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A Random Stroll Amongst Anthony Trollope's Lawyers

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ABSTRACT

Anthony Trollope (1815-1882) resides in the pantheon of nineteenth century English literature. While working full time in his postal position until 1867, he still managed to publish 47 novels, travel books, biographies, short stories, collections of essays, and articles on various topics. Trollope has been described as the novelist of the ordinary for his realistic description of English society.

Law and legal issues flow through Trollope's fiction. The legal system held a special importance to him as the skeleton upholding the social and political framework of the country. Over one hundred lawyers appear in his work and eleven of his novels feature trials or hearings. The law intrigued and exasperated him. Along with the lawyers and legal issues he depicts are ideas of the law and legal system that are part of elaborate philosophical and jurisprudential traditions, which he recognized.

This article examines Trollope's changing attitude toward lawyers. It describes the structure of the Bar in terms of class, status and reputation. Trollope believed the legal system should ensure justice, and those who labored in the law should be the vehicle of that pursuit. Justice for Trollope was the meting out of rewards and punishments as the consequence of a right or wrong decision. However, the law, as he depicted it, was often an impediment to this process, and lawyers were unreliable guides.

Initially Trollope portrayed lawyers critically as caricatures as evinced by such names as Alwinde, O'Blather, Slow & Bideawhile, Haphazard, and Chaffanbrass. He was outraged that barristers (lawyers who appear in court) put loyalty to their clients ahead of the search for truth and justice. The adversary system was flawed as the enactment of laws in accord with the laws of nature assumes an inbuilt moral compass in humans that contains self-evident truths of right and wrong. Trollope felt there was no reason why a right-minded person could not intuitively recognize the truth, so criminal law's adversary system was unnecessary. The legal system sought not the discovery of the truth but was more interested in aiding the guilty defendant to escape punishment.

As he matured as a writer and achieved success, Trollope's understanding and appreciation of the legal profession changed. He met and become friends with leaders of the Bar, and they influenced his descriptions of lawyers, who became realistic and often admirable human beings. Beyond the legal problems of its characters, Trollope's later novels incorporated the social, political, and jurisprudential issues of the times and engaged the Victorian legal culture in a broader sense of history, traditions, continuity and change.

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Natural law principles were challenged during the Victorian era by positivist notions that law is what the statute books say. These divisions lurk in the background of his later portraits of lawyers and the legal system. In his later period Trollope created a realistic characterization of the legal profession at the time that offered universal insights into human nature.

KEYWORDS

Anthony Trollope, Law, Lawyers and Society, Nineteenth Century Fiction, Law & Literature

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> *"Wills' contests and inheritance law are staples of Victorian fiction … plus it seems, almost every novel by Trollope*." --Richard Posner[1]

Anthony Trollope (1815-1882) resides in the pantheon of nineteenth century fiction writers and was perhaps second only to Charles Dickens in contemporary popular appeal. Today, he may be the most widely read novelist of that period. After a miserable childhood, he became an official with the Post Office and is credited with introducing the familiar red mailbox. While working full time in his postal position until 1867, he began to write and managed to publish 47 novels plus travel books, biographies, short stories, collections of essays, and articles on various topics.

Though Judge Posner's comment is an exaggeration, lawyers, legal issues relating to land, estates, wills, inheritance, and trials on these topics abound in Trollope's fiction. The law and the legal system fascinated him. Trollope believed that the legal system should ensure justice, and those who labor in the law should be the vehicle of that pursuit. That lawyers' primary allegiance was to their clients rankled him.

Trollope initially was extremely hostile to lawyers. The London Review in an essay reviewing *Orley Farm* stated: "[Trollope] cannot bear a lawyer. They are all rogues, not by nature, but by profession."[2] While this view seems appropriate for his early career, he changed his attitude over time. This essay discusses Trollope's conception of what the law should strive for; suggests how that vision affected his view of lawyers; examines his changing attitudes toward them; and speculates why he altered some of his harsher opinions of the legal profession. It also notes the changes occurring in the legal profession and the law during the mid-nineteenth century and how Trollope incorporated them into his work.

