) (in which he states that Lockean ideas regarding the natural law were influential in Thomas Jefferson's drafting of the Declaration of Independence). By the 19th century, although appeal to natural law was on the wane it was still applied from time to time in court opinions. *See, infra*, note 65. John Norton Pomeroy, an American jurist and author of "An Introduction to Municipal Law" published in 1864 acknowledges natural law as one of the sources of municipal law. *See,* Smith, *supra* note 1, 230. Interestingly, however, and indicative of this positivistic age, Pomeroy bifurcates natural and municipal law and plainly states that the two, while ideally ought to coincide, in practice never do. He then comes to the astonishing conclusion that when the natural law and municipal law contradict one another, the natural law must give way in favor of the municipal law. *Id.* at 274. Pomeroy thus accomplishes a perfect about-face of the Medieval notion of the supremacy of the natural law!

67 *See, e.g.,* Banse v. Muhme, 7 Ohio C.D. 224 (1897); Hopkins v. Oxley Stave Co., 83 F.912, 929 (1897); Clark v. City of Elizabeth, 61 N.J.L. 565, 623 (1898).

68 The Bank of Toledo v. City of Toledo, 1 Ohio St. 622 (1853).

69 *Id.* at 632. The court's idea that government is a necessary burden placed upon man for the protection of his fundamental rights is highly reminiscent of Blackstone's own

This short passage includes a number of ideas of interest, such as: fundamental rights exist anterior to civil government; they are not bestowed by the government; the purpose of the government (and by extension the U.S. Constitution), is to secure and protect those rights; and finally, the general substance of these rights are the rights of personal security, liberty, and property.

The court employs several different terms in discussing fundamental rights. It calls the right of private property an *original right*. It refers to *common rights* and *natural justice*. Finally, it quotes with approval a speech made by the Irish Member of Parliament Edmund Burke on the occasion of an introduction of a bill by Charles James Fox for the purpose of repealing the charter of the East India Company:

> The rights of MEN, that is to say, the natural rights of mankind, are indeed sacred things; and if any public measure is proved mischievously to affect them, the object ought to be fatal to that measure, even if no charter at all could be set up against it...The charters, which we call by distinction great, are public instruments of this nature; I mean the charters of King John and King Henry the Third. The things secured by these instruments may, without any deceitful ambiguity, be very fitly called the chartered rights of men. These charters have made the very name of a charter dear to the heart of every Englishman.[70]

Notice the allusion, again, to the Magna Carta, the reference to the natural rights of men, and to the rights of Englishmen.

Aside from opinions that the natural law is an origin of fundamental rights, another prevalent notion in early case law is that the English common law is the source and guarantor of such rights. Thus, as we saw in *Zylstra*, Judge Waites refers to the trial by jury as a common law right.[71] Again, in the case *Harris,* we saw that the court declared that the right to petition for a redress of grievances was a fundamental right, based on the common law of England, and codified first by English Parliament and later by the law of Vermont.[72] Finally, in *People v. Goodwin*[73] the Supreme Court of New York, treating of the principle of double jeopardy, refers to it as "a fundamental one of the common law" and notes that Blackstone grounds this universal maxim in the common law of England.[74]

This notion of the common law as a source of ancient rights was popular among the generation in which the Constitution was framed.[75] It was likewise shared by our

philosophical theory concerning the origin of government. *See* Blackstone *infra*, note 83.

70 *Id.* at 634-635 (From speech made by Edmund Burke to Parliament, 1783).

71 *Zylstra,* 1 S.C.L. at 388-389. (1794)….

72 *Harris,* 2 Tyl.129, 1802 WL 777 at 143 (Vt.1802).

73 People v. Goodwin, 1 Wheeler C.C. 470, 18 Johns. 187. N.Y. Sup. 1820.

74 *See* Blackstone, *supra* note 16, IV, 335.

75 *See, e.g.,* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev at 170 (noting that Thomas Jefferson quaintly theorized that the American constitutional system only restored to mankind the long lost polity of Anglo-Saxon England); Jeffrey D. Jackson, *Blackstone's* Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights, 62 Okla. L. Rev. 167 (noting that many of the proposed rights that would later find their way into the American Bill of Rights had a long pedigree in English law).

English counterparts, who considered the common law as having a transcendental quality.[76] John Neville Figgis well summarized the veneration afforded the common law in his book *The Divine Right of Kings*:

> The Common Law is pictured invested with a halo of dignity peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the Law of nature implanted by God in the heart of man. As yet men are not clear that an Act of Parliament can do more than declare the Common Law. It is the Common Law which men set up as an object of worship. They regard it as the symbol of ordered life and disciplined activities, which are to replace the license and violence of the evil times now passed away. ... The Common Law is the perfect ideal of Law; for it is natural reason developed and expounded by a collected wisdom of many generations... Based on long usage and almost supernatural wisdom, its authority is above, rather than below that of Acts of Parliament or royal ordinances which owe their fleeting existence to the caprice of the King or to the pleasure of councilors, which have a merely material sanction and may be repealed at any moment.[77]

The understanding of the English common law shared by the Founding Fathers and early jurists was primarily obtained from two sources: Sir Edward Coke's Institute of the Laws of England and Sir William Blackstone's Commentaries on the Laws of England.[78] These authors personified to the Founding Fathers that ancient English legal tradition that was the basis and origin of the American legal system. Coke and Blackstone were assiduously studied by law student and lawyer alike in 18th century America and as a result were inextricably intertwined with the DNA of the American legal tradition.[79]

---

[76] Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 Harv. L. Rev. at 171 (stating that the notion that the common law embodied decisions based upon right reason by wise judges furnished its chief claim to be regarded as higher law and eventually gave rise to the principle of *stare decisis* in the English common law system). The idea that the common law is an unerring guide for dealing with legal questions is due to the immense respect the English showed to their judges, believing as it were that these judges poured all of their erudition and contemplation into their decisions. As Blackstone notes: How are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes* [twenty years of burning of the midnight oil]," which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principle and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. *See* Blackstone, *supra* note 16, 69.

[77] John Neville Figgis, The Divine Right of Kings 228-30 (2d ed. 1914) (1896)..

[78] Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. at 200.

[79] *Id.* at 201-203. *See also, infra* notes 116 and 118 (in which it is shown that a clause in the Wisconsin Constitution is essentially an exact reproduction of a passage in Sir Edward Coke's Institutes).

This review of early American case law yields two answers to our question regarding what sources the courts turned to in order to discover and articulate fundamental rights. The first that we encountered was the natural law. As stated earlier, however, pinning down the exact contours and philosophical bases of this law in early American thought is a protean battle. The unitary concept of natural law present in the ancient and medieval worlds was largely shattered by the modern era and did not carry the same *gravitas* for judicial lawmaking in the 19th century as it had in earlier centuries.[80]

The second source of fundamental rights that we encountered was the English Common Law, as especially understood through the writings of Sir Edward Coke and Sir William Blackstone. To this can be added the Magna Carta, as well as a flurry of other documents that sought to protect certain fundamental rights and were integrated into the common law. These include: the Petition of Rights of 1628, the Habeas Corpus Act of 1679, the English Bill of Rights of 1689, the Toleration and Mutiny Acts of 1689, and the Settlement Act of 1701.[81] Some of the fundamental rights mentioned in these documents were enshrined in the American Bill of Rights and 1791 and have been the bulwark fundamental rights in our country ever since.[82]

It would be a mistake, however, to view these two sources of fundamental rights as mutually exclusive of one another. Blackstone sees natural rights as begetting and supporting the common law. In his treatment of the Absolute Rights of Individuals he begins by explaining that:

> By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.[83]

These rights are, therefore, instilled in man by nature, and are antecedent to society and government. They are, indeed, one of the gifts of God, as he explains:

---

[80] *See, e.g.,* Thomas Paine, The Rights of Man (1791). Writing in the 18th century, Paine's argument for the transformation of the world order rests upon the natural rights of man. Posing the question as to how man came by these rights, he answers: The error of those who reason by precedents drawn from antiquity, respecting the rights of man, is, that they do not go far enough into antiquity. They do not go the whole way. They stop in some of the intermediate stages of an hundred or a thousand years, and produce what was then done, as a rule for the present day. This is no authority at all. If we travel still farther into antiquity, we shall find a direct contrary opinion and practice prevailing; and if antiquity is to be authority, a thousand such authorities may be produced, successively contradicting each other: But if we proceed on, we shall at last come out right; we shall come to the time when man came from the hand of his Maker. What was he then? Man. Man was his high and only title, and a higher cannot be given him...We are now got at the origin of man, and at the origin of his rights.

[81] *See,* Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. 305 n.76.

[82] *See, generally* F. Mcdonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 9-55 (1985); H. Taylor, The Origin and Growth of the American Constitution 230-43, (1911).

[83] *See* BLACKSTONE, *supra* note 16, 123.

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will.[84]

Blackstone, however, considers this natural liberty to be in a vulnerable state without the protection of government, and therefore observes:

> But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.[85]

In this last passage, Blackstone betrays a Rousseauian impulse, seeing society as taking away a part of man's natural liberty as the price for bestowing its benefits. Thomas Paine, in his *Rights of Man*, expresses similar sentiments, but is less willing than Blackstone to compromise those natural rights of man as the price of better protection. He writes:

> Man did not enter into society to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights. But in order to pursue this distinction with more precision, it will be necessary to mark the different qualities of natural and civil rights. A few words will explain this. Natural rights are those which appertain to man in right of his existence. Of this kind are all the intellectual rights, or rights of the mind, and also all those rights of acting as an individual for his own comfort and happiness, which are not injurious to the natural rights of others. - Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection. From this short review, it will be easy to distinguish between that class of natural rights which man retains after entering into society, and those which he throws into the common stock as a member of society. The natural rights which he retains, are all those in which the *power* to execute is as perfect in the individual as the right itself. Among this class, as is before mentioned, are all the intellectual rights, or rights of the mind: consequently, religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. They answer not his purpose. A man, by

---

84 *Id.* at 125.

85 *Id.*

> natural right, has a right to judge in his own cause; and so far as the right of mind is concerned, he never surrenders it: But what availeth it him to judge, if he has not the power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. Society *grants* him nothing. Every man is a proprietor in society, and draws on the capital as a matter of right.[86]

Blackstone, therefore, like Paine, finds the bases of absolute rights in the natural law as endowed by the Creator of the Universe. However, he does not end his discussion there, but proceeds to explain the role of the English common law in articulating and securing these rights:

> The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject.[87]

Blackstone then contrasts the "nearly perfect" English system of law and government with the arbitrary and despotic power of Continental Europe, which tramples upon the fundamental rights of human beings.[88] He then explains that:

> The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. Sometimes we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.[89]

Therefore, for Blackstone it is not a question of whether fundamental rights proceed from the natural law or the common law. Both laws taken together form the

---

86 *See* Paine, *supra* note 78.

87 *See* Blackstone, *supra* note 16, 126-127.

88 *Id.* at 127. "Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of imperial law; which in general are calculated to vest and arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees."

89 *Id.*

backbone of the absolute rights of Englishmen. While the natural law endows man with fundamental rights, the English common law protects those rights and gives them legal effect. Without the common law, the natural rights would still exist, but there would be no way of securing them in practice or arbitrating them. In order to properly understand the thinking of the early American courts when it comes to fundamental rights, it is necessary to appreciate this rich texture of legal thought that Blackstone articulates so well in this section of the Commentaries and which most likely comprises the intellectual milieu in which the early judges of America were situated.

## VII. The Statistical Frequency of Specific Rights

In this next part we will step back a moment from the individual cases that we have reviewed and look at the specific enumerated fundamental rights mentioned by the courts, their frequency, and their correlation, if any, to the great Anglo-American legal documents: the Magna Carta, the English Bill of Rights, and the American Bill of

Rights. We will also note whether the fundamental rights mentioned in American case law were deemed absolute rights in Blackstone's Commentaries.

First, it would be helpful to conduct a statistical analysis of early American case law in order to better understand the general layout of the terrain between the period of *Kamper v. Hawkins* in 1793 (the first mention of the term fundamental right), and the latest case that we reviewed, *Stokes v. Scott County* in 1859, just two years prior to the Civil War. The following chart shows the frequency per decade in which the term "fundamental right" appears in a court opinion:[90]

1790-1799: 3
1800-1809: 4
1810-1819: 3
1820-1829: 7
1830-1839: 5
1840-1849: 8
1850-1859: 18
1860-1869: 29
1870-1879: 65
1880-1889: 110
1890-1899: 190

As can be deduced from reviewing the chart, the term was very scarce during the first 60 years of American jurisprudence. During the 1850s it began to pick up

---

[90] These statistics have been generated by searching for the exact term "fundamental right" in the Westlaw database between the relevant years. Such a calculation prior to computerized databases would have been well-nigh impossible.

some steam, and after the Civil War it was not infrequently mentioned. As might be guessed, the term continued on its path of increasing popularity, and in the 1990s was mentioned an astounding 11,308 times. This makes the current endeavor somewhat challenging given the paucity of fundamental rights language. However, the rarity of the term is somewhat balanced out by the privileged place that early American case law should hold in legal theory.

The mentions of fundamental rights in the U.S. Supreme Court opinions of the first half of the 19th century are scarcer still, with only one occurrence, excluding *Corfield*.[91] Most of the cases that directly address fundamental rights are at the state level, with New York, Kentucky, Pennsylvania, and Ohio being those states with the most frequent mention between 1789-1859. As for the most frequently mentioned specific fundamental rights, they are: private property (6);[92] access to the courts (5);[93] the right to a trial by jury (4);[94] the right to vote (3);[95] freedom of religion (1);[96] the right to petition for redress of grievances (1);[97] freedom of the press (1);[98] expatriation (1);[99] the government's right to exercise eminent domain (1);[100] the right of representation (1);[101] the right to sell goods (1);[102] the right to personally file suit for a distinct claim (1);[103]the right to travel and change residency (1);[104] the right to petition for Writ of Habeas Corpus (1);[105] equal protection with regard to taxation (1);[106] and the right to assemble (1).[107] The general fundamental rights of life, liberty, or security, are also mentioned a few times.

Conspicuously absent in this list is mention of the right to bear arms, the right against unreasonable searches and seizures, the right not to be subjected to cruel or unusual punishments, and the right to privacy. We can say conspicuously because the first three are explicitly enumerated in the Bill of Rights, and the last one is pervasive in late 20th century case law. We can now look and see which of the fundamental rights mentioned above are found in some form in the Magna

---

91 *Green*, 21 U.S. 1 (1823).

92 *Corfield,* 4 Wash C.C. 371; Eakin v. Raub, 1825 WL 1913 (1825); *Spring Grove,* 1 Ohio Dec.Reprint 316 (1849); *Stokes,* 10 Iowa 166 (1859); Robinson v. New York & E.R. Co., 27 Barb. 512 (1858); *Bank of Toledo,* 1 Ohio St. 622 (1853).

93 *Corfield,* 4 Wash C.C. 371; *Robb,* 15 Ohio 689 (1846); *Heighway*, 15 Ohio 735 (1846); *Phelps,* 9 Wis. 70 (1859); *Evans,* 1 Ohio St. 437 (1853).

94 Frost v. Brown, 2 Bay 133 (1798); *Zylstra,* 1 Bay 382 (S.C. 1794); *Green,* 21 U.S. 1 (1823); *Barker,* 3 Cow. 686 (1824).

95 *Corfield,* 4 Wash C.C. 371; *Barker,* 3 Cow. 686 (1824); *Evans,* 1 Ohio St. 437 (1853).

96 *Barker,* 3 Cow. 686 (1824).

97 *Harris,* 1802 WL 777 (1802).

98 *Croswell,* 3 Johns. Cas. 337 (1804).

99 *Juando,* 13 F. Cas. 1179 (1818).

100 *Spring Grove,* 1 Ohio Dec.Reprint 316 (1849).

101 *Evans,* 1 Ohio St. 437 (1853).

102 Wynehamer v. People, 2 Parker Crim. Rep. 490 (1856).

103 Merrill v. Lake, 16 Ohio 373 (1847).

104 *Corfield,* 4 Wash.C.C. 371 (1823).

105 *Id.*

106 *Id.*

107 State v. Walker, 8 West. L.J. 145 (1850).

Carta or English or American Bill of Rights.[108] In order to better visualize these correspondences, it may help the reader to refer to Table A.

First, we begin by looking at one of the most commonly cited fundamental rights in early American case law, the right to a trial by jury. Cited four times by court in the first 70 years, it has proven to be one of the most commonly researched and cited rights in the American legal system.[109] Corwin, noting the presence of this right in the Magna Carta, says that "for the history of American constitutional law and theory no part of the Magna Carta can compare in importance with clause twenty-nine."[110] That clause reads:

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.[111]

---

108 Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. at 380. "From...the Magna Carta, through the English Declaration and Bill of Rights of 1688 and 1689, to the Bill of Rights of our early American constitutions the line of descent is direct." The Magna Carta, or great Charter, has almost a mythical grandeur in Anglo-American legal history. *Id.* at 175 (stating that the constitutional fathers regarded the Magna Carta as having been from the first a muniment of English liberties, largely owing to the revival of respect for the Magna Carta initiated by Sir Edward Coke). Coke states in his Institutes of the Laws of England: "It is called Magna Charta, not that it is great in quantity, for there be many voluminous charters commonly passed, specially in these later times, longer then this is; nor comparatively in respect that it is greater than Charta de Foresta, but in respect of the great importance, and weightiness of the matter." Coke, Inst., 2nd Part. Although the Magna Carta was originally somewhat limited in scope, "the range of classes and interests brought under its protection widened, its quality as higher Law binding in some sense upon government in all its phases steadily strengthened until it [became] possible to look upon it in the fourteenth century as something very like a written constitution in the modern understanding." Corwin, *supra* note 108, at 177. "Thus the vague concept of "common right and reason" is replaced with a "law fundamental" of definite content and traceable back to one particular document of ancient and glorious origin." *Id.* at 378. The English Bill of Rights, passed by Parliament in 1689 and laid down to protect English liberties (or more accurately Protestant English liberties), also stands as a foundational document in Anglo-American constitutional law. The document was not perceived to have created new rights, but rather to have reinstated rights native to Englishmen and purportedly lost temporarily under the reign of the Catholic sovereign James II. *See* Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 Okla. L. Rev. at 176-177. As Blackstone notes, the Bill ended with these words: "and they do claim, demand, and insist upon, all and singular the rights and liberties asserted and claimed in the said declaration to be the true, antient, and indubitable rights of the people of this kingdom." *See* Blackstone, *supra* note 16, 128. Finally, we come to the American Bill of Rights of 1791, obviously the most important document in American jurisprudence pertaining to fundamental rights. As has been noted by scholars, however, this document is not wholly original, and echoes in many ways the English Bill of Rights of a hundred years earlier. *See, e.g.,* Jackson, *id*. at 192-193 (noting that many of the rights included in the American Bill of Rights were also included in the English Bill of Rights, such as the right to petition for redress of grievances and the right to bear arms). Therefore, it is reasonable to conclude that the American Bill of Rights was partially modeled on and developed from its English predecessor.

109 A search under the term "jury trial" in the Harvard Libraries turns up 2,412 titles, compared with 1,793 for "right to privacy", 960 for "bear arms", and 330 for "right of worship."

110 Corwin, *supra* note 108, at 176. (1928).

111 *See* Magna Carta, *supra* note 37, clause 39. This famous clause is known variously as

This cherished right, though absent in the English Bill of Rights, appears three times in the U.S. Constitution. First in Article III, Section 2:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.[112]

In the Fifth Amendment of the Bill of Rights:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[113]

And in the Seventh Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[114]

James Madison finds the origin of this right in the positive rather than the natural law, but nevertheless states that the right to a trial by jury is "as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[115] And as we saw above, the early courts of America were by no means ignorant of the fundamental nature of this right and its ancient pedigree in Anglo-American law.[116]

Another fundamental right commonly cited in early American case law is the right to have free access to the courts, both to seek redress of wrongs and to defend oneself from criminal or civil accusation. This right was cited six times in the 70 year period that we covered and appeared also in Bushrod Washington's list of fundamental rights in *Corfield*.[117] For example, Chief Justice Dixon on a motion for rehearing which was denied in the case *Phelps v. Rooney*, filed a dissenting opinion citing the Wisconsin state constitution:

> The constitution itself [declares] as a fundamental right that "every person is entitled to a certain remedy in the laws, for all injuries or wrongs which

---

clause 29 or clause 39 depending on which version of the Magna Carta is being referred to. The original Magna Carta published in 1215 had this law as clause 39, but later version has it as clause 29.

112 U.S. Const. art. III, §2.

113 *Id.,* Amendment V.

114 *Id.,* Amendment Vii.

115 Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 Hastings L.J. Footnote 47, Quoting 1 Annals of Cong. 454 (J. Gales & W. Seaton ed. 1836) (remarks by Elbridge Gerry).

116 *See, e.g.,*1 S.C.L. at 388-89. (1794).

117 *Corfield,* 4 Wash. C. C. 371 at 552 (1823).

> he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and with delay, conformably to the laws."[118]

This is, in essence, an elaboration on the very brief, but fundamental clause in the Magna Carta which reads: To no one will We sell, to none will We deny or delay, right or justice.[119] This right, unlike that of a right to a jury trial, is not explicitly mentioned in the American Constitution. Nonetheless, it appears to be a mainstay of Anglo-American fundamental law, and Blackstone even takes notice of it in his Commentaries when he refers to it as one of the subordinate rights without which the absolute rights of Englishmen would be dead letters.[120]

Next is a right akin to the free access of the courts, that is the right to petition the government for a redress of grievances, a fundamental right which, significantly, appears in every single document reviewed in this section. It is also in Blackstone's commentaries.[121] It appears in a rudimentary form in clause 52 of the Magna Carta:

> If anyone has been disseised or deprived by Us, without the legal judgment of his peers, of lands, castles, liberties, or rights, We will immediately restore the same, and if any dispute shall arise thereupon, the matter shall be decided by judgment of the twenty-five barons mentioned below in the clause for securing the peace.[122]

The right is repeated in a more succinct form in the English Bill of Rights which reads:

---

[118] *Phelps,* 9 Wis. 70 (1859). In the former edition this opinion was published in the 12th volume of Reports, pages 699 to 715 inclusive. This passage is from page 701 and cites the Wisconsin Constitution Sec. 9, Art. I. The language of this section in Wisconsin's Constitution does not seem to be directly modeled on that of the Magna Carta, but rather on Sir Edward Coke's Institutes. *See infra* note 118.

[119] *See,* Magna Carta, *supra* note 37, clause 40.

[120] "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*, spoken in the person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam:* "and therefore, ever subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." *See,* Blackstone, *supra* note 16, 141 (Citing Coke, 2 Inst. 55.).

[121] "If there should happen any uncommon injury, or infringement of the rights before-mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house or parliament, for the redress of grievances." *See* Blackstone, *supra* note 16, 143.

[122] *See,* Magna Carta, *supra* note 37, clause 52.

> It is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.[123]

And again, in the First Amendment of the American Bill of Rights:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[124]

Finally, as we saw above, early American case law pays tribute to this fundamental right,as when the court in *Harris* proclaimed:

Our *English* ancestors have ever held the privilege of petitioning the King and Parliament for redress of grievances as an inherent right.[125]

Not every right in the Magna Carta or the English and American Bill of Rights is mentioned as a fundamental right in early American case law. Contrariwise, not every right deemed fundamental in early case law appears explicitly in these three documents. For example, the Magna Carta and the English and American Bill of Rights include provisions barring excessive punishment.[126] However, there are no explicit declarations in early American case law addressing this fundamental right. Likewise, the right to bear arms appears in the English and American Bill of Rights, and even in Blackstone's Commentaries, but is not spoken of in the first 70 years of American case law as a fundamental right.[127] Not too much ought to be read into these omissions, since as we saw earlier, early case law is relatively scant regarding explicit fundamental rights, and it is unlikely that the early courts would have had occasion to review and decide upon every possible fundamental right of the Anglo-American tradition.

Similarly, there are a number of fundamental rights mentioned in early case law that do not appear in one or more of these monumental documents. For example,

---

[123] English Bill Of Rights, Article 5.

[124] U.S. Const. amend. I.

[125] *Harris,* 2 Tyl.129, 1802 WL 777, 140-141 (Vt.1802).

[126] "A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy."*See,* Magna Carta, *supra* note 37, clause 20. "Excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." English Bill of Rights, Article 10. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[127] That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." English Bill of Rights, Article 7. "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2, and it is indeed, a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *See* Blackstone, *supra* note 16, 143-144.

the right to vote is mentioned as a fundamental right in *Barker v. People,*[128] *State ex rel. Evans v. Dudley,*[129] and *Corfield v. Coryell,*[130] but is not found in the Magna Carta or the English Bill of Rights. Also, the right to religious freedom is mentioned as fundamental in *Barker* and is in the U.S. Constitution, but is conspicuously absent in the great English documents.[131] Neither of these omissions in the English documents are surprising. The right to vote is the cornerstone of the American system of government. It distinguished the American democracy from the British monarchy. Likewise, English law did not appreciate the freedom of religion until much later.[132]

Therefore, it can truly be said, fundamental rights law in early America, though deeply rooted in the Anglo-American legal tradition was not identical to this ancient inheritance. The rights protected by the Magna Carta and English common law were also rights protected by the American courts and Constitution, but they were not exhaustive of American's fundamental rights. The American Bill of Rights, in particular, not only *added* to the Anglo-American tradition, but in some ways even *altered* it.[133] It would be going too far to simply say that American fundamental rights law is the logical development of English fundamental law; there were some aspects of the ancient English laws incompatible with the American Constitution. It would be more accurate to say that the establishment of the United States of America marked a decisive watershed moment in the English legal tradition, a moment in which our country adopted the English fundamental law tradition, but then spun it in a distinct direction. Therefore, when it comes to interpreting fundamental rights already present in the ancient English legal tradition, utilization of this tradition is helpful in better understanding the origin and intended breadth and purpose of these rights. On the other hand, when attempting to interpret rights entirely unknown to this tradition, such as the right to the freedom of worship, a different sort of approach needs to be used.

---

[128] *Barker,* 3 Cow. 686 at 706 (1824).

[129] *Evans,* 1 Ohio St. 437 at 452 (1853).

[130] *Corfield,* 4 Wash. C. C. 371 at 552 (1823).

[131] *Barker,* 3 Cow. 686 at 706 (1824).

[132] Catholics, for example, were highly disfavored under the law until the Catholic Relief Act of 1829 and even to this day a Catholic is forbidden from assuming the royal throne.

[133] Even during Blackstone's time, the Freedom of Religion was not recognized as a fundamental right under English law. For example, in his chapter on Public Wrongs he comments upon the restrictive religious laws of England, both old and new. He explains that although non-conformity to the worship of the Established Church need not be rigorously prosecuted, nevertheless "care must be taken not to carry this indulgence into such extremes, as may endanger the national church." *See* Blackstone, *supra* note 16, IV, 51-52. Nevertheless, he shows much greater intolerance towards Roman Catholics, who he labels "Papists", and of whom he remarks that as long as they acknowledge the Pope as the Head of the Church, the laws laid upon them will be enforced with rigor. *Id. at* 54. This includes being prohibited from holding office or employment; keeping arms in their houses; coming within ten miles of London on pain of a 100 l. fine; bringing any action at law or suit in equity; traveling above five miles from home, unless by license, upon pain of forfeiting their goods; and coming to court under pain of a 100l. fine. *Id.* at 55.

## VIII. Conclusion

A voyage through early American fundamental rights case law is both illuminative and rewarding. Although practically none of these decisions are of consequence for establishing the present-day state of law, they are invaluable resources for getting to know the mental processes of our early courts and to connect the dots between our fundamental rights law and that of the ancient Anglo-American legal tradition. It is difficult to arrive at any hard and fast conclusions simply from the few cases covered here, but there is enough consistency and cohesion among them that I do not think it is untoward to at least propose a few affirmations.

For one thing, it is abundantly clear that the early American courts were not working in a vacuum of political and legal thought. As mentioned earlier, many of them were well acquainted with Sir Edward Coke and Sir William Blackstone, and many times consciously adopted their thinking and even their exact words into their own judicial decisions. The fundamental or absolute rights delineated by these two towering figures played no small role, not only in the early court system, but in the drafting and promulgation of the Declaration of Independence and U.S. Constitution. In looking at the Constitution we behold not just the creative product of late 18th century colonial philosophers and statesmen, but an accumulation of sundry rights gleaned from nearly a millennium of English experience. This experience was the foundation that gave shape and form to the Constitution.

From this first assertion, a second one can be deduced, namely, the early American courts considered fundamental rights law to be bounded and defined by something beyond themselves. The judges were extremely conscious of being a part of the great Anglo-American legal tradition, and when the legal question presented before them entailed some issue of fundamental importance, they easily and without hesitation turned to the Magna Carta, the English or American Bill of Rights, Coke, Blackstone, or anything else they deemed representative of this tradition to support and guide their opinion. Additionally, some judges were perfectly comfortable invoking the natural law when devising their opinions, and recognized this higher law as a sure basis for elucidating certain rights that belonged to all men. No court considered itself the dispenser of these rights and no court apparently felt itself authorized to make up new fundamental rights.

This leads us to a final point. Although Bushrod Washington states that the fundamental rights are more tedious than difficult to enumerate, it is quite clear that such rights can not be multiplied *ad infinitum*. Even Washington's list itself is fairly uncreative and for the most part adopts those rights already well known to exist in English law. So what are these rights? Are they established once and for all, or is it possible to develop new rights from the preexisting ones? Or is it perhaps possible to create entirely new rights, without precedent, simply by appealing to the "spirit" of the Anglo-American tradition. It is useful at this juncture to point out three things.

First, the fundamental rights of Americans must be *finite in number*. If everything becomes a fundamental right, then the sense of the word "fundamental" loses its meaning altogether. Judging from early case law and the great Anglo-American documents, the fundamental rights are relatively few and appear to revolve in one way or another around the general rights of life, liberty, and property.

Second, these rights are *discoverable* from the ancient sources. Fundamental rights are not rights that lie dormant for centuries only to surprisingly and spontaneously appear at a convenient moment of social upheaval or controversy.

Therefore, any scholar or judge interested in the question of fundamental rights would do well to become acquainted with the ancient tradition of Anglo-American fundamental law, and when interpreting the Constitution must not lose sight of the fact that this document is only one in a tradition of similar documents, and can only rightly be understood when placed within this context.

Third, fundamental rights are *nameable*. This may seem like an obvious observation, but if conjoined with the two assertions above, it leads one to the recognition that early fundamental rights case law is relatively modest in its ambitions. The fact that fundamental rights can be named, defined, and applied, and furthermore, that the same rights are usually revisited time and again, leads one to the conclusion that fundamental rights law must not become a nebulous field of ambiguous formulas and tests and hollow speculations. Compared to the vast and complicated morass of modern fundamental rights jurisprudence, the ancient Anglo-American legal tradition's view of fundamental rights is fairly cut and dry. This tradition sees the Magna Carta and English common law as the fount of these rights. It considers the American Bill of Rights as an indispensable supplement. Finally, it may look to the natural law from time to time to better understand the exact contours of this tradition. However, even though many are the sources that one may consult to better understand what these fundamental rights consist of, the actual rights remain easily identifiable by a cursory look at the monumental documents of Anglo-American law: the right to trial by jury, access to the courts, the freedom of religion, due process, the right to petition for grievances, the right to have punishment proportionate to the crime, and several more which can be found on the table. The early American courts rarely venture beyond these, and if they do, it is usually a right already present in Blackstone or some other facet of the ancient common law.

A modest ambition is the best way to describe early American fundamental rights law. Compared to the ever-burgeoning fundamental rights litigation in contemporary courts, the Founding Fathers, and the early courts that interpreted them, were far more limited in their scope. The individual States, like the ancient Sovereign of England, were given great leeway in enacting laws and regulating the lives of their citizens. It was bounded by natural law and the great protections of the Anglo-American legal tradition. These protections may be variously qualified as fundamental rights, absolute rights, or privileges and immunities. The specific content of these rights did not change a great deal from age to age. Beginning with the Magna Carta, until the founding of the American Republic, their scope, though deemed absolute, was relatively narrow. With the passage of the American Bill of Rights their application was somewhat widened, but hardly overturned or left as an open book. If anything is discoverable, it is discoverable because it is already couched in this tradition. The early case law confirms this, and lends credence to the theory that fundamental rights law must tend towards *originalism* in its interpretation, meaning, it must look to the origins of American fundamental rights in order to properly interpret its meaning for today. This task, though perhaps a laborious one, has the advantage that it is in conformity with the path initially struck by the early fathers of our judicial system.

Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0005

DE G DE GRUYTER OPEN

# The Holmes Truth: Toward a Pragmatic, Holmes-Influenced Conceptualization of the Nature of Truth

Jared Schroeder*
*Southern Methodist University, Dallas, Texas*

## ABSTRACT

*Truth as a fundamental ingredient within the flow of discourse and the application of freedom of expression in democratic society has historically received considerable attention from the U.S. Supreme Court. Many of the Court's central precedents regarding First Amendment concerns have been determined by how justices have understood truth and how they have conceptualized the complex relationship truth and falsity share. Despite the attention truth has received, however, the Court has not provided a consistent understanding of its meaning. For these reasons, this article examines how the Supreme Court has conceptualized truth in freedom-of-expression cases, ultimately drawing upon the results of that analysis, as well as pragmatic approaches to philosophy, the so called "pragmatic method" put forth by American philosopher William James, to propose a unifying conceptualization of truth that could be employed to help the Court provide consistency within its precedents regarding the meaning of a concept that has been central to the Court's interpretation of the First Amendment since, in many ways, another pragmatist and friend of James's, Justice Oliver Wendell Holmes, substantially addressed truth in his dissent in* Abrams v. United States*. The article concludes by proposing that the courts conceptualize the nature of truth via three substantially related understandings: that truth is a process, that it is experience-funded, and that it is not absolute and is best approached without prejudice. Each of the three ingredients relates, at least to some extent, with thematic understandings put forth by the Court in previous freedom-of-expression cases, and therefore does not represent a significant departure from justices' traditional approaches to truth. The model, most ideally, does seek, with the help of pragmatic thought and ideas put forth by Justice Holmes, to encourage consistent recognition of certain principles regarding truth as justices go about considering its nature in First Amendment cases.*

## KEYWORDS

*First Amendment; Truth; Pragmatism; Holmes; Supreme Court.*

## CONTENTS

I. Pragmatism ........ 173
A. Pragmatism as Method........ 174
B. Toward Pragmatically Discerned Truth ........ 176

* Jared Schroeder is an assistant professor of journalism at Southern Methodist University in Dallas, Texas. He is the author of The Press Clause and Digital Technology's Fourth Wave.

(cc) BY-NC-ND © 2018 Jared Schroeder, published by De Gruyter Open.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

II. The Holmes Truth ....................177
A.The Mirage of Absolute Truth ....................177
B. Becoming a "Bettabilitarian" ....................179
C. Labor and Socialist Unrest ....................180
D. The Unpublished Dissent ....................181
E. The Three Sedition Cases ....................182
F. The Best Test of Truth ....................184
G. Final Dissents ....................185
III. Truth and the Court After Holmes ....................187
A. Pennekamp v. Florida ....................189
B. Beauharnais v. Illinois ....................190
C. New York Times v. Sullivan ....................192
D. Cox v. Cohn ....................192
E. Philadelphia Newspapers v. Hepps ....................193
F. United States v. Alvarez ....................194
IV. Analysis ....................195
A. The Value of Free Debate as a Public Good ....................195
B.The Provisional and Contingent Nature of "Truth" ....................197
C. Communication as a Social Process ....................199
V. Proposing a Unified Conceptualization of Truth ....................201

The concept of truth as an integral component in the exercise of discourse and freedom of expression in democratic society has historically received considerable attention from the Supreme Court. Many of the Court's pivotal decisions regarding First Amendment concerns have been determined by how justices have conceptualized truth and how they have understood the complex connection truth and falsity share in free debate.[1] Concerns regarding truth and protections for truthful statements have received so much attention that it would be easy to conclude that the matter is settled – the First Amendment in nearly all instances protects truthful statements. Such a conclusion, however, only identifies the central role of truth in discourse. It does not address the question of how justices have understood truth or the *nature* of truth in the sense that how justices conceptualize what truth is, in a philosophical sense, will influence how the Court rules within a variety of areas of First Amendment law. The lack of clarity regarding the nature of truth within the Court's jurisprudence, despite there being a relatively clear protection for truthful statements, can be compared with the statement that the First Amendment does not protect obscene content.[2] The Court has consistently upheld this conclusion, though the challenge of defining *what* constitutes obscenity persists.[3] Similarly, the Court has consistently emphasized the centrality of truth in communication in democratic society, but has not provided a consistent understanding of its meaning.

Importantly, consistently identifying that the First Amendment protects truthful speech is not the same as exploring the Court's philosophical conceptualizations regarding the meaning of truth in an effort to both identify the reasons that justices have used to rationalize conclusions in truth-focused cases and to consider a potentially unifying model for how justices could understand truth, thus potentially providing greater consistency in their rulings.[4] After all, the Court has constructed tests in areas such as threatening speech toward the government,[5] obscenity,[6] and advertising regulation,[7] for example, but has not constructed a consistent approach to evaluating matters of truth and falsity, and their merits as contributors to communication in a democratic society. Such a concern has been highlighted

---

1 *See* Abrams v. United States, 250 U.S. 616 (1919); Near v. Minnesota, 283 U.S. 697 (1931); Thornhill v. Alabama, 310 U.S. 88 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Dennis v. United States, 341 U.S. 494 (1951); Burstyn v. Wilson, 343 U.S. 1952; Roth v. United States, 354 U.S. 476 (1957); New York Times v. Sullivan, 376 U.S. 254 (1964); Columbia Broadcasting System v. Democratic Nat'l Committee, 412 U.S. 94 (1973); Cox v. Cohn, 420 U.S. 469 (1975); Hustler v. Falwell, 485 U.S. 46 (1988) for examples.

2 Miller v. California, 413 U.S. 15 (1973).

3 Cass Sunstein, *Pornography and the First Amendment*, 1986 Duke L.J. 589, 591-593 (1986). Prior to the Miller Test, Justice Potter Stewart expressed his frustration with defining obscenity when he wrote, "I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description and perhaps I could never succeed intelligibly doing so. But I know it when I see it," Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

4 Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 112 (1962); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 Social Networks 16, 16 (2008).

5 Brandenburg v. Ohio, 395 U.S. 444 (1969).

6 Miller v. California, 413 U.S. 15 (1973).

7 Central Hudson Gas & Electric v. Public Service Comm., 447 U.S. 557 (1980).

in relatively recent decisions as justices have devoted portions of opinions to justifications of protections of truth and reciprocal concerns regarding falsity.[8] Whilst justices have ardently defended the rights of individuals to communicate truthful statements, whether writing the opinion of the Court, a concurrence, or a dissent, they have at times disagreed widely regarding the nature of truth. In *United States v. Alvarez* for example, justices disagreed substantially regarding the Stolen Valor Act, a law that criminalized false statements about having earned military honors. Justice Samuel Alito, in a dissent that was joined by two other justices, concluded false claims such as those made by Xavier Alvarez, "possess no intrinsic First Amendment value" and therefore should not be protected.[9] Justice Anthony Kennedy, writing for the Court, framed truth as something that develops through discourse, concluding, "society has a right and civic duty to engage in open, dynamic, rational discourse."[10] The ways that the two justices understood the nature of truth influenced their positions in the case's outcome. Justice Kennedy referred to an emergent form of truth, subjective and the result of experience. Justice Alito referred to a more universal form of truth, pre-existent and absolute.

The Court has traditionally focused justifications for interpreting the First Amendment as protecting certain forms of truthful or less-than-truthful speech, rather than taking the additional step of addressing the nature of truth as it applies to fostering communication in a democratic society. For these reasons, this article examines how the Supreme Court has conceptualized truth in freedom-of-expression cases, and then draws on the results of that analysis, as well as pragmatic approaches to philosophy, the so called "pragmatic method" put forth by American philosopher William James,[11] to propose a unifying conceptualization of truth that could be employed to help the Court provide consistency within its precedents regarding the meaning of a concept that has been central to the Court's interpretation of the First Amendment since, in many ways, another pragmatist and friend of James's, Justice Oliver Wendell Holmes, substantially addressed truth in his dissent in *Abrams v. United States*.[12] The pragmatic method is uniquely suited for such an enquiry because its approach emphasizes practical investigation of how the world is understood because, as James lamented during the lectures in which he laid out the pragmatic ideal in 1906, too much of philosophy "bakes no bread."[13] Pragmatism also avoids philosophical extremes, instead approaching each problem with "the attitude of looking away from first things, principles, categories, supposed necessities; and of looking towards things, fruits, consequences, facts."[14] Finally, pragmatism is uniquely suited to questions regarding freedom of expression. Judge Richard Posner contended "There is at least one specific legal question to which

---

8 *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015); United States v. Alvarez, 132 S. Ct. 2537 (2012); Snyder v. Phelps, 562 U.S. 443 (2011) for examples.

9 Alvarez, 132 S. Ct. at 2560 (Alito, J., dissenting).

10 *Id*. at 2550.

11 William James, Pragmatism 28-29 (1978).

12 Abrams v. United States, 250 U.S. 616 (1919). *See* The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions and Other Writings of Oliver Wendell Holmes, Jr. xi (Richard A. Posner ed., 1992) and Louis Menand, The Metaphysical Club: A Story of Ideas in America x-xi (2002) for Holmes's relationship to pragmatic thought.

13 James, *supra* note 11, 10.

14 *Id.* at 32.

pragmatism is directly applicable and that is the question of the basis and extent of the legal protection of free speech."[15]

In many ways, Justice Holmes laid much of the groundwork for a pragmatic method for understanding truth in the *Abrams* dissent in 1919, both by drawing pragmatic thought into the Court's narrative concerning freedom of expression and by introducing the marketplace-of-ideas metaphor into the Court's lexicon.[16] The metaphor, which is substantially rooted in communicating how Justice Holmes understood the nature of truth, is cited in dozens of freedom-of-expression-related case in which justices have wrestled with matters of truth in falsity.[17] As a result, this article begins and ends with Justice Holmes at the forefront. This article first examines the American pragmatic movement, outlining the assumptions its adherents made regarding the nature of truth, before considering Justice Holmes's extensive and often philosophical writings outside of the Court, as well as his foundational freedom-expression-related legal opinions. After outlining pragmatic thinking and examining Justice Holmes's understandings regarding the nature of truth, six of the cases in which the Court has most incorporated the word "truth" in regard to freedom-of-expression concerns[18] are analyzed using sociologist David Altheide's method for qualitative document analysis with the goal of identifying how justices in the decades since Justice Holmes's retirement and the eventual fading of pragmatic thought from American discourse have articulated how they understand the nature of truth.[19] In drawing central conceptual building blocks from American pragmatic thought, Justice Holmes's writings outside of the Court and his opinions for the Court, and themes from cases in which truth has been a central point of contention among the justices, this article concludes by proposing a unifying, pragmatics-based approach to the nature of truth that is specific to the Court and the role of freedom of expression in a democratic society.

## I. Pragmatism

While James is the figure most closely associated with the formation of American pragmatic philosophy, it was his friend Charles Sanders Peirce who coined the term "pragmatism."[20] Peirce, an American philosopher and mathematician, joined

---

15 Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. Cal. L. Rev. 1653, 1661 (1989).

16 *Id.* at 1662. Judge Posner, for example, found that the pragmatic approach is a "plausible extension" of the marketplace-of-ideas metaphor.

17 See Walker v. Tex. Div., Sons of Confederate Veterans, 135 S. Ct. 2239 (2015); Milkovich v. Lorain Journal, 497 U.S. 1 (1990); Texas v. Johnson, 491 U.S. 397 (1989); Miami Herald v. Tornillo, 418 U.S. 241 (1974); and Tinker v. Des Moines, 393 U.S. 503 (1969) for examples.

18 The cases were identified by conducting a search in the WestlawNext database for all the cases dealing with the First Amendment and the word "truth." The cases were ranked based on the number of times justices used the word "truth" in the case opinions.

19 David L. Altheide, Qualitative Media Analysis 16 (1996). Information regarding case selection and the method of analysis is provided later in the study.

20 James, *supra* note 11, at vii. James stated pragmatism was "oddly named," see James, *supra* note 11, at 23.

James and Holmes, along with other intellectuals in Cambridge, Mass., to form what became known as the Metaphysical Club in early 1870s.[21] While the group was short-lived, it operated during a period in which the minds of three great American thinkers intersected to discuss philosophical concerns of the day.[22] In 1872, during one of the final meetings of the Metaphysical Club, Peirce read a paper that espoused support for a pragmatic form of belief that operated as a way of scientifically conceptualizing chance and uncertainty in the universe.[23] A revised version of that paper, published six years later in *Popular Science Monthly* under the title "How to Make Our Ideas More Clear," stands as the origin of American pragmatic thought.[24] Peirce contended that the way individuals consider truth or meaning is based on guesses that are educated by past personal experience. James and Holmes, who was then the editor of *The American Law Review*, supported such an experience-oriented view of how individuals understand and interact with the world around them.[25] Years later, in 1900, Peirce wrote to his old friend James to ask him who coined the term "pragmatism." James responded, "You invented pragmatism, for which I gave you full credit."[26]

### *A. Pragmatism as method*

Peirce coined the term "pragmatism," but it was James, late in his life, who gave it definition and form as a discernable philosophical approach and who made it a topic of conversation within and without the scholarly community. In 1898, he delivered a lecture titled "the Pragmatic Method," at the University of California, in which he outlined what would become his lasting, influential contribution to philosophy.[27] During the lecture, James contended "To develop a thought's meaning we need only determine what conduct it is fitted to produce; that conduct is for us its sole significance."[28] Such an approach foreshadowed his later work in devising a pragmatic method. James retired from Harvard in 1907, starting a brief period (he died in 1910) during which he was most focused on pragmatism and philosophy

---

[21] Menand, *supra* note 12, at 216, 226.

[22] It could be stated that the Metaphysical Club was pre-dated by the Saturday Club in Cambridge, Massachusetts, which included Oliver Wendell Holmes Sr. and Benjamin Peirce, Charles's Harvard-professor father, as well as Ralph Waldo Emerson, who was close friends with Henry James, William James's father, and an early inspiration to Oliver Wendell Holmes Jr. The club also included Louis Agassiz, who Henry James went on an expedition of South America with. See Menand, *supra* note 12, at x-xi, at 17 and 83 and Richard Ormerod, *The History and Ideas of Pragmatism*, 57 The J. of the Operational Research Soc. 892, 895 (2006).

[23] Menand, *supra* note 12, at 227.

[24] Charles Sanders Peirce, *How to Make Our Ideas Clear*, in The Nature of Truth: Classic and Contemporary Perspectives 193-209 (Michael P. Lynch, ed., 2001); James B. Pratt, What is Pragmatism? 16-17 (1909).

[25] Menand, *supra* note 12, at 229.

[26] Joseph Brent, C.S. Peirce: A Life 86 (1998).

[27] Richard J. Bernstein, The Pragmatic Turn 1-2 (2010).

[28] William James, *The Pragmatic Method*, 1 J. of Philosophy & Scientific Methods 673, 673 (1904).

more generally.[29] He turned a series of lectures he gave in Boston and New York that year into *Pragmatism*, the foundational work for American pragmatic thought. James identified his aim in formulating a pragmatic method when he concluded that much of modern philosophy accomplishes nothing of practical use or importance.[30] In the place of such thought, James outlined the pragmatic method as a sort of tool for getting to the practical truth that is in contention within any substantial dispute regarding ideas. The method begins by asking a simple question, which James repeated throughout *Pragmatism*: "What difference would it practically make to anyone if this notion rather than that notion were true?"[31] If there is no practical difference, he contended, there is no meaningful dispute. Therefore, philosophic discussion should focus on finding "what definite difference it will make to you and me, at definite instances of our life, if this world-formula or that world-formula be the true one."[32] In this sense, James's method was ideally suited to discussion of the meaning of truth and to resolving exactly the types of conflicts the Supreme Court must rule upon.

The next step in the pragmatic method, then, is, in the presence of actual conflict regarding truth or a set of issues, to clear away any considerations that do not practically matter to the outcome. James explained that a pragmatic thinker "turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action, and towards power."[33] James's words convey his disagreement with much of science in the early twentieth century. In his view, scientific theories were being misused because they were seen as solutions rather than tools, answers rather than lenses.[34] A central aspect of the pragmatic method was to avoid coming to a conclusion based solely on "fixed principles."[35] Thus, the method, from this point, focused on identifying what the truth and the truth's "cash-value" meaning was in practical terms. James explained:

> Pragmatism, on the other hand, asks its usual question. 'Grant an idea or belief be true,' it says, 'what concrete difference will its being true make in anyone's actual life?' 'How will the truth be realized?' 'What existences will be different from those which would obtain if the belief were false?' 'What, in short, is the truth's cash-value in experiential terms?'[36]

It is at this truth-evaluating stage of the method that James's contribution to philosophy, and this article, most principally defined itself.

[29] James, *supra* note 11, at ix.
[30] *Id.* at 18-22.
[31] James, *supra* note 11, at 28.
[32] *Id.* at 30.
[33] *Id.* at 31.
[34] *Id.* at 31-32.
[35] *Id.* at 31.
[36] James, *supra* note 11, at 96.