Trollope's career and attitudes toward lawyers can be divided into three periods. The first was pre-London, when he worked for the Post Office in Ireland and where his description of members of the bar were often caricatures. A second period commenced in 1861, after he moved to London and wrote *Orley Farm*. In the third, the London period, when he met and became friends with some of the good and great of the English bar, his lawyers became more sympathetic, realistic, able, and as with his other characters, reflections of real people.[3]

I. Trollope and the Law

Trollope's father was an unsuccessful barrister, an intelligent man whose temperament and personality offended colleagues and drove away clients. These failings led to the family's penury and to a wretched childhood for Trollope. His

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1 Richard Posner, Law and Literature: A Misunderstood Relation 6 (1988).

2 *Mr. Trollope and the Lawyers,* London Review 405 (Nov. 8, 1862) (quoted in Anthony Trollope : The Critical Heritage 156 (Donald Smalley ed. 1969). Trollope has little to say about judges.

3 This division originated with Henry S. Drinker (1880-1965), an attorney and avid Trollopean, in an address before the Grolier Club on November 15, 1949. In 1950. The Grolier Club published the address in Two Addresses Delivered to Members of the Grolier Club. The addresses were reprinted as Henry S. Drinker, *The Lawyers of Anthony Trollope*, Fed. Law., Jan., 2008, (Magazine), at 50.

older son, Henry, was a paper barrister, i.e. one qualified to advocate in court on behalf of clients, but who did not practice law.

The law intrigued and exasperated Trollope. Eleven of his novels have trials or hearings.[4] Over one hundred lawyers appear throughout his works. The legal system held a special importance to him as the skeleton upholding the social and political framework of the country, as important as the church and the body politic. Trollope has been described as the novelist of the ordinary for his realistic descriptions of society. Along with the society he depicts are ideas of the law and legal system that are part of elaborate philosophical traditions, particularly ideas of truth that accompany concepts of natural law. For Trollope law was an integral part of the forces that make a functioning society.[5] In the law, Trollope found also an expression of spiritual principles integral to English customs.[6] He perceived that the role of law in English society was changing, becoming more commercial and urban, and thrusting up new classes at the expense of the landed gentry. Could a legal system that was originally framed to support a feudal structure accommodate the claims of the burgeoning commercial and middle classes?[7] His novels reflect these tensions.

In some sense Trollope's plots and the mediating role of the law between the individual and society resemble contemporary American disputes as to whether the Constitution is to be strictly interpreted according to its original words and meaning or is it to be a more flexible vehicle that changes with the times. The tensions between the law and English society were used brilliantly by Trollope. He believed that justice was the meting out of rewards and punishments as the consequence of a right or wrong decision. The law, as he depicted it, was often an impediment to this process, and lawyers were unreliable guides. Trollope provided the way through his creations of characters, who seem real persons.[8]

Trollope criticized the legal system because of the way it allowed the deprivation of women's property by her spouse, in the rigidity of the land law and the system of entail, and in the absurd distinctions allowed there, such as between heirlooms and paraphernalia exemplified in *The Eustace Diamonds.* Nevertheless, he favored the land and inheritance laws for their stabilizing role in English society and culture.

Throughout much of his career Trollope was critical of the bar and lawyers' work. He admired lawyers who were unswerving in their quest for the truth and carried forth the cause of justice.[9] From Mr. O'Malley, who defends Myles Usher in *The Macdermots of Ballycloran*, his first novel, to Nicholas Apjohn, the attorney in *Cousin Henry*, one of his last, lawyers who seek justice and take an interest in the client receive Trollope's approval. O'Malley, sitting in the courtroom "probably thinking it unprofessional to take more than a lawyer's interest in any case" was

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4 In order of publication they are: The Macdermots of Ballycloran (1847); The Kellys and the O'Kellys (1848); The Three Clerks (1858); Orley Farm (1862); The Last Chronicle of Barset (1867); The Vicar of Bullhampton (1870); The Eustace Diamonds (1872); Lady Anna (1873); Phineas Redux (1874); John Caldigate (1879) & The Land-Leaguers (1883).