### *B. Toward pragmatically discerned truth*

James characterized pragmatism as both a method and a theory of truth, and in many ways the two are inseparable because the method does not function without an explanation of James's conceptualization of truth.[37] Perhaps James's most important, and complex, contribution in his articulation of the pragmatic method is his discussion of the nature of truth and how individuals in a democratic society should determine its meaning. James did not believe in a universal, objective truth.[38] He recognized that all do not share a single reality regarding the world around them.[39] In relation to this matter, he contended that individuals use their experiences to determine what is true. As a person encounters information in his or her daily life, he or she does not stop to verify each item. Instead, people rely on a bank of experiences, which collect to form reality. James conceptualized truth as "a collective name for verification processes, just as health, wealth, and strength, etc., are names for other processes connected with life, and also pursued because it pays to pursue them. Truth is *made*, just as health, wealth and strength are made, in the course of experience."[40] Individuals verify information by comparing it to the reality they have formed as a result of their experiences. In this model, truth is simply anything that aligns with an individual's reality.

Such a notion of truth has been criticized for its fluidity,[41] but this was a feature James, and later pragmatic thinkers who followed him, such as John Dewey and Richard Rorty, embraced.[42] It is also related to Justice Holmes's conceptualization of truth in the sense that both opposed absolute idealism.[43] At the outset, James contended that pragmatism "unstiffens all our theories, limbers them up."[44] When truth is "experience funded,"[45] it allows individuals the flexibility to revise their understandings as new information and new experiences arise. In this sense, James understood each person as continually taking in ideas. Most ideas would be accepted or rejected based on a person's reality.[46] Some ideas, however, have the power to shift a person's reality; they became part of that internal accumulation and constant evaluation of the world around

---

37 John J. Stuhr, 100 Years of Pragmatism: Williams James's Revolutionary Philosophy 2 (2010).

38 James, *supra* note 11, at 116.

39 *Id.*

40 *Id.* at 104.

41 Josiah Royce, James's colleague at Harvard, was a critic of James's conceptualization of truth. Royce believed in a unity of truth that is shared by all. *See* Josiah Royce, The Religious Aspect of Philosophy: A Critique of the Bases of Conduct and of Faith 423-25 (1885). *See also* James Conant, *The James/Royce Dispute and the Development of James's "Solution,"* in the Cambridge Companion to William James 187-88 (Ruth Anna Putnam, ed., 1997).

42 Colin Koopman, *Pragmatism as a Philosophy of Hope: Emerson, James, Dewey, Rorty*, J. Speculative Philo. 106, 110-111 (2006); Richard Rorty, Contingency, Irony, and Solidarity 26-27 (1993); John Dewey, *The Development of American Pragmatism,* in The Essential Dewey Vol. 1, 8 (Larry A. Hickman & Thomas M. Alexander, eds.).

43 Bernstein, *supra* note 27, at 61; Menand, *supra* note 12, at 66; The Essential Holmes *supra* note 12, at 115-16.

44 James, *supra* note 11, at 32.

45 *Id.* at 107.

46 *Id.* at 97-99.

them. This is what was meant when James concluded that ideas do not lead people to the truth, instead "truth happens to an idea."[47] He wrote that:

> The truth of an idea is not a stagnant property inherent in it. . . . It becomes true, is made true by events. Its verity is in fact an event, a process: the process namely of its verifying itself, its verification. Its validity is the process of its validation.[48]

Such a perspective is substantially similar to Justice Holmes's thesis in *The Common Law* in 1881 that "The life of the law has not been logic: it has been experience."[49] Truth, in the conceptualization of the pragmatic method, is derived from the collection of experiences that make up an individual's reality. It is verified by that reality and subject to change based on shifts in how an individual understands the world.

## II. The Holmes Truth

Justice Holmes is included in discussions of pragmatism and at times ascribed the pragmatist label because ideas he communicated in his writings and his relationships with the man who named the philosophy, Peirce, and the man who defined and explained it, James. [50] Justice Holmes did not understand himself, however, to be a pragmatist. In a letter, late in his life, he separated himself from pragmatism, admonishing his friend to avoid the term unless he meant that he followed James's philosophy. He wrote, "I could never make anything out of his or his friends' advocacy of his nostrum. . . . I think as little of his philosophy as I do much of his psychology. He seems to me typical Irish in his strength and his weakness."[51] The letter was written in 1917, seven years after James's funeral, which Justice Holmes attended. Such references indicate that Justice Holmes, late in his life, might not have thought much of James or his philosophy, but he did think of him. Several of Justice Holmes's letters mention James, long after his friend had died.[52] At one time, early in their lives, during the Metaphysical Club era, the two appeared to be close in their thinking, but aside from foundational agreements that overlap with pragmatism's basic assumptions, their views diverged.[53]

### *A.The Mirage of Absolute Truth*

On a basic level, Holmes agreed with James regarding the subjective, personal nature of truth, and the role experience plays in determining how individuals

---

47 *Id.* at 97.
48 *Id.*
49 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).
50 Posner, *supra* note 15, at 1653.
51 The Essential Holmes *supra* note 12, at 37.
52 *Id.* at 37, 40, 49, 60, and 70-71.
53 Menand, *supra* note 12, at 338. Holmes and James were close after the war. They met weekly to discuss philosophy.

understand the world around them. In a letter to a friend in 1912, seven years before he would introduce the marketplace metaphor in his dissent in *Abrams v. United States*,[54] Justice Holmes explained:

> A general fact rather is to be regarded like a physical phenomenon – accepted like any other phenomenon so far as it exists – to be combated or got around so far as may be, if one does not like it, as soon as fully possible. I always say yes – whatever is, is right – but not necessarily will be for thirty seconds longer.[55]

Justice Holmes's personal correspondences include many such references to the subjectivity of information individuals consider to be true.[56] In a letter in 1929, for example, he concluded, "absolute truth is a mirage."[57] Years earlier, in his law article *Natural Law*, the jurist dismissed absolute truth as a product of the natural human desire to be certain.[58] He famously found, "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."[59] Holmes's conceptualization of truth, however, developed differently than other traditional pragmatists, a detail that is also characterized in *Natural Law*.[60] Unlike James, and Peirce for that matter, Holmes fought in the Civil War and his experiences in which, scholars posit, influenced how he viewed the development of truth and the necessity for debate in democratic society.[61]

Scholars have suggested that Holmes entered the war an idealist, joining the Army during his final year at Harvard because of his abolitionist views. He left the battlefields skeptical of those who held rigid, absolutist views about the world around them.[62] In the decades that followed the war, Holmes often used the word "experience" in his descriptions of how the war changed him and others. He stated in his Memorial Day speech in 1884 that "the generation that carried on the war has been set apart by its experience. Through our great good fortune, in our youth our hearts were touched with fire."[63] In a speech to veterans in 1897, he expressed how the war gave him "a different feeling to life."[64] He further lamented his experiences with death during the Civil War in a letter to a friend in 1911. In the letter, Justice Holmes recalled the recent passage of the fiftieth anniversary of his first wounds in the Civil War, and noted that earlier that day he had heard of his colleague, Justice John Harlan's death. He commented that the war had accustomed him to death when he was young.[65] The first injury Holmes referred to in the letter was

---

[54] 250 U.S. 616 (1919).
[55] The Essential Holmes *supra* note 12, at 7.
[56] *Id.* at 107, 115, 117, for example.
[57] *Id.* at 107.
[58] Oliver Wendell Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 40-41 (1918).
[59] *Id.* at 40.
[60] *Id.* at 41-42.
[61] Menand, *supra* note 12, at 64-66; Catherine Wells Hantzis, *Legal Innovation - the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 Nw. U. L. Rev. 541, 548 (1987).
[62] Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529, 535 (1951); Menand, *supra* note 12, at 38.
[63] Oliver Wendell Holmes, Speeches 11 (2006).
[64] The Essential Holmes, *supra* note 12, at 73.
[65] *Id.* at 3.

a gunshot wound to the chest at Ball's Bluff in Virginia in 1861.[66] The doctors told him he would likely die from the wound and, at 20 years old, Holmes was left to face death.[67] After he survived, he wrote in his journal that he considered it "curious how rapidly the mind adjusts itself under some circumstances to entirely new relations."[68] He wrote that when he thought he was going to die, it seemed a natural thing, but when he learned he would live, the thought of dying again became unconscionable.[69] Cultural historian Louis Menand contended that during experiences and reciprocal reflections such as this during the war, Holmes recognized that a person's beliefs, even foundational ones about life and death, were contingent on experience.[70] Perspectives change as a result of experience, an idea that, whether Holmes would have found the comparison agreeable or not, aligns quite closely with James's position that "new truth is always a go-between, a smoother-over of transitions. It marries old opinion."[71]

### *B. Becoming a "Bettabilitarian"*

On a broader scale, the simmering tensions between North and South that ultimately resulted in the war instilled an understanding in Holmes that rigid, unmoving certainty about truth is likely to lead to violence.[72] Both Northerners and Southerners viewed their positions as absolutely right, and that unwavering posture led to a war in which Holmes saw several of his friends killed and was himself shot three different times.[73] He used war imagery to communicate this idea in *Natural Law*, in which he argued that "we all, whether we know it or not, are fighting to make the kind of world we should like – but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity and belief."[74] In the same passage, Justice Holmes concluded, "When differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as it appears, his grounds are just as good as ours."[75] Such a central passage in Justice Holmes's scholarly writing, published in the year prior to his authorship of the marketplace metaphor in *Abrams*, further illuminates his unique, but also pragmatically founded, approach toward absolute positions. His experiences made him more skeptical of certainty and those who claimed to be certain about the truths they believed. In this regard, late in his life, Justice Holmes declared himself a "bettabilitarian," which he explained as a person who does not believe in the possibility of absolute certainty, but does expect that he can *bet*, using the experiences that have formed his reality,

---

[66] Holmes was shot on two other occasions during the war.
[67] Oliver W. Holmes, *Ball's Bluff Diary*, in Touched with Fire: Civil War Letters and Diary of Oliver Wendell Holmes, Jr. 25-27 (Mark DeWolfe Howe, ed., 1946).
[68] *Id.* at 32.
[69] *Id.*
[70] Menand, *supra* note 12, at 37-38.
[71] James, *supra* note 11, at 35.
[72] Menand, *supra* note 12, at 61-62.
[73] DeWolfe Howe, *supra* note 62, at 536-37.
[74] Holmes, *supra* note 58, at 41.
[75] *Id.*

on "the behavior of the universe in its contact with us."[76] In the letter, Holmes attributed the "bettabilitarian" idea's foundation to Chauncey Wright, a member of the Metaphysical Club who died in 1875.[77] Holmes referred to himself in such light from 1915 to 1930, most often during a lengthy correspondence with American philosopher Morris Cohen.[78] When discussing the term with Cohen, Justice Holmes often referred to himself as having his own "universe," within the context of each person forming his or her own reality.[79] Legal scholar David Luban described Justice Holmes's "bettabilitarian" terminology as reinforcing his consistent claim that individuals base their knowledge of the world around them on a "leap of faith rather than a reasoned demonstration."[80]

Justice Holmes's rejection of absolute positions, and his position that the best anyone can do is "bet" on what the truth is, extended to his judicial philosophy and interactions with other justices.[81] In a letter to a friend in 1920, he explained that he does not believe cases can be settled by general propositions. To support his position, he wrote that he made it a practice to challenge the other justices to choose any general legal philosophy and he would create a reason why the case could be decided on those grounds.[82] Such a perspective is consistent with Justice Holmes's central premise in *The Common Law*, which he wrote in 1881. He famously contended that the "life of the law has not been logic: it has been experience."[83] He elaborated on the statement by contending that the passage of time, the development of political theories, public policy decisions, the prejudices of judges, and other influences have had a greater impact on legal decisions than logic.[84] Mark DeWolfe Howe, who clerked for Justice Holmes and became his biographer, concluded that Holmes's statement about the life of the law was a form of rejection of the traditionalist approach to the law and to "purely logical – even theological – methods which threatened to dominate legal thought."[85] In this sense, Justice Holmes's statement that the law is based on experience ideally surmises the substantially pragmatic assumptions Justice Holmes developed and applied throughout his life.

### *C. Labor and Socialist Unrest*

Unprecedented labor unrest in the 1890s and governmental concern regarding the spread of socialism during and after World War I placed Justice Holmes in a unique position to substantially shape the foundations of First Amendment

---

76 Holmes *supra* note 12, at 108.

77 *Id.*

78 *See* Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 The History of Ideas 3 (1948).

79 *Id.* at 12.

80 David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 Duke L. J. 449, 474 n.78 (1994).

81 Menand, *supra* note 12, at 62-65.

82 The Essential Holmes *supra* note 12, at 38.

83 Holmes, *supra* note 49, at 7.

84 *Id.*

85 DeWolfe Howe, *supra* note 62, at 539.

jurisprudence during the heart of his career as a jurist.[86] Justice Holmes, raised as part of the New England elite, did not think much of labor unionists or socialism.[87] In a letter in 1912, before the wave of cases regarding socialist activities began to reach the Supreme Court, Justice Holmes wrote to a friend that he had read several central works about socialism and found it to be "wrongly thought."[88] He further determined "I have as little enthusiasm for it as I have for teetotalism."[89] Justice Holmes, however, read Karl Marx, Georg Wilhelm Friedrich Hegel, Herbert Spencer, and others in trying to understand organized labor and socialism.[90] Such an approach was evident in three dissents Justice Holmes penned during his final years on the Massachusetts Supreme Judicial Court. In each case he sided with organized labor, those who picketed or refused to work, in an effort to improve wages. In particular, in *Vegelahn v. Gunter*, an 1896 case involving a worker strike at a furniture manufacturer's business, Justice Holmes contended that part of free competition allows for competitive interference to a person's business, whether the source of interference is a new, competing business or workers using their power to receive a wage increase.[91] He continued, "The only debatable ground is the nature of the means by which damage is inflicted."[92] He dissented in a similar case four years later, finding that the conflict between two disagreeing groups must "be carried out in a fair and equal way."[93] Interestingly, without specifically invoking freedom of expression protections, on the state or federal level, Justice Holmes came to a conclusion that expression should be protected, but only up to the point that it causes or substantially threatens violence or injury.

### *D. The Unpublished Dissent*

Such cases clearly set the stage for the ten-year period, from 1919 to 1929, when Justice Holmes, at that point a veteran of the Supreme Court, added First Amendment considerations to the ideas he developed about protections for expression while on Massachusetts's highest court. Before the well-known stream of sedition cases arose, starting with *Schenck v. United States* in 1919, the Court heard arguments in *Baltzer v. United States* in November 1918, just as the armistice ending World War I was being signed.[94] During the war, Emanuel Baltzer and two dozen other socialists wrote letters to the governor of South Dakota demanding changes to the draft system. They threatened to vote the governor out of office if such changes

---

86 Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 Sup. Ct. Rev. 303, 303 (1991).
87 Novick, *supra* note 86, at 315; Plant v. Woods, 176 Mass. 492, 505 (Mass. 1900) (Holmes, C. J., dissenting); The Essential Holmes *supra* note 12, at 30.
88 The Essential Holmes *supra* note 12, at 66.
89 *Id.*
90 Novick, *supra* note 86, at 314.
91 167 Mass. 92, 106 (Mass. 1896) (Holmes, J., dissenting).
92 *Id.*
93 Plant v. Woods, 176 Mass. 492, 504 (Mass. 1900) (Holmes, C. J., dissenting).
94 Baltzer v. United States, 248 U.S. 593 (1918). The decision cited here merely notes that there was an error in the government's case, which led to the case being returned to the lower court.

were not made.[95] They were arrested and charged for violating the Espionage Act of 1917 because their letters were interpreted as an effort to obstruct the draft. The Court voted 7-2 to uphold the convictions, with Justices Holmes and Louis Brandeis opposing the decision. Justice Holmes contended in his dissent that "our intention to put all our powers in aid of success in war should not hurry us into intolerance of opinions and speech that could not be imagined to do harm."[96] He concluded that the Court should "err on the side of freedom" and "that the emergency would have to be very great before I could be persuaded that an appeal for political action through legal channels, addressed to those supposed to have power to take such action was an act that the Constitution did not protect."[97] Justice Holmes's dissent was not popular with Chief Justice Edward White, who sought the strength of a unanimous court. He delayed the announcement of the opinion, which proved to be fortuitous when the government admitted an error in its work in the case and it was remanded for retrial, thus leaving Justice Holmes's dissent unpublished.[98]

### *E. The Three Sedition Cases*

The unpublished dissent in *Baltzer* represented the first time Justice Holmes explicitly incorporated First Amendment principles into what he had already been developing as an approach to freedom of expression that allowed the free exchange of ideas, as long as there was no real threat of injury to others.[99] The dissent also came just months after he published *Natural Law*, in which he articulated his skepticism of absolutist perspectives and questioned those who contend truth is fixed and universal.[100] His developing ideas regarding freedom of expression were tested in the Court's next term, however. When the Court returned to work in January 1919, three new cases involving the Espionage Act of 1917 awaited the justices.[101] All of the cases involved socialists who were convicted for their anti-war statements. Justice Holmes wrote short, terse opinions that upheld the convictions under the act for a unanimous court in all three of the cases. The outcomes of the cases, on the surface, appear to be in direct conflict with Holmes's conclusions in the labor union cases from the 1890s and the unpublished *Baltzer* dissent a few months earlier. In each case, however, Justice Holmes emphasized a pragmatically related principle that aligns closely with his conclusions regarding the

---

95 Novick, *supra* note 86, at 331.

96 *Id*. at 332. Since the dissent was never published, the only record of the text was found in Justice Holmes's personal papers. As a result, *see also* Thomas Healy, *The Justice Who Changed His Mind: Oliver Wendell Holmes, Jr., and the Story Behind* Abrams v. United States, 39 J. Sup. Ct. Hist. 35, 43-44 (2014), for a second source regarding the non-published dissent's wording.

97 *Id.*

98 Novick, *supra* note 86, at 333.

99 *See* Commonwealth v. Perry, 155 Mass. 117 (Mass. 1891) (Holmes, J., dissenting); Vegelahn v. Guntner, 167 Mass. 92 (1896) (Holmes, J., dissenting); Plant v. Woods, 176 Mass. 492 (1900) (Holmes, C. J., dissenting).

100 Holmes, *supra* note 58, at 40-41.

101 Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); and Debs v. United States, 249 U.S. 211 (1919). Sugarman v. United States, 249 U.S. 182 (1919) presented a similar question to the Court but was dismissed because it presented no constitutional question.

nature of truth and his rejection of absolute positions. His decisions were based on the *context* of the person's actions. He explained in *Schenck* that "in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."[102] Thus, the dispersal of an anti-draft message during World War I by Charles Schenck, as general secretary of the Socialist Party in Philadelphia, had effectively pushed the messages outside of the purview of First Amendment protection. Justice Holmes supported his contention with the example that freedom of speech does not protect a person's right to cause a panic by falsely yelling "fire" in a crowded theater and concluded by introducing the clear and present danger test.[103] Similarly, in the case of Jacob Frohwerk's *Missouri Staats Zeitung* newspaper's anti-war messages in 1917, Justice Holmes concluded that "the First Amendment, while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language."[104] In both examples, as well as in *Debs v. United States* during the same term, Justice Holmes rejected an absolute protection for freedom of expression, thus reinforcing his distrust of absolutist positions found in his letters and legal scholarship.[105]

Despite his apparently confident reasoning in the opinions, Justice Holmes was not at complete peace with the outcomes. In a letter to Harold Laski, then a Harvard professor and dear friend, a week after the *Frohwerk* and *Debs* decisions were announced, Holmes wrote "I greatly regretted having to write them – and (between ourselves) that the government pressed them to a hearing. . . . But on the only questions before us I could not doubt about the law."[106] Justice Holmes went on to express his discomfort with the number of convictions lower-court judges were upholding in regard to speech and the war.[107] About a year later, Laski was gone from Harvard, having been largely pressured to leave because of his socialist views.[108] Upon learning the news, Justice Holmes lamented his friend's departure, "Dear lad, I shall miss you sadly. There is no other man I should miss so much."[109]

Justice Holmes's decision to join the Court and write its opinions upholding Espionage Act convictions that ultimately limited expression in three cases during the spring of 1919 caught the attention of leading thinkers, such as Laski, Zechariah Chafee, and Judge Learned Hand.[110] During the summer that followed, Judge Hand approached Justice Holmes, whom he revered, in person and followed that meeting with a letter regarding the three sedition rulings.[111] Judge Hand, as a federal district judge in New York, had constructed a different approach to similar cases in 1917, basing his ruling on the question of whether the speakers' expressions were a "direct incitement."[112] His test, which was overturned on appeal, substantially narrowed the

---

102 *Schenck,* 249 U.S. at 52.

103 *Id.*

104 *Frohwerk*, 249 U.S. at 206.

105 Harold J. Laski, *The Political Philosophy of Mr. Justice Holmes*, 40 Yale L. J. 684, 692 (1931); Holmes, *supra* note 58, at 40-41; The Essential Holmes *supra* note 12, at 107.

106 The Essential Holmes *supra* note 12, at 316.

107 *Id.*

108 Harold J. Laski, Studies in Law and Politics xvii (2010).

109 The Essential Holmes *supra* note 12, at 8.

110 Menand, *supra* note 12, at 427-29.

111 Felix Frankfurter, *Learned Hand*, 75 Harv. L. Rev. 1, 1 (1961).

112 Masses v. Patten, 244 F. 535, 540 (SDNY 1917); Menand, *supra* note 12, at 427-29.

field of speech that could be prosecuted under the Espionage Act. Justice Holmes flatly disagreed with him, contending it was the *context* of the action, not the words themselves, which should be the deciding factor.[113]

### *F. The Best Test of Truth*

*Abrams* was waiting for the justices when they returned to work in the fall of 1919. Much as with the cases from the previous term, Jacob Abrams and others spread ideas that were critical of the war effort, this time in July 1918, not long before the war's end.[114] Seven justices voted to uphold Abrams's twenty-year prison sentence for violating the Espionage Act, but Justice Holmes indicated he would dissent. Three justices went to his house in an effort to convince him to change his vote so that the Court could remain unanimous in matters relating to the Red Scare.[115] Justice Holmes was not deterred, ultimately writing a dissent that amounts to his most complete statement regarding truth as it relates to freedom of expression.[116] The dissent includes all of the central characteristics of Justice Holmes's tendency toward pragmatic thought. He concluded that, "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas."[117] Within the passage, he drew from his understanding that experience shapes reality and new experiences can result in shifts in how individuals understand the world.[118] In communicating that truth emerges from an open exchange of ideas, he further supported the pragmatic conceptualization of truth as individual, rather than universal. Furthermore, he conceptualized truth as "the only ground up which [our] wishes safely can be carried out."[119] Justice Holmes continued within the same passage by describing life as an experiment and that "every year if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge."[120] In conceptualizing life's decisions as "wagers" and by highlighting that knowledge is imperfect, Justice Holmes's dissent relates with his declaration that he is a bettabilitarian and reinforces his rejection of absolutism, which was forged during the Civil War-era and reinforced in his scholarly and legal writings.[121]

Justice Holmes did not understand his dissent to be a departure from his opinions in *Schenck*, *Frohwerk*, and *Debs*. He wrote in *Abrams* that the previous cases were "rightly decided."[122] He reiterated that in certain contexts, when there is an immediate evil, the government has the right to limit expression. His dissent aligns most clearly with his decisions for the Massachusetts court in the labor

---

113 Menand, *supra* note 12, at 427-29.
114 Schenck v. United States, 250 U.S. 616, 620-23 (1919).
115 Novick, *supra* note 86, at 343.
116 *Id.* at 346.
117 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
118 The Essential Holmes *supra* note 12, at 7, 107, 115, 117; Holmes, *supra* note 58, at 40.
119 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).
120 *Id.*
121 Menand, *supra* note 12, at 61-62; Holmes, *supra* note 58, at 41; The Essential Holmes *supra* note 12, at 108.
122 *Abrams,* 250 U.S. at 627-28 (Holmes, J., dissenting).

union cases in the 1890s and the unpublished dissent in *Baltzer*, except, this time, he included a theory of the First Amendment. Menand contended that Justice Holmes's focus on the context of the cases remained consistent and that Abrams's actions were simply interpreted as being outside the law's jurisdiction.[123] Others have argued that the criticism Justice Holmes received during the summer between the *Schenck, Frowerk*, and *Debs* cases and *Abrams* prompted him to reconsider his interpretation of the law.[124] Regardless of Justice Holmes's reasoning, his dissent in *Abrams* conveyed central pragmatic conceptualizations regarding the nature of truth and how it operates within individuals' lives. The dissent also signaled a change in his interpretation for free expression protections, as is evident in the final two cases, *Gitlow v. New York* and *United States v. Schwimmer*.[125]

## *G. Final Dissents*

Unlike the incidents that led to the preceding cases, the conflicts that brought Benjamin Gitlow's and Rosika Schwimmer's cases to the Supreme Court occurred after World War I. Just more than a year after Jacob Abrams and his co-conspirators dumped anti-war leaflets out of New York City buildings, Benjamin Gitlow published his "Left Wing Manifesto." Gitlow's first court appearance in regard to his criminal anarchy charges in New York occurred just days after the Court announced its opinion in *Abrams*.[126] Six years later, the Supreme Court invoked reasoning similar to what it had used in *Abrams* to uphold Gitlow's conviction under the New York state law.[127] Justice Holmes was the lone dissenter. In his short dissent, he reiterated his clear and present danger test must be utilized in such cases.[128] He explained that the majority in *Abrams* misused his test because there was no "present danger to attempt to overthrow the government."[129] He added, using pragmatically related wording, that, "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[130] His conclusion regarding beliefs relates closely with the marketplace-of-ideas metaphor he employed in his dissent in *Abrams*.[131] Using different terms, he emphasized his understanding that individuals make decisions that are essentially experience-informed bets. Such decisions can change as a

---

[123] Menand, *supra* note 12, at 429.

[124] Joseph A. Russomanno, *"The Firebrand of My Youth": Holmes, Emerson and Freedom of Expression*, 5 Comm. L. & Pol'y 33, 34-35 (2000); Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: First Year, 1919*, 58 J. Am. Hist. 24, 44 (1971); Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action*, 1994 Sup. Ct. Rev. 209, 220 (1994).

[125] 268 U.S. 652 (1925); 279 U.S. 644 (1929).

[126] Thomas C. Mackey, *"They are Positively Dangerous Men": The Lost Court Documents of Benjamin Gitlow and James Larkin Before the New York City Magistrates' Court, 1919*, 69 N.Y.U. L. Rev. 421, 425 (1994).

[127] Gitlow v. United States, 268 U.S. 652, 661-62 (1925).

[128] *Id.*at 672-73 (Holmes, J., dissenting).

[129] *Id.* at 673.

[130] *Id*.

[131] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

result of shifts in experience. In a letter to a friend, Justice Holmes explained that he understood his discussion of "incitement" in the dissent as his lone original contribution when it is compared with his work in *Abrams*.[132] Otherwise, he wrote, indicating his opinion of Gitlow's work, "I regarded my view as simply upholding the right of a donkey to drool."[133]

Justice Holmes, nearing his ninetieth birthday, once again dissented four years later in *Schwimmer*, which revolved around a Hungarian immigrant's contention that the requirement that she, in the process of becoming a United States citizen, agree to be willing to take up arms against enemies of her new country, was unconstitutional. Schwimmer was a pacifist, who contended that a willingness to fight in a war should not be a requirement for citizenship.[134] Justice Holmes, this time joined by his friend Justice Brandeis, contended that Schwimmer's expression that she was against wars and thought the United States can be improved should not make her ineligible to become a United States citizen.[135] He continued by drawing his own wartime experiences into his discussion of the need for a free exchange of ideas. Of Schwimmer's pacifism and the necessity of war, he wrote:

> I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and . . . would welcome any practicable combinations that would increase the power on the side of peace.[136]

Justice Holmes continued the short dissent by accepting that Schwimmer's views might cause unrest and encourage dissatisfaction with the government, but "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom of thought that we hate."[137]

*Schwimmer* represents Justice Holmes's final statement regarding his understanding of freedom of expression and its necessary limits and protections. He left the Court three years later and died soon after, in 1935. Justice Holmes's legal opinions and scholarly contributions can be encompassed by three ideas in relation to pragmatic philosophy and the nature of truth: (1) His judicial opinions and legal writings consistently communicated an understanding that truth is contingent upon experience. In this sense, his conclusion that the "life of the law has not been logic: it has been experience," in the *Common Law* in 1881[138] aligns with his contention that "time has upset many fighting faiths" in his dissent in *Abrams* nearly four decades later.[139] (2) The opinions and scholarship also support his steadfast stand against absolutism and those who claim ownership of absolute truth. In 1929, just months before penning his dissent in *Schwimmer,* he wrote "absolute truth is a mirage" as

---

132 The Essential Holmes *supra* note 12, at 322.
133 *Id.*
134 United States v. Schwimmer, 279 U.S. 644 (1929).
135 *Id.* at 654 (Holmes, J., dissenting).
136 *Id.*
137 *Id.*
138 Holmes, *supra* note 49, at 1.
139 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

part of a larger discussion of the limits of truth in a letter to Laski.[140] His distaste regarding those who espoused absolute beliefs was evident in his comparison of Gitlow's work to a "donkey's drool"[141] or that Eugene Debs might have "split his guts without my interfering with him."[142] Furthermore, in wording that appears influenced by his experiences in the Civil War, he espoused in *Natural Law* that, "Certitude is not the test of certainty. We have been cock-sure of many things that were not so."[143] Such perspectives also align with Justice Holmes's considering himself a bettabilitarian. He believed there was no absolute truth, and that experience drives people's perspectives regarding the world around them. Within such thinking, the best an individual can do is *bet*, using incomplete knowledge, when making a decision.[144] (3) Finally, Justice Holmes emphasized that the true meaning of an expression is contextual. His contention regarding the importance of circumstance in deciding the freedom of expression cases, as well as Massachusetts state-court opinions, was that the circumstances surrounding a case were what should decide a case. This was his argument when he was approached by Judge Hand in 1919, that it was not the words or actions of those involved in the cases, so much as the circumstances in which those words and actions took place.[145] The differing outcomes between *Schenck*, *Frohwerk*, and *Debs* from the spring of 1919 and *Abrams, Gitlow*, and *Schwimmer* in the terms that followed are only logically tied together in regard to Justice Holmes's assertion that the context of the expression in question must be the central determining factor. In *Schenck,* he emphasized that the First Amendment might have protected the socialist party members' actions at other times, when the nation was not at war.[146] The clear and present danger test introduced by Justice Holmes in *Schenck* is, in itself, primarily a context-based test because it focuses not on the speaker's words or actions, but on the potential for the words or actions to result in violence toward the government. Justice Holmes's context-based approach can be seen in his reasoning in *Plant v. Woods* while he was chief justice of the Massachusetts Supreme Judicial Court. In his dissent, he emphasized that the workers went on strike in search of better wages, rather than to damage the business.[147] Such a perspective aligns with Justice Holmes's own personal belief against absolutism. He did not believe in a universal legal method for resolving cases.[148]

## III. Truth and the Court After Holmes

Substantially catalyzed by external pressures, primarily the Great Depression and Franklin Roosevelt's New Deal legislation, the Court in the years that followed

[140] The Essential Holmes *supra* note 12*,* at 107.
[141] *Id.* at 322.
[142] *Id.* at 316.
[143] Holmes, *supra* note 58, at 41.
[144] *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In this passage, he wrote, "Life is an experiment. Every year if not every day we have to wager our salvation upon. . . imperfect knowledge."
[145] Menand, *supra* note 12, at 427-29.
[146] Schenck v. United States, 249 U.S. 47, 52 (1919).
[147] 176 Mass. 492, 504 (Mass. 1900) (Holmes, C. J., dissenting).
[148] *See generally*, Holmes, *supra* note 58.

Justice Holmes's retirement shifted its attention toward the relationship between government and the individual.[149] Supreme Court historian Robert McCloskey contended that historical pressures essentially ended the Court's focus on free enterprise, prompting it to find a new direction.[150] The shift in focus to individual rights, which occurred both within the Court and more generally in society as a whole beginning in the post-World War II years, instituted a movement away from the pragmatic thinking that had developed during a time period that roughly aligned with the progressive era.[151] With Justice Holmes, James and Peirce gone, society's champions of pragmatism were fading.[152] Dewey retired from Columbia in 1930, but carried the torch of progressive-era pragmatism onward as he continued to develop and share his philosophy through books and lectures until his death in 1952. Ultimately, James's and Dewey's disciples, the next generation of pragmatists, were either drawn away from pragmatism to other fields, marginalized because their views drew them into socialistic circles during an era of fierce backlash against such groups, or motivated to draw pragmatism away from its communal and democratic moorings.[153]

While pragmatism faded from the nation's judicial and philosophical conversation, the Court's jurisprudence regarding freedom of expression continued to develop. Since Justice Holmes's departure and pragmatism's fade from the nation's discourse more broadly, hundreds of cases have challenged justices to wrestle with First Amendment questions relating to truth.[154] Since it is not possible to examine all, or even a substantial number of these cases here, this analysis employed Altheide's method of "progressive theoretical sampling," which emphasizes selecting materials based on an evolving understanding of the topic of the study.[155] First, the twenty decisions in which the Court used the word "truth" the most times in examining a First Amendment-related issue were identified using a WestlawNext search.[156] Each of the twenty cases identified in the search were examined. Fourteen of the cases dealt with defamation claims and a majority of the cases were decided in the 1960s and 70s. With the analysis's focus on identifying ways justices have articulated their conceptualizations of truth, the number of defamation cases used was limited, so it would be possible to examine a greater diversity of types of legal questions the Court faced. Similarly, the question is not

---

149 Robert G. McCloskey, The American Supreme Court 121 (2010). *See also* John B. Gates, *The American Supreme Court and Electoral Realignment*, 8 Soc. Sci. Hist. 267, 267-268 (1984). Gates examined the influence of "partisan realignments" on the Court's actions. The start of the New Deal era, which occurred just after Justice Holmes's retirement, is understood by scholars as the clearest example of partisan realignment.

150 *Id.*

151 Menand, *supra* note 12, at 437-38.

152 Peirce died in 1914.

153 Cornel West, The American Evasion of Philosophy 112-13 (1989); Hollinger & Depew, Pragmatism: From Progessivism to Postmodernism xv (1995).

154 A LexisNexis Academic search for all of the cases after the 1932 term (Justice Holmes's final term) that include the words "truth" and "First Amendment," resulted in 372 results.

155 Altheide, *supra* note 19, at 23-44.

156 The cases were identified by conducting a search in the WestlawNext database for all the cases dealing with the First Amendment and the word "truth." The cases were ranked based on the number of times justices used the word "truth" in the case's opinions.

date-specific, with the only requirement being that the cases occurred after Justice Holmes's retirement.[157] For this reason, the cases selected represent a variety of years. Using these criteria, six cases were selected: *Pennekamp v. Florida* (1946),[158] *Beauharnais v. Illinois* (1952),[159] *New York Times v. Sullivan* (1964),[160] *Cox v. Cohn* (1975),[161] *Philadelphia Newspapers v. Hepps* (1986),[162] *United States v. Alvarez* (2012).[163] Among the defamation cases, *Sullivan* was chosen because of its central role in defamation law. *Hepps*, a second defamation case, was selected because it challenged justices to consider a truth-related question that was substantially different than those that immediately followed *Sullivan* and was decided in the 1980s, a decade in which few cases arose in the search. The remaining cases were chosen because they each challenged the Court to consider truth within the contexts of different areas of freedom-of-expression-related law and helped provide a broad representation of years. Before drawing central understandings regarding the Court's conceptualization of the nature of truth from the discourse put forth in these cases, the primary facts, questions, ideas, and overall outcomes are briefly outlined.

## *A. Pennekamp v. Florida*

In *Pennekamp*, in 1946, the Court overturned a Florida Supreme Court decision to uphold contempt charges against editors at the *Miami Herald*. The charges stemmed from editorials the criticized Dade County judges' decisions.[164] The editorials contended that the judges were favoring certain groups in their efforts to "block, thwart, hinder, embarrass and nullify prosecution."[165] The editorials named judges who the authors believed were making rulings that did not benefit the community and identified recent rulings as examples of such decisions. Among the Court's primary considerations within the case were whether the criticisms amounted to a "clear and present danger" to the area's judicial processes and whether the editorials' inclusions of incomplete truths and assumptions deprived the defendant of First Amendment protection.[166] In regard to the truthfulness of the messages, the justices contended that the editorials distorted their actions and conveyed only half-truths in many instances.[167] Justice Stanley Reed, writing for the Court, constructed much of the opinion around the conclusion that the words in the editorials, despite the incomplete information that was communicated, did not represent a clear and present danger, thus drawing substantially from the test Justice Holmes fashioned in *Schenck* and that was taken up by the Court in the sedition cases that followed.[168]

---

157 Though the search encompassed all of the Supreme Court's rulings, none of the cases that appeared in the search were from Justice Holmes's time on the Court.
158 328 U.S. 331 (1946).
159 343 U.S. 250 (1952).
160 376 U.S. 254 (1964).
161 420 U.S. 469 (1975).
162 475 U.S. 767 (1986).
163 132 S. Ct. 2537 (2012).
164 Pennekamp v. Florida, 328 U.S. 331, 349-350 (1946).
165 *Id.* at 339 (quoting one of the editorials, which is included within the opinion).
166 *Id.* at 334.
167 *Pennekamp*, 328 U.S. at 367 (Frankfurter, J., concurring).
168 Schenck v. United States, 249 U.S.47, 52 (1919).

He ended the opinion, for example, by stating, "We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment."[169]

Justice Felix Frankfurter, a friend of Justice Holmes with a similar judicial philosophy, wrote a concurring opinion that criticized the Court's use of the clear and present danger test in the case.[170] Despite an outcome that supported freedom of expression, Justice Frankfurter was uncomfortable with the Court's reasoning. He contended that Justice Holmes did not intend the test to be used in an absolutist sense, nor was it created to limit abstract criticisms.[171] He explained that, "It does an ill-service to the author of the most quoted judicial phrases regarding freedom of speech, to make him the victim of a tendency which he fought all his life, whereby phrases are made to do service for critical analysis."[172] Justice Frankfurter's opinion, which was longer than that of the Court,[173] continued by emphasizing the importance of freedom of expression to a free society, thus reinforcing Justice Holmes's rather pragmatic assumption, also supported in James's and Dewey's philosophies, that freedom of expression must be understood as a social, rather than an individual, freedom.[174]

### *B. Beauharnais v. Illinois*

Six years after *Pennekamp*, Justice Frankfurter wrote the Court's opinion in a case that upheld an Illinois law criminalizing the expression of ideas that were disparaging toward certain racial or religious groups.[175] The justices were deeply divided in the case, with the five-to-four ruling producing four dissenting opinions. The overall decision to uphold the law and Justice Frankfurter's efforts to rationalize the creation of a broadly defined form of "group libel" particularly drew the ire of Justices Hugo Black and William O. Douglas, who wrote separate dissents.

Joseph Beauharnais, who was president of the White Circle League of America in Chicago, was convicted and fined $200 for violating state law[176] by

---

[169] *Pennekamp*, 328 U.S. at 350.

[170] Luban, *supra* note 80, at 451; The Essential Holmes *supra* note 12, at 14.

[171] *Pennekamp*, 328 U.S. at 351-352 (Frankfurter, J., concurring).

[172] *Id.* at 352.

[173] Justice Reed's opinion for the Court was seventeen pages (pp 333-50). Justice Frankfurter's concurring opinion was nearly twenty pages (p 350-69).

[174] Menand, *supra* note 12, at 432. *See also* John Dewey, *Creative Democracy – The Task Before Us,* in The Essential Dewey Vol. 1, 341-42 (Larry A. Hickman & Thomas M. Alexander, eds., 1998); James, *supra* note 11, 102-03.

[175] Beauharnais v. Illinois, 343 U.S. 250, 251 (1952).

[176] § 224a of the Illinois Criminal Code, Ill. Rev. Stat., 1949, c. 38, Div. 1, § 471 provided:

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . .

circulating leaflets calling on the Mayor and City Council of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. . . ."[177] The leaflet called for "One million self respecting white people in Chicago to unite . . . ." and added that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." Attached to the leaflet was an application for membership in the White Circle League of America, Inc.

Challenging his conviction Beauharnais argued that the statute violated the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment, and was too vague to support a conviction for crime. Upholding the statute and the conviction, Justice Frankfurter, for the Court, explained that the law was created to limit racial and religious violence in a place with a long history of violent unrest.[178] He further justified the Court's conclusion by attempting to create a logical, reasoned path from the argument that defamatory attacks on individuals are not protected by the First Amendment, and therefore, similar attacks on defined groups should also be unprotected. He reasoned, "If an utterance directed at an individual may be the object of criminal sanctions, we cannot deny the State the power to punish the same utterance directed at a defined group."[179] Finally, Justice Frankfurter clouded the Court's opinion by rationalizing the need for state governments to experiment with different solutions to problems and then qualifying the ruling by stating "our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or its efficacy."[180]

Justice Black offered a vigorous dissent, contending that the law was both content-based and that it limited peaceful political speech.[181] Importantly, in supporting these and other arguments, Justice Black emphasized the importance of individual rights, framing the issue in the case as a matter of the state taking away the individual's right to communicate ideas, as well as the individual's right to receive the ideas communicated by others. The state, to Justice Black, was censoring speech about a matter of substantial public concern, disallowing others' rights to individually receive the ideas. He contended, "No legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country that is the individual's choice, not the state's."[182] Justice Black's emphasis on individual, rather than societal, rights extended to his argument against the Court's group-libel-law reasoning. He concluded that the fighting-words doctrine that emerged from *Chaplinsky v. New Hampshire*[183] and used by the Court in *Beauharnais* applied to individual and not group statements[184] stating that the common-law crime of libel was created to punish "false, malicious, scurrilous charges against individuals, not against huge groups."[185]

---

[177] *Id.* at 252.
[178] *Id.* at 259.
[179] *Id.* at 258.
[180] *Id.* at 266-67.
[181] *Id.* at 267-68 (Black, J., dissenting).
[182] *Id.* at 270 (Black, J., dissenting).
[183] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[184] Beauharnais v. Illinois, 343 U.S. 250, 272-73 (1952) (Black, J., dissenting).
[185] *Id.* at 272 (Black, J., dissenting).

### C. *New York Times v. Sullivan*

Both *Pennekamp* and *Beauharnais* were drawn into Justice William Brennan's opinion for the Court in *Sullivan* in 1964. The case revolved around a full-page advertisement, titled "Heed Their Rising Voices," which was published in the *New York Times* as a tool for gathering support, financial and otherwise, for the efforts of the civil rights movement. L.B. Sullivan, the Montgomery, Alabama, commissioner who oversaw the police and other services, contended that the advertisement, though it did not name him or his job title, defamed him because some of the information was incorrectly reported and reflected poorly on the work of those he supervised.[186] The Court rejected his claims, concluding that to win a defamation claim, a public official must prove actual malice, knowledge that the information was false or a lack of concern regarding its accuracy.[187]

Justice Brennan, who wrote the Court's opinion, rejected both *Pennekamp* and *Beauharnais* as guiding precedents in the case.[188] Instead, he focused extensively, as did Justices Black and Arthur Goldberg in their separate concurring opinions, on the necessity of allowing for some falsity in the nation's discourse in order to protect the flow of information.[189] Justice Brennan concluded that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials."[190] He acknowledged that factual error cannot be avoided in open debate and that regulating speech to avoid such errors would damage discourse in society more broadly.[191]

Justice Black wrote a concurring opinion to indicate that the majority did not go far enough in protecting freedom of expression. He explained that, "Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times. . . had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials."[192] He further contended that the country could live without libel lawsuits, but not without the individual right to discuss and comment upon the work of public officials.[193] Similarly, Justice Goldberg concurred to reinforce the importance that individual citizens and the press should retain their rights to publicly criticize government officials.[194]

### D. *Cox v. Cohn*[195]

Just more than a decade after *Sullivan*, a substantially remade Court struck down a Georgia law that criminalized the broadcast or publication of the name of a sexual-

---

[186] New York Times v. Sullivan, 376 U.S. 254, 257-58 (1964).
[187] *Id.* at 280.
[188] *Id.* at 268.
[189] *Id.* at 270-71. *See also id.* at 296-97 (Black, J., concurring) and *Id.* at 300 (Goldberg, J., concurring).
[190] *Id.* at 270-71.
[191] *Id.* at 272-73.
[192] *Id.* at 293 (Black, J., concurring).
[193] *Id.* at 297 (Black, J., concurring).
[194] *Id.* at 298 (Goldberg, J., concurring).
[195] Cox v. Cohn, 420 U.S. 469 (1975).

assault victim.[196] Justice Byron White, one of the three justices who remained from the *Sullivan* decision, wrote the Court's opinion in the eight-to-one ruling. The case stemmed from a television reporter's coverage of a murder trial in which the victim was sexually assaulted and died as a result of the attack.[197] The reporter encountered the victim's name while viewing public documents during the murder trial and later reported this during the station's coverage of the trial. Martin Cohn, the victim's father, sued Cox Broadcasting alleging the station violated his right to privacy as protected by the state law.[198]

Justice White emphasized that Cohn's claim did not revolve around any of the established privacy torts. Instead, it sought to penalize the conveyance of true information about a matter of public concern that was legally obtained from publicly available documents.[199] He ultimately concluded that the First Amendment protects the press from "liability for truthfully publishing information released to the public in official court records."[200] Throughout the opinion, Justice White contended that the press must remain free to report information as it preforms its valued service to the public.[201] Justice Douglas wrote a short concurring opinion to clarify that he agreed with the ruling but did not believe that Justice White went far enough in emphasizing the extent of the First Amendment protections the press enjoys. He contended that, "There is no power on the part of the government to suppress or penalize the publication of 'the news of the day.'"[202] Finally, Justice William Rehnquist dissented because of questions regarding the Court's jurisdiction on the matter.[203]

### *E. Philadelphia Newspapers v. Hepps*[204]

Justice Rehnquist again found himself on the dissenting side in the *Hepps* ruling in 1986. In the five-to-four decision, the Court concluded that a private person seeking damages in a defamation lawsuit must prove that the potentially damaging words were false, thus shifting the burden from the previous common-law understanding that the burden rested on the communicator to prove his or her message was true.[205] The case arose when a series of stories in the *Philadelphia Inquirer* indicated that Maurice Hepps, who led a chain of stores in Pennsylvania, had ties to organized crime and used his influence to manipulate government officials.[206]

In the Court's opinion, Justice Sandra Day O'Connor recognized that many expressions of comment cannot be definitively proven to be true or false, which would mean that the plaintiff's burden of proving falsehood would at times

---

196 *Id.*
197 *Id.* at 471-72.
198 *Id.* at 474.
199 *Id.* at 489.
200 *Id.* at 496.
201 *Id.* at 491-92.
202 *Id.* at 501 (Douglas, J., concurring).
203 *Id.* at 502 (Rehnquist, J., dissenting).
204 Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).
205 *Id.* at 776-77.
206 *Id.* at 769.

allow untrue and harmful messages to damage the reputations of individuals.[207] In attempting to balance the considerations between freedom of expression and protecting the reputations of individuals, the Court concluded that "the Constitution requires us to tip them [the scales] in favor of protecting true speech."[208] Justice John Stevens' dissent, which was joined by Justice Rehnquist and two others, focused on the very problems Justice O'Connor examined in deciding to err on the side of freedom of expression and to require plaintiffs to prove falsehood. Justice Stevens contended that "the only publishers who will benefit from today's decision are those who act negligently or maliciously."[209] He further concluded that some facts cannot be verified or disproven, with the regrettable result that canny individuals may be permitted to destroy the reputations of others by carefully manipulating information in such a way as to be certain the victim could not prove the statements to be false.[210] Both the Court's opinion and Justice Stevens's dissent ultimately focused on the extent to which individuals could prove statements as being true or false. The justices repeatedly used the terms "true facts," "true speech," and "unprovable facts," for example, as they ultimately disagreed regarding the amount of protection an individual who is harmed by information has when forced to overcome the burden of proving the information or comment about them was false.[211]

### *F. United States v. Alvarez*[212]

Xavier Alvarez falsely claimed during a public meeting that he received the Congressional Medal of Honor and was charged with violating the Stolen Valor Act..[213] Alvarez contended that the law violated his First Amendment rights and, in a six-three decision in 2012, the Court agreed, striking down the law. The Court's opinion and Justice Alito's dissent diverged regarding whether false statements should receive First Amendment protection and if the law was overly broad in the types of speech it proscribed. Justice Kennedy, writing for the Court, found the "quite unprecedented reach of the statute puts it in conflict with the First Amendment. . . . The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings."[214] His primary concern regarding the law's breadth was that in the effort to halt untrue speech about military honors, the law would chill truthful speech. Citing Justice Holmes's marketplace metaphor from *Abrams*[215] and the Court's conclusion that false statements are inevitable in free debate from *Sullivan*,[216] Justice Kennedy contended that the law posed too great a danger to freedom of expression.

---

207 *Id.* at 776-77.
208 *Id.* at 776.
209 *Id.* at 780 (Stevens, J., dissenting).
210 *Id.* at 785-86 (Stevens, J., dissenting).
211 *See id.* at 776, *Id.* at 778, and *Id.* at 785 (Stevens, J., dissenting), for examples.
212 United States v. Alvarez, 132 S. Ct. 2537, 2537 (2012).
213 *Id.*
214 *Id.* at 2547.
215 *Id.* at 2550 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).
216 *Id.* at 2544 (citing New York Times v. Sullivan, 376 U.S. 254, 271 (1964)).

Justice Alito, in dissent, presented a substantially different interpretation of the law in question. He concluded the law "applies to only a narrow category of false representations of objective facts that can almost always be proved or disproved with near certainty."[217] Furthermore, he distinguished his definition of false speech from Justice Kennedy's, emphasizing that the First Amendment does not protect false statements of *fact* because they do not contribute to free debate in society.[218] He compared such statements to disagreeable ones made about subjective matters, such as philosophy or within the social sciences, finding that in certain areas of discussion "there is no such thing as truth or falsity" because "the truth is impossible to ascertain."[219] Thus, Justice Alito understood the law to be narrowly tailored because in his conceptualization, the speech it restricted was the type of false expression that contributes nothing of value to public discourse.