5 R.D. McMaster, Trollope and the Law 31(1986).

6 *Id.* at x.

7 Geoffrey Harvey, *Introduction*, Mr. Scarborough's Family viii (Oxford Univ. Press 1989) (1883).

8 Coral Lansbury, The Reasonable Man: Trollope's Legal Fiction 95 (1981).

9 *Id.* at 157.

so anxious about the result he could not wait to hear the verdict.[10] Mr. Apjohn seeks the truth about a will even though it will go against his client's interest.[11] In contrast, Trollope despised those lawyers who knew their clients were guilty and used their legal skills to plead for their innocence.

A. The Distinction Between Solicitors and Barristers

In discussing Trollope's attitude toward lawyers, one should be aware of the structure of the English Bar and the distinction between solicitors and barristers. While both are members of the legal profession, their functions differ, as did Trollope's attitude toward them. A solicitor deals directly with his client on such matters as conveyancing real property, drawing up of wills and estate planning, negotiating and drafting agreements and other papers and documents, and offers general legal advice. The solicitor is often the family attorney.[12] In Trollope's novels, a firm of solicitors may represent a family for generations. Solicitors can represent their clients in private disputes, but the barrister is a client's advocate in court and is retained by the solicitor when such advocacy is needed.

Barristers are independent of one another and self-employed, and usually work in chambers, rather than firms. Two self-employed barristers in the same chamber can advocate on the other side of a dispute against each other, as they are independent of one another. Members of a solicitors' firm cannot represent two sides of a legal dispute.

B. Trollope's Solicitors

Trollope's treatment of solicitors is often benign. They are professionals and respected members of the legal profession and the community:

> There is no form of belief stronger than that which the ordinary English gentleman has in the discretion and honesty of his own family lawyer. What his lawyer tells him to do, he does. What his lawyer tells him to sign, he signs. He buys and sells in obedience to the same direction and feels perfectly comfortable in the possession of a guide who is responsible and all but divine.[13]

Solicitors are the protectors in the present and future of a family's estate and wealth who assure future generations of their status and inheritance according to the laws of inheritance and customs of English society. They guard a family's personal and

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[10] The Macdermots of Ballycloran 606 (Oxford Univ. Press 1989) (1847). Trollope's novels come in a variety of editions. Where possible the Oxford University Press novels, which reprint the original format and pagination are used. As per The Bluebook: A Uniform System of Citation, used for legal citations, the original date of publication is listed after the date of the particular edition cited.

[11] Trollope ignored the legal ethical issue involved in Apjohn's pursuit of the truth. An attorney cannot act against his/her client while continuing representation.

[12] The word "attorney" applies only to solicitors. A barrister would be insulted to be referred to by that name. McMaster, *supra* note 5, at xi. This essay uses the term generically to apply to both solicitors and barristers.

[13] The Eustace Diamonds 91 (Oxford Univ. Press 1973) (1872).

financial interests against the outside world and sometimes from those within the family who would undermine it.[14]

Samuel Camperdown is such a solicitor.[15] In the *Eustace Diamonds* he zealously protects the interests of the Eustace estate even beyond the desires of his clients. For generations Camperdowns had been solicitors for the Eustace family. Lizzie Greystock, though well born, beautiful, and charming is a compulsive liar and thief. She marries the dying Sir Florian Eustace and soon becomes a widow. His death leaves Lizzie in possession of a priceless diamond necklace, which she claims Sir Florian gave to her.