## IV. Analysis

The Court's opinions in the cases outlined in the preceding section, when drawn together, represent a decades-long dialogue between the justices regarding the nature of truth as it relates to the protection of freedom of expression in a democratic society. The cases were analyzed using qualitative document analysis methodology, which in this stage emphasized analyzing data by conducting repeated readings of the cases, sorting and comparing information, and searching through the documents.[220] Furthermore, it included comparing and contrasting extremes and noteworthy differences, summarizing findings, and placing the findings within a broader interpretation.[221] The method focuses on moving beyond identifying *what* is written in a text. Instead, analysis must be "oriented to documenting and understanding the communication of meaning, as well as verifying theoretical relationships."[222] After analyzing six of the cases in which the Court most extensively examined truth as it relates to freedom of expression, and in which justices ultimately constructed rationalizations for their understandings of truth, three primary themes emerged regarding how justices have understood truth. In particular, the justices conceptualized truth in terms of the value of free debate as a public good in a democratic society, its malleability as something that is provisional and contingent in nature, and its formation as a consequence of communication processes in society.

### *A. The Value of Free Debate as a Public Good*

The justices' discourse in the cases examined consistently communicated an understanding that the possible truth or falsity of an idea or expression was a matter

---

[217] *Id.* at 2557 (Alito, J., dissenting).
[218] *Id.* at 2563 (Alito, J., dissenting).
[219] *Id.* at 2564 (Alito, J., dissenting).
[220] Altheide, *supra* note 19, at 23-44.
[221] *Id.*
[222] *Id*. at 16.

to be considered in relation to the value of free debate as a public good or contribution to democratic values. Such an understanding was substantially communicated in *Sullivan*, in which Justice Brennan identified the questions that surrounded the form of communication – an advertisement –[223] and the factual errors in the message, as concerns in the case. The Court's discourse conveyed the idea that the form of the message and the errors were not destructive to the case, in this instance, because the expression in question addressed "a movement whose existence and objectives are matters of the highest public interest."[224] Later in the opinion, Justice Brennan drew "good motives and belief in truth" together in his discussion of defamation law.[225] He returned to the form and content of the message later in the opinion, concluding, "the present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to quality for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements."[226] Ultimately, the Court, largely basing its rationale on the contribution of the message as a matter of public discourse – its perceived goodness and value – concluded the format and false statements were not enough to make the *New York Times* liable in the case.

Similarly, in *Beauharnais*, Justice Frankfurter drew discussion of whether or not the ideas communicated by the plaintiff were made with "good motives" or could be regarded as "utterances as fair comment" into the opinion for the Court.[227] He concluded his opinion for the Court by emphasizing that the truth of the statements that are made should often be considered alongside the author's intent and whether or not the person had "justifiable ends."[228] Thus, to Justice Frankfurter, at least in a defamation case that occurred twelve years before *New York Times v. Sullivan* was decided in 1964, the meaning and the intent of the message, its contributory aspects, were a crucial part of the case's considerations. Justice Black, while he dissented, largely constructed his opinion in the case on the basis that Beauharnais's ideas were a matter of public concern.[229] Therefore, once again, the social value of the ideas was placed alongside the consideration of the value of truth and falsity in discourse. These considerations by the justices in this case further reinforce the broader narrative that justices understand and evaluate truth and falsity by reference to perceptions of public good or value in a democratic society. The Court in *Cox*, a case which posed a substantially different question from that considered in *Sullivan* and *Beauharnais*, found the truthfulness of the message was not in question, but the Court still conceptualized the issue of accuracy in terms of the statement's value as a public good. The Court identified the question before it as revolving around the "great responsibility" the news media carry in reporting "fully and accurately the proceedings of the government,

---

223 Advertising was not protected by the First Amendment in 1964. It would not receive such protection until the mid-1970s. *See* Bigelow v. Virginia, 421 U.S. 809 (1975) and Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976).

224 New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

225 *Id.* at 267.

226 *Id.* at 271.

227 Beauharnais v. Illinois, 343 U.S. 250, 264-65 (1952).

228 *Id.*

229 *Id.* at 270 and 272 (Black, J., dissenting).

government officials, and documents open to the public."[230] Throughout the Court's opinion, the importance of the media making "truthful information available on the public record" was repeated, further communicating the understanding that the extent of a statement's truth or falsity should be evaluated in relation with the public-good value of free debate..[231]

The theme was communicated from a different perspective in *Hepps* and *Alvarez*, which dealt substantially with the extent to which false statements can contribute value to democratic discourse or the "public good." Justice Kennedy, writing for the Court in *Alvarez*, contended that false speech could, in some instances, be a public good.[232] He explained that such false statements can "avoid embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence."[233] Thus, Justice Kennedy reasoned that false statements, while they receive *less* protection than true statements, must still be evaluated based on the extent to which they benefit others. While Justice Alito dissented in the case, his reasoning appeared to align with Justice Kennedy's. He explained that the misinformation Alvarez was involved in spreading was intentionally false and that it served no public good.[234] Thus, the false information served no public good. Justice Alito emphasized that free speech "does not protect false factual statements that inflict real harm and serve no legitimate interest."[235] Similarly, in *Hepps*, Justice Stevens reasoned in his dissent that false speech does not contribute to the public good and therefore should not be protected. He wrote that, "while deliberate or inadvertent libels vilify private personages, they contribute little to the marketplace of ideas."[236] He further concluded that some speech is "beyond the constitutional pale,"[237] reinforcing the idea, which was primarily discussed in *Sullivan*, *Beauharnais*, and *Cox*, that truth and good intent are a social good and are intertwined as considerations by the Court. For these reasons, it must be understood that false speech is least likely to receive First Amendment protection when it cannot be understood as a social good. Reciprocally, false information can at times be protected if it can be attached to some form of public social benefit.

### *B. The Provisional and Contingent Nature of "Truth"*

In the cases examined, it is clear that the justices consistently conceptualized knowledge of truth or falsity as something that was contingent upon the reception of further information. In this sense, issues of truth and falsity were understood as being, at the same time, static and dynamic. Truth could be static to the extent that the justices understood a matter to be universal reliable and not open to challenge. At the same time, however, the Court clearly recognized that new knowledge, if attainable, could transform truth to untruth, untruth to truth, or a provisional truth

230 Cox v. Cohn, 420 U.S. 469, 491-92 (1975).
231 *Id.* at 495-497.
232 United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012).
233 *Id.*
234 *Id.* at 2557 (Alito, J., dissenting).
235 *Id.*
236 Philadelphia Newspapers v. Hepps, 475 U.S. 767, 782 (1986) (Stevens, J., dissenting).
237 *Id.*

or falsity to something more concrete. Such a challenging, contingent dynamic between fully accepting truths or falsities as being absolute and leaving room for them to be reassessed was a central ingredient within the conflicting understandings communicated in the narratives regarding the nature of truth. The theme in this regard was most substantially represented in *Pennekamp*, in which justices continuously accepted "the truth" that was available as concrete, while recognizing that the "whole" or "full" truth might not yet be known. The Court accepted "the facts stated in the editorials were correct,"[238] and relied heavily upon that understanding in its decision to reverse the lower-court's ruling against the newspaper.[239] The truth as it was known, was sufficiently reliable to come to a conclusion in the case. Such a conclusion, however, did not preempt extensive discussion by the justices regarding the likely existence of more information, more knowledge, that would have influenced how the editorials were received and, potentially, the ruling itself. Justice Reed, writing for the Court conceded, "it is clear that the full truth. . . . was not published."[240] In his concurring opinion, Justice Wiley Rutledge reiterated that all of the information was not made available in the editorials, but recognized the speed at which reporting is done, positing, "There must be some room for misstatement of fact, as well as misjudgment, if the press and others are to function as critical agencies in our democracy."[241]

The Court's rulings in the defamation cases, *Sullivan* and *Hepps*, conveyed a similar understanding of truth and falsity as being provisional and contingent upon receipt of further information. In *Sullivan*, the actual malice standard at the heart of the precedent pivots upon an assumption that an inquiry must be made into whether the information was true or false and whether or not the communicator cared or was aware of the message's truth or falsity.[242] In recognizing Alabama's libel law in the passage before discussing the actual malice standard, Justice Brennan wrote, "even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so," speech might be limited.[243] In such a passage, the broad understanding of the inherent malleability of the issue of truth as being both fixed and contingent can clearly be seen.

Similarly, in *Hepps*, the Court repeatedly concluded that expressions must be "proven" or "shown" to be true or false, thus communicating the understanding that a decision on truth or falsity was contingent on more information.[244] The *Hepps* case, however, added the concern that some expressions cannot be proven true or false. A central point of contention between the Court's majority and the dissent was in regard to the ramifications that potentially defamatory statements that could not be proven true or false would have on plaintiffs and defendants in such cases. Justice O'Connor, writing for the Court, concluded, "There will always be instances when the factfinding process will be unable to resolve conclusively

[238] Pennekamp v. Florida, 328 U.S. 331, 340 (1946).
[239] *Id.* at 349-50.
[240] *Id.* at 344.
[241] *Id.* at 372 (Rutledge, J., concurring).
[242] New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).
[243] *Id.* at 279.
[244] Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776 (1986).

whether the speech is true or false."[245] The Court recognized this concern, and found that the assumed burden should be on the plaintiff, not the speaker. Justice Stevens, dissenting, contended that the existence of "unprovable facts" meant that placing the burden of proving falsity on the plaintiff would mean malicious gossip and character assassination would be protected by the First Amendment.[246] Despite the justices' disagreements in the case, the Court's concern about the fact that some expressions can neither be true nor false in *Hepps* contributes to the broader theme that justices conceptualized truth as being contingent and provisional in these cases. To consider this conclusion in another way, if an expression cannot be proven true or false, it cannot be conceptualized as being objective and universal to all. Instead, it is best classified as being provisional and contingent.

Finally, in *Alvarez*, justices articulated an understanding of truth and falsity as being divisible into two groups: statements of fact and more abstract statements dealing with intangible ideas, such as "philosophy, religion, history, the social sciences, the arts and the like."[247] Justice Breyer, concurring with the Court's conclusion that the law violated the First Amendment, concluded, "the dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts."[248] In essence, Justice Breyer emphasized that while there is significant danger in limiting expression in many areas where truth is not necessarily fact-based, such as in philosophical or religious discussions, that was not the problem in the present case, because the information was easily checked and contributed little to society. Justice Alito, in a dissent that defended the law in question, also recognized concerns about limiting potentially false speech. Like Justice Breyer, he indicated there are simply areas where the truth cannot be agreed upon and speech must, therefore, be given "a degree of instrumental constitutional protection."[249] In regard to the less-clear areas, he explained, "The point is not that there is no such thing as truth or falsity in these areas, or that truth is always impossible to ascertain, but rather it is perilous to permit the state to be arbiter of truth."[250] In stating as much, Justice Alito, along with the justices in the other cases, contributed to general conclusion that justices regard matters of truth and falsity as being provisional and contingent in the broad sense that allowance should be made for the possibility that new information could change the perspective from which they are viewed.

### *C. Communication as a Social Process*

The set of cases examined above most consistently communicated an understanding by the justices that the production of what is regarded as truth is a social process and an important component of the way in which knowledge can be generated in a democratic society. The conclusion then has to be that more speech, rather

[245] *Id.* 770-71.
[246] *Id.* at 785-86.
[247] United States v. Alvarez, 132 S. Ct. 2537, 2552 (Breyer, J., concurring).
[248] *Id.*
[249] *Id.* at 2563 (Alito, J., dissenting).
[250] *Id.*

than less, would be the best way to ensure that such a process can flourish.[251] In *Pennekamp* and *Hepps*, the Court weighed freedom of expression against the value of a respected judiciary and the reputation rights of citizens, respectively. Both amount to important societal considerations. In both instances, the Court erred on the side of more speech, and communicated an understanding in rationalizing such decisions that more speech would be the best road to fostering the discovery of truth. In *Hepp*s, Justice O'Connor used the metaphor of a set of scales, which required balancing the protection of the reputations of private individuals against the democratic value of freedom of expression. She concluded the Court must "tip [the scales] in favor of protecting free speech."[252] The Court in *Pennekamp* articulated a concern for protecting the reputation of the judicial process against any potential adverse impact from media reports that criticized the courts or negatively reported on certain cases. In its decision, the Court concluded, "We think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range."[253] The justices' conclusions, and their rationalizations all support the view that the Court conceptualizes the formation of truth and knowledge as a social process that in a democracy should require the fewest limitations possible.

The conceptualization of truth formation as a societal process that requires substantial freedom for the communication of ideas was discussed in the *Sullivan* and *Beauharnais* cases in terms of the harm such speech might realize. In his dissent in *Beauharnais*, Justice Douglas allowed that debate on important issues could at times become emotional and destructive. He concluded, however, that the authors of the Bill of Rights were aware of the dangers in ideas, and when faced with a question of more speech or control of speech, "they chose liberty."[254] Similarly, Justice Brennan in the Court's opinion in *Sullivan* enumerated the ways in which speech could reach public officials, recognizing that it could be "vehement, caustic, and sometimes unpleasantly sharp."[255] Later in the opinion, he wrote that limitations on speech dampen "the vigor and limit the variety of public debate."[256] In a different type of case, in *Cox*, the Court rationalized its conclusion that the publication of public records cannot be criminalized by contending, "the citizenry is the final judge of the proper conduct of public business."[257]

Finally, in *Alvarez* and *Hepps*, the justices recognized that despite the value of encouraging the processes of truth and knowledge formation, it is sometimes the case that speech which is not true must be protected. Justice Kennedy, in the Court's opinion in *Alvarez*, posited that the Stolen Valor Act risked suppressing "all false statements on this one subject in almost limitless times and settings."[258]

---

[251] Such a conclusion aligns significantly with Justice Louis Brandeis's contention in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927) that "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

[252] Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986).

[253] Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

[254] Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Douglas, J., dissenting).

[255] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[256] *Id.* at 279.

[257] Cox v. Cohn, 420 U.S. 469, 495 (1975).

[258] United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012).

contending that falsity, in itself, does not automatically place speech outside of First Amendment protection.[259] Despite substantially disagreeing with the Court, Justice Alito recognized that the Court has historically protected some false speech because limiting it would endanger true speech. He contended, "all of these proof requirements inevitably have the effect of bringing some false factual statements within the protection of the First Amendment, but this is justified in order to prevent the chilling of other valuable speech."[260] Similarly, in *Hepps*, the Court recognized that a standard that placed the burden of proving falsity on the plaintiff, rather requiring the defendant to prove truth would incidentally allow for the protection of false statements.[261]

## V. Proposing a Unified Conceptualization of Truth

The goal of this article has been to identify how the Supreme Court has conceptualized truth and, with this information and conceptual building blocks from pragmatic thought and Justice Holmes's legal, scholarly, and personal writings, to construct a unified conceptualization of truth that can be applied in freedom-of-expression-related cases. This goal was partially accomplished in the preceding section by identifying the Court's consistent approach to questions of truth in judgements that they make concerning the value of free speech as a public good in a democratic society, their understandings of the provisional and contingent nature of matters of truth and falsity, and the role of societal communication processes in shaping the way these matters are understood. Constructing such a conceptualization regarding the nature of truth is about externalizing an internal process and is thus different to building a test for obscenity or time, place, and manner restrictions. These factors, however, do not make such an effort less valuable. How justices conceptualize the nature of truth can influence their decisions in freedom-of-expression cases, which ultimately bear upon the crucial flow of information in a democratic society. The internal nature of how truth is understood, however, requires that the unifying model also be focused on more internal, but potentially shared, recognitions regarding the forces at play regarding how truth is understood.

The understandings detected within the Court's cases, in conjunction with the insights of pragmatic theory and the work of Justice Holmes indicate that a unifying conceptualization regarding the nature of truth must begin with the recognition that truth is a *process*. In this regard, the justices have communicated the assumption that ideas and information are to be evaluated by reference to the values of public good and democratic discourse and that the formation of truth is a societal process.[262] Justices also understand the inherent malleability of the concept in the sense that matters of truth can only be evaluated by reference to what is known and that new information might ultimately displace current understandings.[263] Thus, in freedom-

---

[259] *Id.* at 2545.
[260] *Id.* at 2563-64 (Alito, J., dissenting).
[261] Philadelphia Newspapers v. Hepps*,* 475 U.S. 767, 776-77 (1986).
[262] *See* New York Times v. Sullivan, 376 U.S. 254, 266 (1964); Philadelphia Newspapers v. Hepps*,* 475 U.S. 767, 777 (1986) for example.
[263] *See* Pennekamp v. Florida, 328 U.S. 331, 340 (1946); United States v. Alvarez, 132 S.

of-expression cases, the Justices have evaluated the facts they had before them, but often recognized that additional information might have changed the Court's conclusion. In this way there are close similarities with the work of James as we saw earlier.[264] James, in his exposition of pragmatism, indicated that truth "is simply a collective name for verification processes[265] and compared the creation of truth to amassing of wealth or the maintenance of health,[266] So too Justice Holmes referred to absolute truth as a "mirage" and highlighted its contingent nature in a variety of texts.[267] In "Natural Law", he characterized truth as "the system of my (intellectual) limitations," indicating a recognition that his ability to identify something as truthful is contingent upon a series of factors that he can rely upon, but never to the extent that he can be certain of his conclusions.[268] Thus, he identified truth as something he and others make to create order in their worlds.[269]

A second step calls for a recognition of truth as being "experience-funded."[270] The Court's freedom of speech discourse clearly recognized truth as the result of conclusions based on what was known and the product of societal processes but did not explicitly characterize conclusions regarding truth as being the result of experience.[271] Justice Holmes and James, however, understood experience as the crucial ingredient in the *making* of truth. James explained that individuals use their experiences, which form how they understand the world around them, to determine what is true, explaining that, "We receive…the block of marble, but we carve the statue ourselves"[272] Furthermore, as individuals who have established firm convictions concerning what is true and false are later called upon to internalize new experiences, their understandings can be transformed. Justice Holmes famously concluded that the "life of the law has not been logic: it has been experience."[273] He furthermore consistently referred to his experiences in the Civil War as having changed his outlook.[274] Finally, he identified himself as a bettabilitarian, indicating that individuals cannot know the absolute truth, so they *bet* using their experiences as their guide to deciding what is true and what is not.[275] Such a perspective was characterized in his formulation of the marketplace-of-ideas metaphor, where he concluded that, "We wager our salvation upon some prophecy based on imperfect knowledge."[276]

Ct. 2537, 2552 (Breyer, J., concurring) for example.

264 See notes 38-40 and accompanying text on pp. 9-11.

265 James, *supra* note 11, at 104.

266 *Id.*

267 Holmes, *supra* note 12, at 107.

268 Holmes, *supra* note 58, at 40.

269 *Id.* See also discussion *supra* pages 12-14.

270 James, *supra* note 11, at 107.

271 Pennekamp v. Florida, 328 U.S. 331, 347 (1946); Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Douglas, J., dissenting); Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776 (1986).

272 James, *supra* note 11, at 117.

273 Holmes, *supra* note 49, at 1.

274 Holmes, *supra* note 63, at 11; Holmes, *supra* note 12, at 73; Holmes, *supra* note 58, at 41.

275 Holmes *supra* note 12, at 108; *Luban*, *supra* note 80, at 474n.78.

276 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

A third and final theme is that matters of truth should not be understood from absolutist or prejudicial eyes. Such an ingredient aligns with the conclusion that truth should be conceptualized as a process and as something that is experience-funded. Such an approach draws from key understandings from pragmatic thought, as well as Justice Holmes's scholarly, legal and personal writings. Pragmatic thought emphasizes a necessity to avoid approaching questions and problems using "bad a priori reasons, . . . fixed principles, closed systems, and pretended absolutes and origins."[277] Furthermore, James emphasized that "theories become instruments" rather than stringent, unbending rules.[278] Justice Holmes consistently discounted unbending, absolutist perspectives.[279] In "Natural Law," for example, he explained that "our best test of truth is a reference to either a present or an imagined future majority in favor of our view."[280] Menand characterized Justice Holmes and James, as well as Dewey, as understanding democracy as being based on tolerance. He explained, "The political system their philosophy was designed to support was democracy. And democracy, as they understood it, isn't about letting the right people have their say; it's also about letting the wrong people have their say."[281] Finally, such an addition to the model aligns with the theme communicated in the Court's cases that truth is the result of communication processes within society. As was communicated by Justice Holmes, absolutist perspectives are not conducive to the formation of truth in society. The Court in the freedom-of-expression cases analyzed communicated an understanding that more speech, rather than less, was the most likely approach to fostering the discovery of truth.[282]

In conclusion, this proposed unifying conceptualization of the nature of truth calls for the recognition of three substantially related understandings regarding truth: that truth is a process, that it is experience-funded, and that it is not absolute and is best approached without prejudice. Each of the three ingredients relates, at least to some extent, with thematic understandings demonstrated by the Court in previous freedom-of-expression cases, and therefore does not represent a significant departure from justices' traditional approaches to truth. The model, most ideally, does seek, with the help of pragmatic thought and the work of Justice Holmes, to encourage consistent recognition of certain principles regarding truth as justices go about considering its nature in First Amendment cases.

---

[277] James, *supra* note 11, at 31.

[278] *Id.* at 32. See also discussion *supra* pp. 7-11.

[279] Holmes, *supra* note 58, at 40. See also discussion *supra* pp. 12-14.

[280] *Id.*

[281] Menand, *supra* note 12, at 440.

[282] *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986) and Pennekamp v. Florida, 328 U.S. 331, 347 (1946), for example.

Br. J. Am. Leg. Studies 7(1) (2018), DOI: 10.2478/bjals-2018-0006

DE G DE GRUYTER OPEN

# ACTS OF STATE, STATE IMMUNITY, AND JUDICIAL REVIEW IN THE UNITED STATES

Zia Akthar*
*Sussex University*

## ABSTRACT

*The doctrine of the Act of State and State Immunity has its foundation in common law frameworks. It is settled law that there is no cause of action that will make a foreign state liable in the domestic court of another country. In the United States there has been acceptance that certain cases involve "political questions" that are non-justiciable, as they are not a "case or controversy" as required by Article III of the U.S. Constitution. The courts have only intervened either where the federal statutes have applied extra-territorially, such as under the Civil Rights Act 1964 where a U.S. citizen is employed abroad by a company registered in the United States, or under the Alien Tort Claims Act (ATCA) 1789, which protects foreign parties who are designated sufficiently "alien" for the sole purpose of invoking jurisdiction after a civil wrong has been committed against them. There needs to be an evaluation of the U.S. Supreme Court precedents that have asserted judicial oversight in respect of wrongs committed extra-territorially, and their present rationale for retaining the doctrine. This paper also discusses the scope of the Federal State Immunity Act (FSIA) and the Justice Against Sponsors of Terrorism Act (JASTA) that narrow the concept of state immunity when dealing with terrorism by another state or its agents. A comparative analysis with the state immunity doctrine in Canada and the framework for litigation under the merits-based approach by the courts is provided. The common law courts have developed the doctrine of the Act of State and it has become a principle of customary international law. The argument of this paper is that there needs to be a greater focus on the civil injuries that are caused in other jurisdictions that should allow the claimants to litigate in the forum court and for judicial review to be available.*

## KEYWORDS

*Sovereign immunity; Article III; judicial restraint; ATCA; territoriality principle; JASTA; merits-based approach.*

## CONTENTS

I. INTRODUCTION .......... 206

II. UNITED STATES .......... 207

A. Non-Justiciability and the Political Question Doctrine .......... 207

B. Challenging the Executive Powers of State .......... 211

C. Constitutional Review of State Immunity .......... 214

* LLB (Lon), LLM (Lon), Gray's Inn, Doctoral Candidate, Sussex University. The author acknowledges with thanks the helpful comments of the anonymous reviewers of this article and the considerable editorial assistance of members of the editorial team of the British Journal of American Legal Studies

(cc) BY-NC-ND © 2018 Zia Akthar, published by De Gruyter Open.
This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 License.

D. Extraterritorial Jurisdiction and Tort Liability ............................216

E. Impact of JASTA on State Immunity ..........................................223

III. Canada ........................................................................................ 227

A. Sovereign Immunity in Law .....................................................227

B. Merits-Based Approach ...............................................................229

C. Liability of Foreign Countries for Terrorist Conduct .................230

IV. Conclusion ..................................................................................... 232

## I. Introduction

International relations have been governed by the concept of sovereign immunity of states which prevents litigation against them in foreign courts. This concept is based on the doctrine of act of state which grants immunity from wrongdoing to the state for any alleged breach of law. When pleaded in court, judges may deny the private party's cause of action against the invoking state. The existence of sovereign immunity places an absolute bar on judicial review in the domestic courts and, in the United States, is regarded as part of the doctrine of separation of powers. There are statutory exceptions to the law of sovereign immunity when the Supreme Court has review powers over external acts that give rise to a cause of action in U.S. courts for breaches of duty in another country.

The protection for the state under both state immunity and "act of state" doctrines protects individual states and their institutions from scrutiny where they act unlawfully either together or in common with other states and impinges on the ability of private individuals to secure redress. In the common law traditions, the level of restriction on the traditional absolute theory of sovereign immunity has now become the subject of national legislation. The United States was the first to enact a law in the form of the Foreign Sovereign Immunities Act of 1976, followed by State Immunity Act 1978 in the United Kingdom, and in Canada the promulgation of the Foreign State Immunities Act 1985.

The concept of state immunity is based on the common law process of legal precedents developed by the courts. In England, the doctrine of "act of state" is based on judicial restraint rather than constitutional competence. The case for application of the doctrine is subject to close scrutiny and it has been qualified by decisions in the courts that have recognized that non-justiciability is not an absolute principle.[1] The act of state doctrine's origin in the United States was when cases were initiated against officials of foreign governments and the personal immunity of foreign sovereigns was established. It placed limitations on judicial review where the courts respected the right of the executive to deny jurisdiction.

[1] For a general description of the history and development of the act of state doctrine in the United Kingdom, *see* Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice*, 75 Am. J. Int'l L. 283, 284-96 (1981).

One constitutional safeguard is that certain cases have been designated as involving "political questions." Such cases are non-justiciable, as they are not a "case or controversy" as required by Article III of the U.S. Constitution which only allows judicial intervention in such circumstances.[2] The issue the courts face is the extent to which this rule has been circumvented by the doctrine of separation of powers which, unlike in other common law systems, is a central tenet of the U.S. constitution.

Certain extra-territorial breaches involving either U.S. citizens or those foreign citizens affected by an act of a federal agency confer a power of review on federal courts overriding any state immunity. This exists in two instances: the Civil Rights Act 1964, Title VII and the Alien Torts Act 1791, originally enacted as section 9 of the Judiciary Act of 1789, that grants the district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[3] It provides redress for non-U.S. citizens who may bring a civil suit in the federal courts. The preservation of sovereign immunity until now has kept the separation of powers doctrine intact and not only prevented the United States government holding a foreign state liable in its courts but neither has there been a reciprocal power for foreign courts to try U.S. citizens for grave breaches of international law. The cases need analysis to determine the strength of the doctrine that has been a central tenet of public international law. This paper presents a comparative approach by also evaluating the Canadian courts' merits-based approach to set out the need for increased judicial activism in this area of law.

## II. United States

### *A. Non-Justiciability and the Political Question Doctrine*

In the United States, the act of state doctrine excludes jurisdiction in cases that involve "political questions". This is because the separation of powers doctrine vests the executive with its own domain of authority. A right of challenge may exist where a private right of a citizen has been infringed, when the courts will, in principle, exercise their powers of judicial review.[4] However, when the issue relates

---

[2] U.S. Constitution Article III, Section 2 states:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

[3] Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 77 (currently, with some changes, 28 U.S.C. §1350 (1982)).

[4] In the United States, the constitution has been interpreted to provide a balance of powers that can enquire into the legality of the executive's actions. These can be challenged and

to acts of a foreign state acting *intra vires*, then those actions are not reviewable by federal courts under the Article III of the U.S. Constitution.[5]

The context in which the doctrine of act of state has developed and is invoked needs to be appreciated when there is a challenge to an act of state in the domestic courts. This can be by contrasting the concept that prevails at common law from which the act of state doctrine originates. In English law, the act of state doctrine can be accurately described as being a product of the common law and not international law and it has similar origins to the U.S. doctrine.[6] There is a denial of private rights in its application and it is based on notions that parallel other methods of jurisdictional control and regulation in cases involving foreign states.

Lord Wilberforce's principle of "non-justiciability" was elucidated in *Buttes Gas & Oil Co. v. Hammer (No.3*) [1982] A.C. 888 as follows*:*

> But, the ultimate question what issues are capable, and what are incapable, of judicial determination must be answered in closely similar terms in whatever country they arise, depending, as they must, upon an appreciation of the nature and limits of the judicial function. This has clearly received the consideration of the United States courts. When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before U.S. belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it.[7]

The principle of non-justiciability has been extended to the standard of proof to be satisfied by a party which asserts that justice has not been done in a foreign jurisdiction.[8] His Lordship also considered whether it was open to allege that as

---

a body required to submit to a writ of mandamus. The rule was stated by the Supreme Court in *Marbury v Madison,* 5 U.S. (1 Cranch) 137 (1803), where it stated that the discretionary executive actions of the government are not usually reviewable, " but where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy". *Id.* at 166.

5 In *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), Fuller, C.J. established the principle of the act of state in the following terms:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

6 It is worth noting that the Supreme Court decision in *Oetjen v. Central Leather Co*. 246 U.S. 297 (1918), which affirmed the decision in *Underhill*, 168 U.S. 250, was referred to in the judgments in *Luther v. Sagor & Co* [1921] 3 KB 532 and *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718, Scrutton, L.J. in the latter stating that English law on the point was the same as American law (*Princess Paley*, at 724-25; 728-29).

7 Buttes Gas & Oil Co. v. Hammer (No.3) [1982] A.C. 888*,* 937.

8 In *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos 4 & 5)* [2002] UKHL 19*,* the House of Lords identified three separate issues arising when English courts are called upon to adjudicate what might otherwise be a wrong and are offered foreign legislative or executive

a result, for example, of endemic corruption, the principle of justice cannot be achieved in the foreign legal system. The principle of state immunity (or sovereign immunity) is for the legislative or executive acts of foreign states. This aspect of the act of state doctrine has been refined by common law and statute in the United Kingdom and is increasingly determined by its limitations, rather than by providing the state with a discretion as to when an exception will be allowed.

Whereas *Buttes* involved issues concerning several foreign states, the political question doctrine developed as a reaction to both internal and external circumstances. This is the reasoning that underlies the wider application of the political question doctrine in relation to the concept of non-justiciability. It is the basis for the claim that the political question doctrine originates from English precedent and is premised upon concerns different from the contemporary *Buttes* doctrine.[9]

Lord Hope stated further that this did not provide an absolute rule and it was subject to an exception based on public policy. This is effective "if the foreign legislation constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise the legislation as a law at all".[10] The public policy exception was to be very narrowly construed and that the only exception which the courts accepted was based on human rights.[11]

The concept of the political question doctrine arose in the United States at the turn of the 19th century when the U.S. Supreme Court held that policy considerations in foreign relations made certain issues inappropriate for judicial hearing.[12] The implication was that disputes of a political nature, or those within the discretion of the executive, were non-justiciable.[13] However, the rulings did not declare a recognized principle until the decision in the seminal case of *Baker v. Carr*, where the appellants had qualified to vote for members of the General Assembly of Tennessee representing the counties in which they resided. The group claimants served proceedings in a federal district court under 42 U.S. C. §§1983 and 1988, on behalf of themselves and others, to redress the alleged deprivation of their federal constitutional rights by the State's failure to enact redistricting legislation equalizing representation in the Tennessee General Assembly.[14]

---

acts by way of defense. The first was the accepted rule that a foreign sovereign is to be accorded absolute authority to act as a sovereign within its own territory; the second is whether the sovereign was acting within its own territorial jurisdiction or not and, finally, there is a certain class of sovereign act which requires judicial deference, called non-justiciability, on the part of the English domestic court. Lord Hope ruled: "There is no doubt as to the general effect of the rule which is known as the act of state rule. It applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts. They may be pleaded and relied upon by way of defence in this jurisdiction without being subjected to that kind of judicial scrutiny." *Id.* at ¶135.

9 In *Coleman v. Miller*, 307 U.S. 433, 460 (1939), Frankfurter, J. held that this principle extended as far back as the 15th century, citing *Duke of York's Claim to the Crown* (1460) 5 Rot. Parl. 375. In *Coleman*, the U.S. Supreme Court recognized that the doctrine was both part of the separation of powers as well as a limitation on justiciability. *Coleman*, at 454-55 (Hughes, C.J.).

10 Kuwait Airways Corp. v. Iraqi Airways Co. (No's 4 & 5) [2002] UKHL 19, ¶137.

11 *Id.*

12 Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

13 Marbury v. Madison, 5 U.S. 137**,** 170 (1803) (Marshall, C.J.).

14 Baker v. Carr, 369 U.S. 186 (1962).

The issue was that a 1901 statute of Tennessee arbitrarily divided the seats in the legislature among the State's 95 counties, and Tennessee had failed to reapportion them afterwards despite the substantial increase and redistribution of the State's population. This meant that the claimants suffered from a "debasement of their votes," and were, therefore, denied the equal protection of the laws guaranteed to them under the Fourteenth Amendment.

The application for a declaratory injunction restraining certain state officers from organizing any further elections was denied by the district court on the basis that it lacked jurisdiction of the subject matter and that no relief could be granted. The case reached the U.S. Supreme Court where the majority considered the case was justiciable.[15]

Justice Brennan, in a 6-2 majority verdict, delivered the opinion for the Court holding that by virtue of debasement of their votes, the appellants' allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which they were entitled to a trial and a decision. The right asserted was within the reach of judicial protection under the Fourteenth Amendment.[16] This established the precedent for the "political question doctrine" and it remains the leading case. However, unlike the *Buttes* case, the decision in *Baker* did not involve foreign states or external considerations but concerned the alleged failure of the State legislature of Tennessee to abide by its constitutional provisions on the designation of legislative districts.

The dissenting justices, Frankfurter and Harlan, JJ. [17] held that the case was "masquerading" as a legal claim and was not justiciable "by virtue of the very fact that a federal court is not a forum for political debate".[18] Frankfurter, J. stated that the courts, "must remain completely detached from "political entanglements" and abstain "from injecting [themselves] into the clash of political forces in political settlements".[19] The implication was that the role of the courts in hearing disputes would often be compromised in a very wide interpretation of judicial restraint which led to the judicial consensus on the existence of the political question doctrine.

The ruling of the Court identified six factors, the presence of one or more of which would render a case non-justiciable. This established the principle that "it is [an] error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance".[20] In the following circumstances, cases would be held non-justiciable when there was a

> textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due [to] coordinate branches of government;

---

15 *Id.* at 226 (Brennan, J.), 241 (Douglas, J., concurring), 251 (Clark, J., concurring), and 265 (Stewart, J., concurring).

16 *Id.* at 237.

17 *Id.* at 297 (Frankfurter, J.).

18 *Id*. at 330 (Harlan, J.).

19 *Id.* at 267 (Frankfurter, J.).

20 Baker v. Carr, 369 U.S. 186, 211 (1962) (Brennan, J.).

> or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. [21]

These factors are broad in scope and could cover a range of cases and this has caused much criticism of the doctrine.[22] There have been some scholars who have suggested that the doctrine is in perpetual decline.[23] However, other commentators have suggested that the political question doctrine should be retained. [24] The political question doctrine is a firmly entrenched rule of American constitutional law and it separates the role of the branches of government but, in giving cognizance to the view that some cases can be heard if there are principles at stake, the courts have set out the basis of a review of acts of state.

### *B. Challenging the Executive Powers of State*

There have been many decisions in the U.S. courts on the "political question" doctrine both pre- and post-*Baker v. Carr* that have involved considerations internal to the United States and many of the judgments have no impact in relation to transactions involving foreign states.[25] There have also been occasions when they have arisen where this has often been in respect of attempts to bring about changes in the foreign policy of the federal government.[26] Whilst at times application of the

---

[21] *Id.* at 217.

[22] *See*, e.g, Michael E. Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. Rev. 1135 (1970); Louis Henkin, *Is There a "Political Question" Doctrine?,* 85 Yale L. J. 597 (1976); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 Northwestern U. L. Rev. 1031 (1985); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am. J. Int'l L., 805 (1989). Criticism has also been levelled at the doctrine in the Supreme Court of Canada. In *Operation Dismantle v. The Queen*, [1985] 1 SCR 441, 469–70 ('*Operation Dismantle*'), Wilson, J. said that Justice Brennan's statement in *Baker v. Carr* was not helpful in determining when the six factors come into play. Her Honour said that past decisions of the U.S. Supreme Court were highly embarrassing to those in the executive or legislature, for e.g, *Marbury v Madison*, 5 U.S. 137, 170 (1803) and *U.S. v. Nixon*, 418 U.S. 683 (1974).

[23] *See*, *e.g*, R. Brook Jackson, *The Political Questions Doctrine: Where Does It Stand after* Powell v. McCormack*,* O'Brien v. Brown*, and* Gilligan v. Morgan, 44 U. of Col. L. Rev. 477 (1973); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2002).

[24] *See*, e.g, Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 183–98 (1962); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. Penn. L. Rev. 97 (1988); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L. J. 1457 (2005).

[25] *See, e.g*, Powell v. McCormack, 395 U.S. 486 (1969); Gilligan v Morgan, 413 U.S. 1 (1973); Consumers Union of U.S., Inc v. Periodical Correspondents' Ass'n, 515 F.2d 1341 (D.C. Cir. 1975); Metzenbaum v. Fed. Energy Reg. Comm., 675 F.2d 1282 (D.C. Cir. 1982); McIntyre v. O'Neill, 603 F.Supp. 1053 (D.C. Cir. 1985); Davis v. Bandemer, 478 U.S. 109 (1986).

[26] *See*, *e.g*, Atlee v. Laird**,** 347 F.Supp 689 (E.D. Penn. 1972); Holtzman v. Schlesinger**,** 414 U.S. 1321 (1973); Goldwater v. Carter, 444 U.S. 996 (1979); Ramirez de Arellano

doctrine may arise in relation to issues concerning foreign states, it is clear from these six factors identified by Justice Brennan in *Baker* that support for judicial restraint in public international law in private litigation was not within the scope of the political question doctrine.[27]

The interplay between the application of the political question doctrine and public international law is provided by the same concept on which the House of Lords created its doctrine of non-justiciability. The action in the United Kingdom courts which culminated in *Buttes*, also had its American counterpart when the plaintiff Occidental launched two lawsuits in the United States at the same time as commencing litigation in England. This litigation in the United States alleged conspiracy and unlawful interference in respect of the decree made by the Ruler of Sharjah.[28] However, the Californian district court granted a motion to dismiss the first claim by reference to the act of state doctrine and it declined to make inquiries "into the authenticity and motivation of the acts of foreign sovereigns" because those would be "the very sources of diplomatic friction and complication that the act of state doctrine aims to avert".[29] In *Buttes*, Lord Wilberforce described these lawsuits as "closely similar" to allegations that were before him in the House of Lords in England."[30] His Lordship had ruled that the act of state doctrine was inapplicable.[31]

There was subsequent litigation in the United States brought three years later based on similar allegations, but the claims made related to the tortious conversion of cargoes of oil extracted and shipped from the area of disputed sovereignty and imported into the United States. Summary judgment against Occidental was granted.[32] This was affirmed by the Fifth Circuit U.S. Court of Appeals on the basis that the case would involve "resolution of a territorial dispute between sovereigns", a political question upon which the Court was "powerless" to adjudicate.[33] In its judgment, all six *Baker* factors that excluded its jurisdiction were relevant.[34] This was because firstly, the resolution of the ownership of disputed foreign lands is constitutionally entrusted to the executive;[35] secondly, judicial or manageable standards are lacking in the determination of sovereignty;[36] thirdly, in the absence of an executive decision on the sovereignty of the area, judicial determination

v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984); Lowry v. Reagan, 676 F.Supp 333 (D.C. 1987); Made in the USA Found'n v. U.S., 242 F 3d 1300 (11th Cir. 2001).

27 Occidental Petroleum Corp. v. Buttes Gas & Oil Co, 331 F.Supp 92 (C.D. Cal. 1971); aff'd Occidental Petroleum Corp. v. Buttes Gas & Oil Co, 461 F.2d 1261 (9th Cir. 1972).

28 Occidental Petroleum Corp. v. Buttes Gas & Oil Co**,** 331 F.Supp 92, 110 (1971).

29 Buttes Gas & Oil Co. v. Hammer (No. 3) [1982] AC 888**,** 935.

30 *Id.* at 930–31.

31 *Id.*

32 Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo Laden aboard Dauntless Colocotronis, 396 F.Supp. 461 (W.D. La. 1975).

33 Occidental of Umm al Qaywayn Inc. v. A Certain Cargo of Petroleum Laden aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978).

34 Baker v. Carr, 369 U.S. 186**,** 217 (1962).

35 Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo Laden aboard Dauntless Colocotronis, 396 F.Supp 461 (W.D. La. 1975).

36 Occidental of Umm al Qaywayn Inc. v. A Certain Cargo of Petroleum Laden aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978).

was impossible without an executive policy decision;[37] fourthly, deciding the case would reflect a lack of respect for the executive, because the State Department had included a letter in an amicus brief, which indicated the importance of neutrality in the Middle East;[38] fifthly, by implication, the political decision had been made not to declare whom the United States regarded as sovereign; and finally, by implication, there existed the potential source of embarrassment of conflicting statements from different branches of the government on the question of recognition. The State Department had not yet made a declaration in respect of sovereignty but was expected to do so in the future and the Court's ruling would be considered as detrimental to U.S. foreign policy.

This reasoning reveals twofold deference to the United States executive and to the act of state doctrine and has been criticized for violating the protection of private rights in international law.[39] Here the Court was informed of the opinion of the executive, unlike the House of Lords in *Buttes (No. 3)*. This meant it was consonant with the tradition in the United States under its separation of powers doctrine, in which the judiciary will not interfere with the executive's defined role in the constitution. The U.S. Supreme Court had, in paying such respect, denied writs of certiorari in both this and the earlier proceedings.[40] The judicial approach in adopting the political question doctrine was a reflection of the doctrine of non-justiciability in the United Kingdom. In *Buttes (No. 3)*, Lord Wilberforce relied upon *Baker* to suggest that the doctrine of non-justiciability was one "starting in English law, adopted and generalised" in the law of the United States.[41] The outcome of the parallel litigation in the United States on the same issues caused Lord Wilberforce in *Buttes (No. 3)* "to follow the Fifth Circuit Court of Appeals" in its decision and rule that the matter was non-justiciable.[42]

Lord Wilberforce considered that the

> ultimate question [of] what issues are capable … of judicial determination must be answered in closely similar terms in whatever country they arise … When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours … spelt out moreover in convincing language and reasoning, we should be unwise not to take benefit of it.[43]

This makes the judgment in the House of Lords in *Buttes,* as predicated upon reliance on the "political question" doctrine which is part of the U.S. constitutional separation of powers, a fact that Lord Wilberforce acknowledged but did not

---

37 *Id.* at 1205.

38 *Id.*

39 Anne Martragono, *Act of State and Political Question Doctrines: Judicial Prudence or Abdication?*, 11 Lawyer of the Americas 205 (1979).

40 *Occidental Petroleum Corp. v. Buttes Gas & Oil Co*, 409 U.S. 950 (1972); *Occidental of Umm al Qaywayn Inc. v. Cities Service Oil Co*, 442 U.S. 928 (1979).

41 *Buttes (No. 3)* [1982] AC 888, 932.

42 *Id*. at 938.

43 *Id.* at 938.

consider relevant in upholding the act of state doctrine in the English courts.[44] This concurrence meant that the justiciability of cases would be the same in whatever country they arose because of its assumption that it was to be enforced in the multi-jurisdictional world. The rejection did not take into consideration the approach adopted in other Commonwealth states where the courts have been less hesitant in adjudicating on a matter between two private parties.[45]

### *C. Constitutional Review of State Immunity*

The principle that existed prior to the enactment of the Justice Against Sponsors of Terrorism Act (JASTA) in 2016 was that a citizen of the United States was not entitled to recover damages from another country since the acts were those of a foreign government. The issue that the courts face is the extent to which this rule has been circumvented by the separation of powers that is a central tenet of the U.S. constitution unlike other common law systems. This has led to the emergence of the three main principles that justify this doctrine, two of which are based on the theories of "international law" and "territorial choice of law"; external deference which gained approval in the early cases establishing the political question doctrine; and the "separation of powers" theory which is based on the theory of internal deference. These are most crucial in governing the application of state immunity when denying private remedies in international law.

In *Banco Nacional de Cuba v. Sabbatino* (1964),[46] the appellant was a Cuban corporation largely owned by U.S. residents which had contracted with an American commodity broker to buy Cuban sugar. Thereafter, subsequent to the United States government's reduction of the Cuban sugar quota, the Cuban government expropriated the corporation's property and rights. To secure consent for shipment of the sugar, the broker, by a new contract, agreed to make payment for the sugar to a Cuban instrumentality which thereafter assigned the bills of lading to petitioner, another Cuban instrumentality, and petitioner instructed its agent in New York to

---

44 *Id.* at 936–7.

45 There have been references made to *Baker v. Carr,* 369 U.S. 186 in the High Court of Australia, however not in cases involving private international law. Rather, they have been in relation to Senate approval of legislation as in *Victoria v. Commonwealth* (1975) 134 CLR 81, 135 (McTiernan, J., dissenting) ('*Petroleum and Minerals Authority Case*'). For analysis of this judgment, *see* G. Lindell, *The Justiciability of Political Questions*, in H.P. Lee & George Winterton (eds), Australian Constitutional Perspectives 201–02 (1992) and the level of judicial scrutiny applicable to acts of the executive and legislature. *Gerhardy v. Brown* [1985] HCA 11, (1985) 159 CLR 70, 138–43 (Brennan, J.); *see also,* Richardson v. Forestry Comm'n [1988] HCA 10**;** (1988) 164 CLR 261, Georgiadis v. Australian and Overseas Telecommunications Corp .- [1994] HCA 6, (9 March 1994) (Mason, C.J. & Brennan, J.), *Thorpe v. Commonwealth of Australia (No 3)* [1997] HCA 21**;** (1997) 144 ALR 677, 692 (Kirby, J.). That these Australian references to the political question doctrine took place in cases concerning internal political considerations serves as a reminder that the political question doctrine has a wider application than the doctrine of non-justiciability, and is not confined to cases involving foreign states. For an analysis of *Baker v. Carr* and its potential application to Australia in respect of these internal matters, *see* above, at 787–96.

46 376 U.S. 398 (1964).

deliver to the broker the bills of lading and sight draft in return for payment. The broker accepted the documents, received payment for the sugar from its customer, but refused to deliver the proceeds to petitioner's agent. Petitioner brought an action for conversion of the bills of lading to recover payment from the broker and to enjoin from exercising dominion over the proceeds a receiver who had been appointed by a state court to protect the New York assets of the corporation.

The district court had concluded that the corporation's property interest in the sugar was subject to Cuba's territorial jurisdiction, and acknowledged the "act of state" doctrine, which precluded judicial inquiry in the United States respecting the public acts of a recognized foreign sovereign power carried out within its own territory. The court nevertheless rendered summary judgment against the petitioner, ruling that the act of state doctrine was inapplicable when the questioned act violated international law, which the district court found had been the case.[47] The U.S. Court of Appeals affirmed, additionally relying upon two State Department letters which it took as evidencing willingness by the executive branch to judicial testing of the validity of the expropriation.[48] The U.S. Supreme Court held that the basis of the doctrine was not external deference but internal deference, and it concerns "a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community rather than laying down or reaffirming an inflexible and all-encompassing rule in this case".[49]

Justice Harlan's opinion in *Sabbatino* established the principle which is the most popular exception to the act of state doctrine that permits U.S. courts to adjudicate on the validity of foreign acts of state under international law. The international law exception originates from the concept that it would not apply if there was a "treaty or other unambiguous agreement regarding controlling legal principles" and that

> the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or international justice.[50]

This prevented the courts from holding invalid an official act of expropriation by a state within its own territory which was recognized as such by the United States at the time of litigation. This was in the absence of a treaty or other undisputed agreement regarding established legal principles, even if the claim alleged that the appropriation "violates customary international law."[51] The privilege of resorting to the federal courts is available to a recognized sovereign power not at war with the United States and not being dependent upon reciprocity of treatment where the

47 Banco Nacional de Cuba v. Sabbatino, 193 F.Supp. 375 (S.D.N.Y. 1961).
48 Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962).
49 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412-13 (1964).
50 *Id.* at 414-15.
51 *Id.*

petitioner has access to the federal courts.[52] The rule is contingent on the *Kirkpatrick* principle, where the U.S. Supreme Court strictly limited its application to cases in which a court was required to determine the legality of a sovereign state's official acts under that sovereign's own laws.[53] Under this doctrine, the courts of one state will not question the validity of public acts performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.

The act of state doctrine will not apply merely because a judicial inquiry in the United States might humble a foreign country or interfere politically in the conduct of United States foreign policy, which are examples of the narrow application of this doctrine. The Foreign Sovereign Immunities Act of 1976 does not affect the application of the act of state doctrine. In the Restatement (Third) of the Foreign Relations Law of the United States,[54] which is the definitive statement of U.S. policy practice, three jurisdictional bases are confirmed which are (1) the territorial principle, (2) the nationality principle, and (3) the objective territoriality principle.

### *D. Extraterritorial Jurisdiction and Tort Liability*

In the United States there have been legal issues that have arisen in the context of domestic law within the state-federal system and these have involved the personal, territorial, and nationality jurisdictions. The federal government has promulgated several laws that govern the conduct of United States nationals abroad. These include the liability for bribing public officials of foreign countries in order to get contracts (Foreign Corrupt Practices Act of 1976) and Title VII of the Civil Rights Act also applies extraterritorially where, for example, a U.S. citizen is employed abroad by an American company.