Mr. Camperdown doesn't believe her and maintains she had no right to the necklace as it was an heirloom and would stay with the Eustace family. He insists the estate keep the diamonds until the dispute is settled. Lizzie refuses to turn them over, then says they have been stolen and lies to the police. Later, the jewels really are stolen. The solicitor consults a learned barrister, Thomas Dove, who writes an opinion that pearls and jewels are paraphernalia, which can be given before death and become the property of the widow.[16] Ignoring the bad news, Camperdown presses on believing that there are limits to paraphernalia and the diamonds are too valuable to be so categorized. He files a bill in Chancery in which the court will examine the equity of the transfer. Despite the reluctance of the Eustace family to pursue Lizzie, the solicitor considers himself the guardian of the estate, whose interest exceeds that of the family.

Often Trollope uses lawyers' names to highlight a personality trait. In *The Macdermots of Ballycloran*, the barristers are named Allewinde and O'Blather. Other times, the names are merely for purposes of humor. In *Dr. Thorne* he writes:

> "[Mr. Gazebee] was the junior partner of Gumption, Gazebee & Gazebee, of Mount Street … The firm had been going on for a hundred and fifty years, and the designation had often been altered; but it always consisted of Gumptions and Gazebees differently arranged, and no less hallowed names had been permitted to appear. It had been Gazebee, Gazebee & Gumption; then Gazebee & Gumption; then Gazebee, Gumption & Gumption; then Gumption, Gumption & Gazebee; and now it was Gumption, Gazebee & Gazebee."[17]

Trollope's solicitors reflect a substantial range in social status, respectability, integrity, and ability. A firm's or solicitor's name often frames character, class, reputation

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[14] R. D. McMaster elaborates that a solicitor "[has] the personal and transient pecuniary interests of members of the family at heart, but also the inherited dignity and welfare of the estate in general, and he must exercise reason, scholarship and the law's machinery to protect both. He has to contend with the wickedness, passion, and perversity of his client's enemies, but also with the indifference of the people he represents." McMaster, *supra* note 5, at 76.

[15] "A better attorney to which his life was devoted, did not exist in London than Mr. Camperdown. To say that he was honest is nothing. To describe him simply as zealous, would be to fall short of his merits. The interests of his clients were his own interests, and legal rights of the properties of which he had charge, were as dear to him as his own blood." The Eustace Diamonds, *supra* note 13, at 253.

[16] *Id.* at 226-28.

[17] Dr. Thorne 442-43 (Oxford Univ. Press 1989) (1858).

or competence. The firm Slow and Bideawhile appears in six novels.[18] They are respectable senior solicitors with a reputation for unimpeachable probity. Sir Peregrine Orme, a character in *Orley Farm*, suggests to his barrister, Thomas Furnival, that Slow and Bideawhile be employed to defend Lady Mason on a perjury charge:

> There were no more respectable men in the whole profession. But Mr. Furnival feared they were too respectable. They might look at the matter in so straightforward a light as to fancy their client was really guilty; and what might happen then? Mr. Furnival, therefore was obliged to say that on Slow and Bideawhile did not undertake that kind of business.[19]

Mr. Furnival reluctantly then goes to speak with Slow and Bideawhile, who refuse to take on the matter.

As their names suggest, they are neither efficient nor necessarily able. In *Orley Farm*, Mr. Slow is 'Old Slow'.[20] In *Miss Mackenzie,* he is a gray-haired old man, nearer 80 than 70, and Mr. Bideawhile is almost as old himself.[21] By the time of *The Way We Live Now*, Mr. Slow has died. Nor are Slow and Bideawhile considered clever or even competent.[22] They were solicitors with a particular style. With age, Trollope suggests, comes a decline in solicitors' faculties. In *Miss Mackenzie*, Slow and Bideawhile seem to give Miss Mackenzie her property by mistake and allow her to lend a large sum of money without checking on the supposed security, which is already mortgaged elsewhere. Round and Crook, a firm that appears in *Orley Farm*, is respectable, but Trollope notes that "Mr. Round Sr. had enjoyed the reputation of being a sound, honorable man, but was now considered by some to be not quite sharp enough for the practice of the present day."[23]