The Alien Tort Claims Act (ATCA) 1789 may be invoked where the foreign parties are sufficiently "aliens" for the sole purpose of invoking jurisdiction of the U.S. courts. The preamble states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[55]

[52] *Id.* at 408-12.

[53] In *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l,* 493 U.S. 400 (1990) the U.S. Supreme Court held that the doctrine applies 'exceptionally' and only when an action requires a declaration of invalidity of a foreign governmental act performed within its territory and does not preclude inquiry into the motivations of a foreign government. Scalia, J. held "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.* at 409.
It implies that the courts do have a reviewing power to the extent that a case involves the "official act of a foreign sovereign," the Act of State doctrine applies only when a U.S. court must declare such an official act "invalid, and thus ineffective as a rule of decision for the courts of this country." *Id.* at 410.

[54] Published by the American Law Institute in 1987, and regularly updated, this Restatement is an unofficial yet authoritative account of international law as it applies to the United States.

[55] The Act stems from the Judiciary Act in 1789 when the United States government set out it three-tiered system of courts and the U.S. Supreme Court was designated as the apex

The Act provides civil redress in tort for a violation of established customary international law for foreign nationals against U.S. citizens. The elements that have involved legal proceedings under this Act in the American courts have concentrated on legislative intent, international law and human rights violations.

In *Filártiga v. Peña-Irala,*[56] there was a claim by the Filártiga family, who were Paraguayan nationals, that their seventeen-year-old son, Joelito Filártiga, had been kidnapped and tortured to death in 1976 by the Inspector General of Police in Asuncion, Américo Norberto Peña-Irala (Peña). They claimed that Joelito was maltreated because his father was a longstanding opponent of the government of Paraguayan President Alfredo Stroessner. In 1978, Joelito's sister, Dolly Filártiga, and Américo Peña were both in the United States. Dolly applied for political asylum and, upon learning of Peña's presence, she reported him to the Immigration and Naturalization Service. He was arrested and ordered for deportation for staying past the expiration of his visa.

The Filártiga family filed a complaint before U.S. courts alleging that Peña had wrongfully caused Joelito's death by torture and sought compensation of $10,000,000. The action was brought under the Alien Tort Claims Act and was intended to prevent Peña's deportation to ensure his availability for the trial process. The crimes were committed outside the United States, namely in Paraguay, and neither the plaintiffs nor the defendant were United States nationals. The District Court for the Eastern District of New York dismissed the case on the grounds that subject matter jurisdiction was absent and for *forum non conveniens*,[57] but on appeal the Filártiga family succeeded. The U.S. Court of Appeals for the Second Circuit ruled that even though the Filártiga family did not consist of U.S. nationals and that the crime was committed outside the federal jurisdiction, the family should be allowed to bring a claim before U.S. courts.[58]

The main issue before the court was: does an act of torture violate the law of nations and, if a foreign national brings a case before federal courts for civil redress for acts, which occurred abroad, can this be reviewed by the courts? The U.S. Court of Appeals reversed the district court's decision, and declared that foreign nationals who are victims of international human rights violations may litigate against the perpetrators in federal court for civil redress, even for acts which occurred abroad, so long as the court has personal jurisdiction over the defendant. In particular, the Court held that "whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction".[59] The Court held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the

court in the land. This Act established the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, at 77, codified as amended as 'Alien's Action for Tort (Alien Tort Statute (ATS), Alien Tort Claims Act, (ATCA))' 28 U.S.C. § 1350, 25 June 1948 (United States). The Judiciary Act, in its amended form, remains as the framework upon with the national court system is based. *See* Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L. J. 1421, 1478-79 (1989).

[56] 630 F.2d 876 (2d Cir. 1980),

[57] Filartiga v. Peña-Irala, 577 F.Supp. 860 (E.D.N.Y. 1984).

[58] Filartiga v. Peña-Irala, 630 F.2d 876, 889 (2d Cir. 1980).

[59] *Id*. at 878.

law of nations".[60] It further ruled that freedom from torture is guaranteed under customary international law and the prohibition as such "is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens". [61]

In *Sosa v. Alvarez-Machain* (2004), the U.S. Supreme Court stated that "any claim based on the present-day law of nations must rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of piracy, safe conduct, and ambassadorial offenses.[62] The contemporary forms of unlawful conduct must fall within the ambit of ATCA. This is a clear direction that serves its purpose, which was defined at the time of enactment, that the federal courts had jurisdiction to hear claims in a very limited category of instances respected by the law of nations and recognized at common law.[63] There have been more recent applications of the statute that have clarified the principles set out in the Act which have led the Supreme Court to determine the liability of U.S. officials or their agents in the course of claiming state immunity.

In *Sosa*, a U.S. Drug Enforcement Administration (DEA) special agent was abducted and then killed in 1985 by a Mexican narcotics cartel which led to an indictment being issued against Álvarez-Machaín for murder. The DEA could not convince Mexico to extradite the accused; consequently the DEA paid several Mexican nationals to seize him and transfer him to the United States. After his capture, the defense appealed to the U.S. Supreme Court**,** which held that the government could arraign a person who had been forcibly abducted, but that the capture might violate international law and provide grounds for civil litigation. [64]

The case was remitted back to the district court for trial where Álvarez-Machaín was found not guilty for lack of evidence. In 1993, after returning to Mexico, Alvarez filed civil actions against Sosa, Mexican citizen and DEA operative

---

60 *Id*. at 880.

61 *Id.* at 884.

62 Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 **(**2004).

63 *See*, Karen E. Holt, *Filartiga v. Pena-Irala after Ten Years: Major Breakthrough or Legal Oddity**?**,* 20 Ga. J. of Int'l & Comp. L. 543 (1990) Beth Van Schaack, *The Story Behind the Case that Launched a Legal Revolution: A Review of William Aceves's The Anatomy of Torture - A Documentary History of Filartiga v. Pena-Irala'*, Hum. R'ts Q. 1, (2008); James Paul George, *Defining* Filartiga*: Characterizing International Torture Claims in United States Courts***,** 3 Dickinson J. of Int'l L. 1 (1984); Laura Dickinson, *Filartiga's Legacy in an Era of Military Privatization*, 37 Rutgers L.J. 703 (2006); Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights,* 11 Ga. J. of Int'l & Com. L. 317 (1981); Daniel S. DoKos, *Enforcement of International Human Rights in the Federal Courts after* Filartiga v. Pena-Irala, 67 Va. L. Rev. 1379 (1981); W.J. Aceves, The Anatomy of Torture: A Documentary History of Filartiga v. Pena-Irala (2007); Dean Rusk, *Comment on Filartiga v. Pena-Irala,* , 11 Ga. J. of Int'l & Com. L. 311 (1981); Anutosh Pandey, *An Assessment of* Filartiga v. Pena-Irala , Nat'l L. Univ., Orissa (NLUO) 1 (2012); Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. of Int'l L. 1 (2002); Jr. C. Donald Johnson, *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, Ga. J. of Int'l & Comp. L. 335 (1981).

64 *Sosa*, 542 U.S. at 38

Antonio Garate-Bustamante, five unnamed Mexican civilians, the United States, and four DEA agents.

This was under the Federal Tort Claims Act (FTCA), which allows the federal government to be sued on tort claims, and ATCA, which permits law suits against foreign citizens in American courts. The United States government argued that the FTCA applied only to claims arising from actions within the domestic jurisdiction of the United State and, therefore, did not apply to the plaintiff because his arrest took place in Mexico. The federal authorities and the Mexican nationals also stated that the ATCA permitted federal court jurisdiction to decide tort claims against foreign citizens, but did not permit private individuals to commence actions. The federal district court disagreed with the government's contention that the FTCA claim did not apply, finding that the plan to capture Alvarez-Machain was instigated within the U.S. jurisdiction.[65]

They exonerated the federal party by stating that the DEA had acted lawfully when the arrest happened, and also vindicated the litigation by private individuals under ATCA by holding that Sosa, one of the Mexican nationals who kidnapped Álvarez-Machaín, had violated international law and was liable. On appeal, the Ninth Circuit overruled the decision that the federal party was not liable under the FTCA decision, because the DEA could not authorize a citizen's arrest of the accused in another country. It affirmed the lower court's finding on the ATCA claim that Sosa was liable in the detention of Alvarez-Machain. This judgment confirms that the provisions of ATCA enable an "alien" plaintiff to file a tort claim against *any* person over whom the U.S. government has personal jurisdiction, regardless of whether the defendant is a citizen or a foreign national and regardless of whether the alleged tort occurred within or extra-territorially. The provisions of the Act do not prescribe substantive law but require the federal courts to recognize *any* tort that infringes on individual rights granted by international law.[66]

The availability of such a remedy means that the Act is a jurisdictional statute that addresses a set of justiciable torts limited to those defined as prohibited norms under either the law of nations or treaties adopted by the United States. The law of nations covers only that part of international law which can be defined as the core set of norms universally binding on States. This means that there has to be a recognition of rights enshrined as part of the "law of nations". The ruling also established an elastic framework for determining which torts constitute causes of action under its clauses. The clauses of ATCA do not contain any *locus delicti* restriction on the exercise of jurisdiction but §2680(k) of the Judiciary Act (its parent statute ) does.[67] This section provides an exception to the waiver of sovereign immunity provided

[65] *See* summary of proceedings in *Alvarez-Machain v. U.S.*, 331 F.3d 604, 610 (9th Cir, 2003).

[66] Alvarez-Machain v. U.S., 331 F.3d 604 (9th Cir, 2003). The rules most likely to have that status would be specific rules protecting basic human rights, such as the rule against torture or the rule against cruel, inhuman or degrading treatment. For the debate on whether international human rights law is part of federal law, compare Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319 (1997) with Harold Hongju Koh*, Is International Law Really State Law?,* 111 Harv. L. Rev. 1824 (1998).

[67] 28 U.S.C. § 2680(k). "The provisions of this chapter and § 1346(b) of this title [that waive sovereign immunity and include the ATCA] shall not apply to: . . . (k) Any claim arising in a foreign country."

by the ATCA and which proved fatal to the claim in *Sosa*[68] as the term "alien", when construed by the framers of ATCA, premised it on a political identity based on affiliation and the jurisdiction of other sovereigns. If this argument prevails then there needs to be a determination of how high the standard must be to recognize a cause of action for a violation of the law of nations; as a domestic matter there would be no "potential implications" for foreign relations.[69]

For the United States, the point of departure with other common law jurisdictions concerns obligations under treaties which are the highest source of power in the land and which bind the courts to respect them as the law of nations. .[70] It remains settled law in the United States that courts should not construe a statute to violate international law if any other plausible construction presents itself. In *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[71] Thus, American judges remain under a duty to avoid, if at all possible, placing the United States in breach of its international obligations. The issue that concerns the courts only involves *natural persons*; claims where plaintiffs and/or defendants are *entities,* and those against the corporations, governments, etc., are not justiciable under the Act. There is also the consideration that the court does not address the asymmetry of rights, whereby alien plaintiffs can avail themselves of a right under the ATCA (i.e., federal rather than state jurisdiction over tort damages of any amount) that ordinary citizens of the United States cannot invoke.[72]

There has since been affirmation of the common law principles by the U.S. Supreme Court which has held that they override the statute in claims of immunity

---

[68] Sosa v. Alvarez-Machain*,* 542 U.S. 692, (2004) - "The actions in Mexico are thus most naturally understood as the kernel of a claim 'arising in a foreign country,' and barred from suit under the exception to the waiver of immunity." at 700-01.

[69] *Id*. at 727-28. "[T]he subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Indeed, the executive and legislative branches have set a clear, long-standing policy of self-determination, but the courts remain hostile.

[70] The Supremacy Clause of Article VI, cl. 2 of the United States Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land".

[71] 6 U.S. 64, 118 (1804).*See also* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 178 n.35 (1993) (affirming application of *Charming Betsy* canon to all matters of federal statutory construction).

[72] Referring to civil law countries like Belgium, Justice Breyer's concurrence in *Sosa v. Alvarez-Machain* explains that universal criminal jurisdiction necessarily contemplates civil recovery:

> [C]onsensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself.

Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004).

by individual foreign officials. In *Samantar v. Yousuf*, (2010)[73] the plaintiffs, who were of Somalian origin, filed a case against Mr Samantar, a former official of a Somali regime in a Virginia federal district court under the Torture Victim Protection Act ("TVPA") and the Alien Tort Statute ("ATS"). They alleged that they were victims of torture and other human rights violations while the defendant commanded agents of the former Somali government. The district court dismissed the case, holding that Mr. Samantar was immune from suit under the Foreign Sovereign Immunities Act ("FSIA").

The U.S. Court of Appeals for the Fourth Circuit reversed, holding that the FSIA did not render Mr. Samantar immune from suit on the basis that it did not apply to foreign government officials.[74] The court stated that even if the FSIA does apply to foreign government officials, it does not apply to former foreign government officials. This raised the issue, firstly, whether a foreign state's FSIA immunity from suit extend to an individual acting in his official capacity on behalf of the foreign state and, secondly, whether an individual who is no longer a government official of a foreign state when litigation is commenced retains FSIA immunity for acts carried out in that individual's former capacity as a government official acting on behalf of a foreign state.

The Supreme Court held that the FSIA did not govern Samantar's claim of immunity and that there was no inference within the Act to suggest that "foreign state" should be read to include an official acting on behalf of that state. The Court also stated that the intention of Congress in the Act did not express the intention to codify official immunity within the FSIA. Justice Stevens writing his opinion for the court held that the FSIA's provisions—*i.e.* §1603(a) —did not mean to include the 'foreign state' to include foreign officials.[75] In the circumstances where the respondents have sued petitioner in his personal capacity and seek damages from his own resources the proceedings are "governed by the common law because it is not a claim against a foreign state as defined by the FSIA". [76]

Stewart reflecting on this ruling states

> "Human rights advocates might generally be pleased that individual officials can no longer claim immunity under the FSIA. But nothing in the decision signals open season for suits against such officials. Significant issues remain to be litigated, among them whether the Torture Victim Protection Act of 1991 (which creates a civil cause of action against any individual who under actual or apparent authority, or color of law, of any foreign national subjects an individual to torture or extrajudicial killing) reflects congressional intent to override the common law of foreign official immunity".[77]

The litigation in the United States covering extraterritorial claims has proceeded governed by the ATS, as long as the tort claimants have a strong connection with the territory of the US and their claims are sufficiently compelling. In *Kiobel v. Royal Dutch Petroleum Co.* (2013)[78], the plaintiffs were Nigerian citizens who

---

[73] 560 U.S. 305 (2010).

[74] 552 F. 3d 371 at 381-83.

[75] Samantar v. Yousuf, 560 U.S. 305, 319 (2010).

[76] Pp. 13–19.

[77] David P. Stewart, Samantar v. Yousuf: *Foreign Official Immunity Under Common Law*,14 (15) AM.SOC. INTN'L LAW,Insights, (June 14, 2010), https://www.asil.org/insights/volume/14/issue/15/samantar-v-yousuf-foreign-official-immunity-under-common-law.

[78] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

had been subjected to human rights violations in Nigeria committed by Nigerian security forces in the 1990s. The issue was whether the Nigerian subsidiaries of the defendants - Royal Dutch Petroleum Co. of the Netherlands and Shell Transport and Trading Company PLC of the United Kingdom - assisted the commission by the Nigerian security forces of acts of torture, extrajudicial execution, and arbitrary detention. The only connections to the United States, apart from plaintiffs' current residence, were the parent corporations' investor registration in New York. The Supreme Court had to decide whether the extraterritoriality of the alleged acts of abuse brought them within the jurisdiction of the federal courts. The question of the application of the ATCA was based on the precedent of *Sosa* that established it was intended to enforce international norms and civil tort actions inferring that violations of the law of nations should determine the scope of the statute. The majority opinion delivered by Chief Justice Roberts noted that all the relevant conduct took place outside the United States, and that even where the claims affected the territory of the United States, they did not impact with "sufficient force to displace the presumption against extraterritorial application".[79] The corporate presence was not restricted to presence in the U.S. jurisdiction.

Justice Breyer provided the minority opinion concurring with the decision and stated that there should be jurisdiction under the act

> where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.[80]

He founded this belief on the precedent established in *Sosa* where the Court had held that ATCA provided federal courts with jurisdiction for a small number of claims that rested on a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized".[81] However, the Court affirmed that "only conduct that satisfies Sosa's requirements of definiteness and acceptance among civilized nations can be said to have been "the 'focus' of congressional concern".[82] The ATCA cause of action will fall within the scope of the presumption against extraterritoriality and will therefore be barred unless those claims "touch and concern the territory of the United States" with "sufficient force." [83]

---

[79] *Id*. at 124.

[80] *Id.* at 127.

[81] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[82] *Id.* at 732.

[83] Kiobel v. Royal Dutch Petroleum Co, *at* 1669. For objections to the Court's presumption against the ATS's extraterritorial applicability, see *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring); Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations* in Kiobel *and Beyond,* 44 Geo. J. Int'l L. 1329 (2013); Anthony J. Colangelo, Kiobel: *Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction,* 28 Md. J. Int'l L. 65 (2013); Jonathan Hafetz, *Human Rights Litigation and the National Interest*: Kiobel's *Application of the Presumption Against Extra-Territoriality to the Alien Tort*

Justice Alito, concurring, noted the Court's earlier holding in *Sosa* that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[84] This implies the "conduct that satisfies Sosa's requirements of definiteness and acceptance among civilized nations can be said to have been "the 'focus' of congressional concern". The cause of action will fall within the "scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations".[85]

Paul Hoffman, who argued both *Sosa* and *Kiobel* in the Supreme Court, considers that the *Kiobel* presumption will be the main initial "screening mechanism" for claims arising under the Act and will influence the approach of the courts regardless of the manner of its interpretation. He states that "it is unclear how the *Kiobel* majority views the relationship between the new presumption and existing limiting doctrines (e.g. *forum non conveniens*, political questions, international comity) commonly litigated in ATS cases".[86] It could mean that this ruling will become the final reference whenever the courts are unable to rule on the basis of traditional screening doctrine and that they will have to develop a methodology to interpret the case law. The question that will be relevant is whether, as in *Sosa*, the court will apply a number of limiting principles that refer to ATCA including a sufficiently definite international norm, exhaustion of remedies outside the United States, and a policy of facts-specific deference to the political branches of the constitution. The result of the case is that it is now impossible to predict the presumptions of future applications.

### *E. Impact of JASTA on State Immunity*

The Justice Against Sponsors of Terrorism Act **(**JASTA**)** 2016, enacted by the U.S. Congress over President Obama's veto, creates a subject matter jurisdiction for courts to hear cases that involve alleged wrongdoing by other countries. It amends the Foreign Sovereign Immunities Act (FSIA), which had no direct bearing on the *content* of any lawsuit, but articulates a few narrow instances in which lawsuits against foreign countries may proceed in federal court. It had a terrorism exception that was limited to designated state sponsors of terrorism.[87] JASTA amends existing legislation by providing a means to litigate civil claims based on tort for acts related

---

*Statute,* 28 Md. J. Int'l L. 107 (2013); David Sloss, *Kiobel and Extraterritoriality: A Rule Without a Rationale*, 28 Md. J. Int'l L. 241 (2013).

[84] *Id.* at 126.

[85] *Id.* at 127 (Alito J. concurring).

[86] Paul L. Hoffman, Kiobel v. Royal Dutch Petroleum Company: *First Impressions*, 52 Colum. J. of Transnt'l L. 28, 41 (2013).

[87] This exception in the FSIA has existed since 1996, under 28 U.S.C. § 1605A. § 1605A provides that a foreign state shall not be immune from suits seeking money damages for personal injury or death caused by certain acts like torture and extrajudicial killing—or material support for such acts—by foreign government officials. This provision is limited to countries designated by the United States as state sponsors of terrorism (currently Iran, Sudan, and Syria).

to terrorism.[88] The federal courts will be able to hear claims against any sovereign nation that "knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism."[89]

The new terrorism exception added by JASTA under § 1605B provides that a foreign state shall not be immune from suits seeking money damages for personal injury or death, or for injury to property, occurring in the United States that is caused by (1) an act of international terrorism in the United States; and (2) a tortious act of a foreign state or its officials "regardless where the tortious act or acts of the foreign state occurred."[90] The tortious act of a foreign state may not, however, be an omission or "constitute mere negligence."[91] The implication is that it is pending on, or commenced on or after, the date of enactment of JASTA; and arising out of an injury to a person, property, or business on or after September 11, 2001. Unusually Section 7 states that the Act applies retrospectively.

Prior to JASTA, a U.S. national could not litigate an action based on an act of international terrorism against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority."[92] By enacting JASTA, the Congress has ensured that a U.S. national may now bring an action in federal courts for claims against a foreign state seeking money damages for physical injury to a person or property or death that occurs inside the United States, and caused by an act of international terrorism in the United States; the tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occur.[93] The act or acts have to be more than mere negligence.[94]

There has been criticism of JASTA in the light of the erosion of the principle of sovereign immunity. There have been criticisms levelled in European parliaments to the effect that JASTA "conflict[s] with fundamental principles of international law and in particular the principle of State sovereign immunity."[95] This is premised on the fact that state immunity is a rule of customary international law that recognizes foreign sovereign immunity in some circumstances in respect of torts committed by

---

[88] Since the U.S. Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428 (1989), the tort exception has been interpreted as applying only where both the tort was committed in the United States and the resulting injury occurred in the United States. This "entire tort rule" was applied to dismiss actions brought against certain foreign state instrumentalities that the plaintiffs alleged had assisted with the September 11th attacks. In *In re Terrorist Attacks on September 11, 2001,* 714 F.3d 109, 116-17 (2d Cir. 2013), the alleged tortious conduct occurred outside the United States; however, the court found that the entire tort rule barred the suit.

[89] 18 U.S.C. § 2337.

[90] 28 U.S.C. § 1605B(b)(2).

[91] 28 U.S.C. § 1605B(d).

[92] 18 U.S.C.A. § 2337(2)

[93] 28 U.S.C. § 1605B(b).

[94] 28 U.S.C. § 1605B(d).

[95] Julian Pacquet, *EU Lawmakers Warn Congress against Saudi Terrorism Bill,* Al-Monitor, 13 July 2016. http://www.al-monitor.com/pulse/originals/2016/07/european-warn-congress-saudi-terrorism-bill-jasta-911.html#ixzz4OIVbVkWd.

armed forces during an armed conflict.[96] This establishes certainty in the customary international law rules of immunity that must be based upon a general and consistent practice of states followed out of a sense of legal obligation or *opinio juris.*[97]

However, the United States, like many other common law-based jurisdictions, follows a restrictive theory of foreign sovereign immunity under which the immunity of foreign states does not extend to their private and commercial acts (*acta jure gestionis*), but generally does extend to their governmental acts (*acta jure imperii*).[98] The International Court of Justice (ICJ) has also not assiduously demarcated the difference between immunity and lack of immunity between governmental and non-governmental acts. The only certainty in its judgment is related to armed forces during war, leaving open the question whether other governmental acts might not be covered by immunity.[99] This may refer to terrorism or providing material support for acts of terrorism which, if properly considered governmental, may not necessarily entitle those acts to immunity under international law.

The scope of the FSIA and the actions against the governments and their assets deemed to have been sponsors of terrorism has been determined in a recent judgment delivered by the U.S. Supreme Court in *Rubin v. Islamic Republic of Iran* (2018)[100]. The legal proceedings were based on a ruling that the petitioners had obtained against the respondent Islamic Republic of Iran under the §1605A of the Act as a designated state sponsor of terrorism and had *locus standi* with respect to claims arising out of acts of terrorism. To enforce that judgment, they filed an action in the district court to seize and appropriate certain Iranian assets, namely antiques housed at the University of Chicago. This was rejected at first instance based on the immunity granted to a foreign state and the Seventh Circuit affirmed.[101] The Supreme Court upheld the ruling and stated unanimously that there was "no freestanding exception to property immunity in the context of a FSIA exception under the Section 1610(g) to attach and execute against the property of a foreign state".[102]

However, Professor William S. Dodge argues that in validating the JASTA's new terrorism exception there appears to be no general and consistent practice of states or *opinio juris* that establishes a "legal obligation that foreign states are entitled to immunity for acts of terrorism or material support of such acts. To be sure, most states that have statutes governing foreign sovereign immunity do not have exceptions for terrorism. But it is not clear that the states extending foreign sovereign immunity to cover terrorist acts do so out of a sense of legal obligation". He points to both the United States and Canada that have "terrorism exceptions in their foreign sovereign immunity laws" and the "lack of protests prior to JASTA is more evidence that a terrorism exception does not violate customary international law". The liability for breaching the provisions in both the United States and Canada relate to the "state sponsors of terrorism". [103]

---

[96] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)**,** Judgment, I.C.J. Rep**.** 99, ¶78 (2012).

[97] *Id.* at ¶ 55.

[98] *Id.* at ¶ 64.

[99] *Id.* at ¶ 65.

[100] Rubin v. Iran, 583 U.S. _ (2018).

[101] 830 F.3d 470 (7th Cir. 20177).

[102] Rubin v. Iran, No. 16–534, slip op. at 12-15 (Feb. 21, 2018).

[103] William S. Dodge**,** *Just Security, Does JASTA Violate International Law?* (Sept. 30, 2016) -https://www.justsecurity.org/33325/jasta-violate-international-law-2/.

However, Dodge states that the "foreign sovereign immunity typically turns on the nature of the act, and international law does not typically dictate the particular processes a state must use to grant or deny such immunity". It is not contingent on the customary international law for "the U.S. and Canada to deny foreign sovereign immunity when they have designated a particular country as a state sponsor of terrorism". The reason is that "customary international law does not require foreign sovereign immunity for terrorist acts in the first place". In determining whether state immunity for terrorism sponsorship can be deemed as parallel to foreign sovereign immunity with respect to armed forces, Dodge sees a precedent in *Jurisdictional Immunities*, where the ICJ found for armed forces "an almost unbroken practice of judicial decisions extending such immunity, even when the acts were committed on a state's own territory".[104] There is no comparable "unbroken practice of forum states extending immunity to foreign states that provide support for terrorist acts causing injury and death within the forum state".[105]

U.S. courts, before JASTA was enacted, had adopted an "entire tort" interpretation of the FSIA territorial tort exception under ¶ 1605(a)(5), requiring that not just the injury but also all of the tortious conduct should have occurred in the United States. However, Article 12 of the proposed United Nations Convention on Jurisdictional Immunities of States and Their Properties[106], for example, would apply the territorial tort exception if the act or omission occurred "in whole or in part" in the territory of the state exercising jurisdiction. This implies that the U.N. Convention would dispense compensation with regards to immunity, rather than enforce it as customary international law requires.

There are various processes by which sovereign immunity may be preserved. Section 5(b) permits the U.S. Attorney General to intervene in any action being taken against a foreign state "for the purpose of seeking a stay of the civil action, in whole or in part." The U.S. court "may stay a proceeding against a foreign state if the Secretary of State certifies that the federal government is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state, or any other parties as to whom a stay of claims is sought."[107] There may be several 9/11-related suits likely to be filed and it remains to be seen how often, and in what circumstances, an intervention is made by the Department of Justice. There may also be diplomatic, legal, and judicial repercussions and demands made upon the United States for the collateral damage caused by U.S. servicemen, representatives or agencies.[108]

---

[104] *Id.* (citing Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Rep. 99, ¶¶73-77 (2012)).

[105] *Id.*

[106] U.N.G.A. A/RES/59/38 (Dec 2, 2004) (not yet entered into force).

[107] JASTA § 5.

[108] There have been suggestions by an Iraqi lobby group that the United States should pay compensation for damages arising out of the 2003 invasion. *See*, *e.g*., Juliet Eilperin & Karoun Demirjian, *Congress Thwarts Obama on Bill Allowing 9/11 Lawsuits Against Saudi Arabia*, Washington Post (Sept. 28, 2016).

## III. Canada

### *A. Sovereign Immunity in Law*

In comparing the issue of justiciability in the Canadian courts with the American "political question" doctrine, state immunity needs to be considered within the context of recent statutes and case law. The Canadian government has, like the other common law countries, enshrined the principle of state immunity into its statutory framework.[109] The State Immunity Act (SIA) has been upheld as a complete solution to any claim against immunity, trumping countervailing theories of implied exceptions that may exist elsewhere under the common law or international law.[110] The law of sovereign immunity under the SIA has been recognized by the courts in Canada as giving effect to the customary rules of international law.[111] The Canadian courts recognize that state immunity represents important issues of comity and mutual respect between nations.[112]

Section 3(1) states "[e]xcept as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada". Under a plain and ordinary reading, these words codify the law of sovereign immunity. In Canada, international treaties must be incorporated into domestic law through adoption before they have domestic force and effect.[113] Customary law, on the other hand, is presumed to be directly incorporated into domestic law unless explicitly altered by contrary legislation.[114] SIA governs civil claims against foreign states and Canadian courts recognize that state immunity represents important issues of comity and mutual respect between nations. However, in cases where Canadian nationals have been tortured by a foreign state, there has been recourse to the courts where state immunity has been pleaded.[115]

---

[109] State Immunity Act, R.S.C. 1985, as amended 2012. c. S1-18 (the "SIA").

[110] The Supreme Court in *Re Canada Labour Code*, [1992] 2 S.C.R. 50, held the Act to be a codification of Canadian law regarding foreign immunities (¶ 69).

[111] *See generally*, John H. Currie, *Perspectives on State and Diplomatic Immunity*, County of Carlton Law Assoc. Update on Civ. Lit., (2001); and Hazel Fox, The Law of State Immunity (2002).

[112] Schreiber v. Canada (Attorney General) (2002), 216 D.L.R. (4th) 513 (S.C.C.), ¶ 27.

[113] Upon ratifying an international agreement, Canada will have international obligations flowing from that agreement that remain unchanged despite a failure to enact implementing legislation or otherwise make the agreement domestically binding. *See Ahani v. Canada (Attorney General*) 58 OR (3d) 107, ¶ 32 [2002] (Ontario Court of Appeal). The majority decision was set out with reasons but, in a highly unusual move, Heureux-Dube, J. expressed dissent from the other two judges on the appeal panel. *Id.* at ¶62.

[114] On the importance of customary international law for Canadian legislation generally, see *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (ville)* 2001 SCC 40, ¶ ¶ 28-32. For a discussion of the application and incorporation of international law generally in Canada, *see*: Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 Canadian Y'book of Int'l L. 3 (2002).

[115] "While human rights norms have been accumulating at a rapid pace since the end of the Second World War, the development of *institutional* mechanisms of enforcement has not tracked these advances. […] The result is an enforcement gap which leaves many individuals in the untenable position of possessing rights without remedies"- *see* Wendy

In *Bouzari v. Islamic Republic of Iran*, (2004), a case brought by an Iranian immigrant, who was tortured by government officials in his home country, led to the Ontario Court of Appeal dealing with the question of whether the SIA provides potential remedies for victims of torture abroad. The facts in the case demonstrated that Ontario was the only place where Mr. Bouzari could sue and, as in many such cases for victims of torture, it was impossible for Mr. Bouzari to return to the country whose government agents had tortured him in order to lodge a legal claim against the state.[116]

The Court decided that existing Canadian law precludes claims against foreign sovereigns for such acts. Goudge, J.A. ruled that

> the wording of the SIA must be taken as a complete answer to this argument. Section 3(1) could not be clearer. To reiterate, it says: "3(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada." The plain and ordinary meaning of these words is that they codify the law of sovereign immunity.[117]

The *Bouzari* Court concluded that the SIA occupies the field in this area and that it provides no exception for torture. The outcome in this case suggests, therefore, that civil redress in Canadian courts for grave human rights abuses committed by foreign states will be driven by legislative change, not an expansive interpretation of the existing Act.[118]

The Canadian courts recognize a difference between forms of international law and treaties must be incorporated into domestic law through a formal act of parliament before they have domestic force and effect.[119] Customary law, on the other hand, is presumed to be directly incorporated into domestic law unless explicitly altered by contrary legislation.[120] To the extent that an act of torture constitutes a violation of customary law, Canadian courts may presume a violation of domestic law unless that presumption is refuted by a statute or treaty. However, this implied waiver approach first gained prominence in the United States and is a cousin to the normative hierarchy theory.[121] This approach implies that state immunity is a

---

Adams, *In Search of a Defence of the Transnational Human Rights Paradigm: May* Jus Cogens *Norms be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?* in Craig Scott (ed.), Torture as Tort 250 (2001).

116 Bouzari v. Iran [2004] OJ No 2800, ¶ 42 (Ontario Court of Appeal).

117 *Id.*

118 *See also*, Arar v. Syria [2005] O. J. No. 752, ¶ 28.

119 Upon ratifying an international agreement, Canada has international obligations flowing from that agreement that remain unchanged despite a failure to enact implementing legislation or otherwise make the agreement domestically binding. *Ahani v. Canada (Attorney General*) 58 O.R. (3d) 107, 2002 O.J. No. 431, ¶ 32; (Leave to appeal to the Supreme Court den'd, [2002] S.C.C.A. No. 62).

120 Bouzari v. Iran [2004] OJ No 2800 , ¶ 65; On the importance of customary international law for Canadian legislation generally, *see 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (ville)* 2001 SCC 40, 200 D.L.R. (4th) 419, ¶ ¶ 28-32. For a discussion of the application and incorporation of international law generally in Canada, *see*: Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 Canadian Y'book of Int'l L. 3 (2002).

121 *See generally,* Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens*: A*

privilege granted to states as members of the international community of nations and intended to encourage the comity of nations. However, if a state acts contrary to its international legal expectations and violates prohibitions of international *jus . cogens*, it cannot then claim the privilege of immunity for those acts.[122] The offending state, by disregarding peremptory norms of international law, has waived its rights under international law to the extent that those rights conflict with its illegal actions.

### *B. Merits-Based Approach*

The implication for the sovereign immunity is that the Canadian judiciary has not defined the powers of judicial review by restricting them to just sovereignty and territoriality. This is a clear basis for review by the courts for private litigants, which can bring private claims for tortious liability and the review will be the process of a merits-based approach. The merits-based approach has an advantage in that it is a more appropriate procedure for those seeking judicial resolution of disputes. It makes the courts more accessible for litigants who should anticipate that their claims may only fail for legal reasons. These litigants will not be dismissed because state immunity will not apply and the failure to use, and the abuse of, executive certificate standards or concerns not to infringe the executive's role will not prevent the court's intervention.

In *Operation Dismantle Inc. v. R.* [1985] 1 SCR 441, the Supreme Court of Canada unanimously dismissed an appeal against a decision to strike out a statement of claim which alleged that the Canadian executive's decision to allow the United States to test cruise missiles in Canada increased the likelihood that Canada would be a target for nuclear attack, thereby violating the right to life, liberty and security of the person under the Canadian Charter of Rights and Freedoms (Section 7, Part I of the Constitution Act 1982).[123] The judgment seemed to imply that the question presented to the Court was by no means non-justiciable; however, there was no reference to *Buttes Gas & Oil*[124] in the ruling even though this decision was contemporaneous with the House of Lords case. Nor did *Operation Dismantle* draw on Lord Wilberforce's reasoning that defined the parameters of when the act of state doctrine will not apply, such as where there will be a "breach of clearly established rules of international law or are contrary to English principles of public policy, or where there is a grave infringement of human rights".[125]

Wilson, J. explicitly rejected the "political question" doctrine and instead stated there was a concept of abstention, and focused on "whether the courts should

*Critique of the Normative Hierarchy Theory,* 97 Am. J. Int'l L. 41 [2003]; Adam C. Belsky et al., *Implied Waiver Under the FSIA*, 77 Cal. L. Rev. 365 (1989).

122 Adam Day defines the normative rights theory as 'International law cannot bestow immunity from prosecution for acts that the same international law has universally criminalized'. *See* Adam Day, *Crimes against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got* Belgium v. Congo *Wrong*, 22 Berkeley J. of Int'l L. 489 (2004).

123 Operation Dismantle Inc. v. R. [1985] 1 SCR 441.

124 Buttes Gas & Oil Co. v. Hammer (No. 3) [1982] AC 888.

125 Kuwait Airways Corp. v. Iraqi Airways Co. (No's 4 & 5*)* [2002] UKHL 19, ¶ 148.

or must rather than on whether they can deal with such matters".[126] Wilson, J. held that courts should not relinquish their judicial review function simply because a case involves a "weighty" matter of state and it is not available to a court to surrender jurisdiction "on the basis that the issue is inherently non-justiciable, or that it raises a so-called political question".[127] This determination was based on the constitutional determination that balanced the principles of the "separation of powers, responsible government and the rule of law which obviate the need for a doctrine of abstention".[128] She ruled that, in Canadian constitutional law, separation is not a core principle, but is rather of secondary application and there is an overlap between the branches as demonstrated in the system of responsible government**.**[129]

Dickson, J. dismissed the appeal on its merits, declaring that the appellants could never prove the causal link between the government's decision to permit testing and the increased likelihood of a nuclear war. The foreign policy decisions of other nations were thought not to be capable of forecasting "to any degree of certainty approaching probability" and would remain based on speculation.[130] The judgment analysed the claim for its plausibility rather than opposing it based on an abstract notion of judicial restraint. It gave weight to the allegation that development of the cruise missile would lead to an escalation of the nuclear arms race but found that to be too hypothetical. However, it could equally be alleged that development of the cruise missile might compel foreign powers to negotiate agreements that would reduce the threat of a nuclear war.[131]

In terms of stating principles, the joint judgment stated *obiter*, that there is "no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts".[132] This is a clear indication that the Supreme Court of Canada rejected the political question doctrine and, by implication, the doctrine of non-justiciability.[133] It manifests a framework for judicial review based on the merits criteria that reflects the courts approach that they will not refuse jurisdiction because a matter involves foreign states.

### *C. Liability of Foreign Countries for Terrorist Conduct*

The Canadian legislature enacted the Justice for Victims of Terrorist Act (JVTA) 2012 allowing victims of terrorism to sue the perpetrators and supporters of terrorism. These may include supporters of foreign states, provided that the Canadian government has formally listed the state as a supporter of terrorism. This provision in the JVTA sets out that if the if the judgment is against a foreign state, that state

---

[126] Operation Dismantle Inc. v. R. [1985] 1 SCR 441, 467.
[127] *Id.* at 472.
[128] *Id.* at 491.
[129] *Id.* at 486.
[130] *Id.* at 453.
[131] *Id*. at 443.
[132] Operation Dismantle Inc. v. R. [1985] 1 SCR 441, 459.
[133] For further reference, *see Re Canada Assistance Plan* [1991] 2 SCR 525. According to Sopinka J, '[t]hat there is a political element embodied in the question [before the Court] … may well be the case. But that does not end the matter' (545). *See also Vancouver Island Peace Society v. Canada,* [1994] 1 FC 102.

must be on the list referred to in subsection 6.1(2) of the SIA for the judgment to be recognized. . This has been in accordance with the 1996 amendment to the FSIA in the United States that enables victims to sue if the country has been declared as a sponsor of terrorism under S 1605A. [134]

The enactment of the JVTA in Canada led to expatriate Arab communities, who had been victims of violence, bringing group claims against perpetrators allegedly backed by Iran. The litigation commenced once the families of the victims, who had been previously awarded damages against Iran by various U.S. courts, tried to satisfy the U.S. damages awards by seizing Iranian assets in the U.S.

While the various claimants brought separate actions in Canada seeking to enforce their U.S. judgments and recover against Iran's non-diplomatic assets in Canada, the actions were ultimately heard together as a group claim. In *Tracy v. Iranian Ministry of Information and Security* (2016), the Ontario Superior Court of Justice had to consider the legislative reforms and how they applied to a series of American judgments rendered against Iran in favor of American victims of terrorist acts which Iran was found to have sponsored. The court held that Iran was not immune from the enforcement proceedings and that accordingly the American judgments were enforceable against certain assets of Iran in Ontario.[135]

The plaintiff brought the action under Part 2 of the Criminal Code and section 4 of the Justice for Victims of Terrorism Act. The Court considered issues relating to the limitation period and the enforcement of punitive damages awards (in this case, in the hundreds of millions of dollars). The government of Iran‘s defense was that the loss or damage suffered by the victim had to have been, in the language of s 4(1) of the JVTA, suffered after January 1, 1985, but the Court held that this didnot prevent the enforcement of American decisions in respect of acts of terror which happened before that date because the victims continued to suffer harm on an ongoing basis. The court's ruling was that damages that were punitive awards were not contrary to public policy.[136]

However, in any appeal, Iran does have a significant procedural problem as it did not defend the actions initially brought in Ontario. The immunity arguments were received by the court as part of Iran's motion to have the resulting default judgments set aside, and not on the issue of whether Iran might have a sustainable defense on the merits. The case concerned the non-diplomatic assets that were available for recovery in accordance with the Vienna Convention on Diplomatic Relations[137] which were valued at an estimated $7-8 million and included certain non-diplomatic properties and the contents of various bank accounts.

The Court ordered that Iran's non-diplomatic assets be handed over to the claimants, effectively holding Iran financially responsible for the actions of terrorist

---

[134] Section 1605A states that a foreign state shall not be immune from suits seeking money damages for personal injury or death caused by certain acts like torture and extrajudicial killing—or material support for such acts—by foreign government officials. This provision is limited to countries designated by the United States as state sponsors of terrorism (currently Iran, Sudan, and Syria). It also requires both conduct and injury inside the United States—specifically, "an act of terrorism in the United States" and injury or death "occurring in the United States.

[135] Tracy v. Iranian Ministry of Information and Security, 2016 ONSC 3759 (2016).

[136] *Id*. at ¶ 109 (2016).

[137] 500 U.N.T.S. 95, entered into force Apr. 24, 1964.

groups it had allegedly sponsored. The *Tracy* verdict marks a landmark decision for the victims of terrorist actions who have claimed against the commercial assets of a government that is on the terror list, as was Iran in the Canadian case. The ruling also confirms that the JVTA imposes liability for state-sponsored terrorism in accordance with the Canadian approach to commercial actions seeking compensation for foreign state misconduct. The State Immunity Act provides an escape clause from the immunity of foreign states when it comes to commercial activity.[138]

In commenting on the JVTA and the FSIA section 1605A, Francis Larocque states that "the Canadian model is just as problematic as both statutes ultimately grant or deny immunity by executive fiat, and not through principled assessment of the impugned state act's legal character as continuously required under the restrictive doctrine."[139] Canada and the United States, in denying foreign sovereign immunity when they have designated a particular country as a state sponsor of terrorism, have eroded state immunity even if they have not established a norm of customary international law because, as the ICJ noted in *Jurisdictional Immunities*, while the territorial tort exception had "originated in cases concerning road traffic accidents and other 'insurable risks'" national legislation codifying the exception was written in more general terms.[140]

## IV. Conclusion

The common law doctrine of the Act of State with no foundation in the law of nations has spread and become a universal doctrine with acceptance across states even within the civil law jurisdictions. It has brought about inconsistent results when it has been tested in the courts which have led to critics treating the doctrine with a considerable amount of circumspection. This has not led to its dissipation but has enhanced its use by the adoption of different rules of application by the common law courts, notably in the United Kingdom, the United States, Canada and Australia. The rulings of the courts apply within their jurisdictions but there are principles to be drawn, such as non-justiciability and the political question doctrine, that the courts need to explain when distinguishing their refusal to step into the domain of the executive and drawing a narrow basis for their intervention.

The doctrine is closely linked to the constitutional arrangements in which the issues that come before the courts are decided and the judges have to evaluate their application. It is no surprise that the reluctance of the judiciary to adjudicate upon the issues is premised on the abstract principles of state sovereignty, the separation of powers and the comity of nations. This is the reason why the judiciary has traditionally abstained from adjudicating upon issues which may impact upon the relations between states considering that to be the responsibility of the executive

[138] "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."

[139] Francois Larocque, *Torture, Jurisdiction and Immunity*, in Alexander Orakhalashvili (ed.), Research Handbook on Jurisdiction and Immunities in International Law 461 (2015).

[140] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Rep. 99, ¶ 64 (2012).

branch of the government. In the common law countries, the judicial interpretation of these concepts comes up against the complex factual and legal questions of a transnational nature which leads to lack of uniformity in the decisions by judges.

The understanding of the U.S. courts has moved from the time when it was determined in *Underhill* that an act of state doctrine was one of non-decision into a source of principles by which to decide cases on their merits. The decision of the Supreme Court in *Sabbatino* was to the effect that Act of State is not a requirement of international law, nor is it derived from the Constitution but is a doctrine of federal common law, binding on state as well as federal courts.[141] The Court ruled that the doctrine rested on the jurisdictional immunities of states and their officials under international law, and not on principles governing the legal effect of foreign official acts in the domestic jurisdiction.[142]

In the *Jurisdictional Immunities (Germany v. Italy)* case, the principle was established that the jurisdictional immunity is not absolute…"and that "…in cases of crimes under international law, the jurisdictional immunity of States should be set aside."[143] The ICJ's judgment established that State immunity derives from the principle of sovereign equality found in Article 2(1) of the UN Charter and is "one of the fundamental pillars of the international legal order." As between Italy and Germany, this right was derived from customary international law in the absence of a treaty to that effect. Based on its analysis of State practice and *opinio juris,* the ICJ held that, "…practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity".[144]

The Court also defined the relationship between jurisdictional immunity and the territorial sovereignty of the forum State by stating that:

> This principle [of State immunity] has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may [also] represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[145]

The Court made its decision on the basis of the European Convention for the Peaceful Settlement of Disputes 1961. Article 27(a) of the Convention states that the Convention did not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". The Court held that the subject matter of the dispute – the crimes for which reparations are sought – occurred during between 1943 and 1945. However, the "…facts or situations" which have given rise to the (present) dispute before the Court are constituted by

---

141 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424-27 (1964).

142 *Id*.

143 *Id*. (¶ ¶ 27 – 29).

144 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)**,** Judgment, I.C.J. Rep**.** 99, at ¶¶ 55 – 56 (2012).

145 *Id.* at 57.

Italian judicial decisions that denied Germany the jurisdictional immunity… and by measures of constraint applied to property belonging to Germany."[146]This occurred between 2004 and 2011. Italy violated its obligation to respect Germany's immunity under international law by allowing civil claims to be brought against Germany based on violations of international humanitarian law between 1943 and 1945, by declaring enforceable in Italy decisions of Greek courts and by taking measures of constraint against German property in Italy. The Court requested Italy to enact legislation, or resort to other methods of its choosing, to ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which Germany enjoys under international law cease to have effect.

It has to be noted that the jurisdictional immunities of states and their officials are governed by international law. The United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted on Dec. 2, 2004 and was opened for signature on 17 January 2005, and is at present short of ratification by 9 states to be effective.[147] The Preamble states "Judicial immunities of States and their property are generally accepted as a principle of customary international law". The Convention formulates the recognized norms of state practice into rules of conduct for which a State could be liable under international law if the case were to come before the ICJ. Article 5 state: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention".

The Convention articulates a restrictive theory of sovereign immunity, rather than the historic absolute immunity. The rules relate to legal proceedings in the courts of another state, do not cover criminal proceedings, and do not allow civil actions in tort liability for human rights abuses against state agents where the abuse has occurred in another country. Liability is not predicated upon serious breaches of jus cogens norms. In that sense it has given precedence to state immunity and reaffirmed the judgment in the *Jurisprudential Immunities of the State* case. The reasoning seems to be that civil actions for a state agent's misconduct should be brought in the courts of that state and not in a foreign court and the belief that civil litigation by individuals is self-serving. It may have an impact on the relations between both the states.

The United States has not ratified the prospective Convention and it seems that the federal government is reliant on its own domestic legal framework to interpret the doctrine of Act of State. It is by reference to the FSIA and the exceptions that the courts are allowed to intervene and to the CRA and ATCA which can be invoked when the issue of liability arises for injury caused by officials in other jurisdictions. The courts have to be impartial in adjudication and despite the exceptions to the political question doctrine need to be familiar with the grounds for litigation in the courts that may challenge state immunity.

---

[146] *Id* at 49.

[147] U.N. Doc. A/59/508 (not yet in force).

**Publisher:** British Journal of Legal Studies is published by Birmingham City University, 15 Bartholomew Row, B5 5JU, United Kingdom.

**Disclaimer:** The Publisher, Editors, Members of the Editorial Board, associates and assistants cannot be held responsible for errors or any consequences arising from the use of information contained in this journal; the views and opinions expressed do not necessarily reflect those of the Publisher, Editors, Members of the Editorial Board, associates and assistants.

**Copyright and Photocopying:** The British Journal of American Legal Studies © 2018 Birmingham City University. All rights reserved.

**Subscription Information:** All UK enquiries should be addressed to the Law School, Birmingham City University, The Curzon Building, 4 Cardigan Street, Birmingham, B4 7BD, United Kingdom.

For all subscriptions in **North America**, please contact: Gaunt, Inc., 3011 Gulf Drive, Holmes Beach, Florida 34217-2199.Tel: 1 (941) 778 5211 or 1 (800) 942-8683; Fax: 1 (941) 778-5252. Email: info@gaunt.com

**Information for Authors:** We welcome the submission of unsolicited manuscripts for publication. Manuscripts should be electronically submitted via e-mail at BJALS@bcu.ac.uk. Citations should conform to *The Bluebook: A Uniform System of Citation* (19th ed.2010). Further information can be found at www.bcu.ac.uk/bjals

**Citation:** The British Journal of American Legal Studies should be cited as 7 Br. J. Am. Leg. Studies (2018).

BRITISH JOURNAL OF AMERICAN LEGAL STUDIES
BIRMINGHAM CITY UNIVERSITY LAW SCHOOL
THE CURZON BUILDING, 4 CARDIGAN STREET,
BIRMINGHAM, B4 7BD, UNITED KINGDOM