A theme raised in several novels is the decline in solicitors' ethics, a generational shift that reflects a conflict between traditional mores and sharper practices by younger solicitors. More senior respectable solicitors, Slow and Bideawhile, Round and Crook, Mr. Camperdown & Son represent a past where professional standards were higher than the present, which rewards shifty practices. In *Mr. Scarborough's Family* this new environment is recognized by John Grey, Mr. Scarborough's solicitor. He notes the tendency of his partner, Mr. Barry, to sharp practices as reflecting the age.[24] Mr. Squercum in *The Way We Live Now* exemplifies the modern 'sharp' solicitor. Despised by Slow and Bideawhile as "so clever and so pestilential" and damned with faint praise as "fairly honest,"[25] Squercum nevertheless gets results.

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18 Doctor Thorne (1858); Framley Parsonage (1861); He Knew He Was Right(1869); Miss Mackenzie(1865); Orley Farm (1861) & The Way We Live Now (1875).

19 Orley Farm 263 (Oxford Univ. Press 1970) (1862).

20 *Id.* at 263-64.

21 Miss Mackenzie 221 (Dover 1986) (1865). The Dover citations are unabridged republications of the work originally published by Chapman and Hall.

22 "The Bideawhiles piqued themselves on the decorous and orderly transaction of their business. It had grown to be a rule in the house that anything done quickly must be done badly. They never were in a hurry for money, and they expected their clients never to be in a hurry for work." The Way We Live Now 69-70 (Oxford Univ. Press 1951) (1875).

23 Orley Farm, *supra* note 19, at 157-58.

24 Mr. Scarborough's Family, *supra* note 7, at 600.

25 "Squercum was the very opposite to [Slow and Bideawhile]. He had established himself, without predecessors and without a partner, and we may add without capital, at a little

As one would expect, Trollope's discussions of attorneys are infused with differentiations based on status, class and wealth. The nineteenth century legal profession was highly stratified as it is today. Not surprisingly Trollope made much use of those differences in his descriptions of lawyers, particularly in his later novels. To return to the firm of Gumption, Gazebee & Gazebee:

> Mr Gazebee was a very different sort of gentleman; he was the junior partner in the firm of Mount Street, a house that never defiled itself with any other business than the agency business, and that in the very highest line. They drew out leases, and managed property both for the Duke of Omnium and Lord de Courcy; and ever since her marriage, it had been one of the objects dearest to Lady Arabella's heart, that the Greshamsbury acres should be superintended by the polite skill and polished legal ability of that all but elegant firm in Mount Street.
>
> It must not be supposed that Messrs. Gumption, Gazebee & Gazebee were in the least like the ordinary run of attorneys. They wrote no letters for six-and-eightpence each: they collected no debts, filed no bills, made no charge per folio for "whereases" and "as aforesaids;" they did no dirty work, and probably were as ignorant of the interior of a court of law as any young lady living in their Mayfair vicinity. No; their business was to manage the property of great people, draw up leases, make legal assignments, get the family marriage settlements made, and look after wills. Occasionally, also, they had to raise money; but it was generally understood that this was done by proxy.[26]

C. Ungentlemanly Solicitors

On the other hand, some of Trollope's solicitors were not gentlemen. Of Squercum he writes: "it must be owned, though an attorney, he would hardly have been taken for a gentleman from his personal appearance." [27] In *Mr. Scarborough's Family*, Squire Prosper is engaged to Matilda Thoroughbung, the daughter of a brewer, who will bring to the marriage £25,000 but is negotiating to control her own fortune. She uses the firm of Soames and Simpson. The Squire doubts they are gentlemen as their work consisted of the recovery of local debts. He believes they are crass local

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office in Fetter Lane, and had there made a character for getting things done after a marvelous and new fashion. And it was said of him that he was fairly honest, though it must be owned that among the Bideawhiles of the profession this was not the character which he bore. He did sharp things no doubt and had no hesitation in supporting the interests of sons against those of their fathers." 2The Way We Live Now, *supra* note 22, at 70-71.

26 Doctor Thorne, *supra* note 17, at 442-43.

27 2 The Way We Live Now, *supra* note 22, at 70. "He was a mean-looking little man, not yet above forty, who always wore a stiff light-coloured cotton cravat, an old dress coat, a coloured dingy waistcoat, and light trousers of some hue different from his waistcoat. He generally had on dirty shoes and gaiters. He was light-haired, with light whiskers, with putty-formed features, a squat nose, a large mouth, and very bright blue eyes. He looked as unlike the normal Bideawhile of the profession as a man could be;" *Id.*

lawyers and is wounded when Miss Thoroughbung compares him unfavorably to Soames and Simpson, whom she considers gentlemen. "They were gentlemen! The vulgarest men in all Buntingford! He declared to himself, and always ready for any sharp practice."[28] The Squire recalls his lineage and compares it to his fiancée's solicitors: "Soames was the son of a tax-gatherer; and Simpson had come down from London, as a clerk from a solicitor's office in the City."[29]

Toward the bottom of the legal profession rests Samuel Dockwrath, a sleazy solicitor, who has taken over his father-in-law's legal practice, and in going through his papers, discovers evidence that indicates a witness in a case involving a disputed will may have perjured herself.[30] Dockwrath calls on Round and Crook, respectable solicitors, with the information he has discovered and attempts to worm his way into the litigation as a co-counsel.

Trollope informs us that in normal circumstances Round & Crook had no personal or business dealings with someone of Dockwrath's ilk. If some intercourse between them became necessary, Round and Crook's confidential clerk would have seen him, "but even then the clerk would have looked down or him from a great moral height and Dockwrath knew it."[31] Old Mr. Round remarks to Mr. Furnival that Dockwrath was "a low fellow whom you would be ashamed to see in your office."[32] Dockwrath is condescended to when meeting young Mr. Round, rather than the senior partner and namesake of the firm, and his effort to become part of the team representing Joseph Mason's interests is rejected.

D. Solicitors as Knaves or Criminals

A few of Trollope's solicitors are knaves. In *The Macdermots of Ballycloran*,[33] Trollope narrates the demise of a small Catholic landowning family in mid-nineteenth century Protestant-dominated Ireland. The property, a run-down mansion, is mortgaged to its builder, Joe Flannelly, whose ambition is to dispossess the Macdermots from their land. Thady Macdermot lives there with his father Larry, but they cannot keep up the mortgage payments. To further undermine their situation, Thady has declined to marry Flannelly's daughter.

Hyacinth Keegan, the agent and son-in-law of Joe Flannelly, is an attorney who aspired to become a country gentleman by acquiring the property. He threatened to evict the Macdermots and swore to make beggars of the whole family and developed a plan to do so. As Trollope described him:

> He was a hardworking man … he was a plausible man, a good flatterer, not deficient in that sort of sharpness which made him a successful attorney in a small provincial town. … Principle had never stood much in his way.

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28 Mr. Scarborough's Family, *supra* note 7, at 258, 483-84.

29 *Id.* at 484.

30 This is the subject of Orley Farm, *supra* note 19, at 17-23.

31 Dr. Thorne, *supra* note 17, at 157.

32 *Id.* at 168. While Dockwrath is an unsavory individual, Trollope, as is his wont, makes his characters more complicated than mere villains. He notes that Dockwrath used the leased land for a few cows to provide milk for his sixteen children. Revenge has been instigated for far less. 1, Orley Farm, *supra* note 17 at 6-7.

33 The Macdermots of Ballycloran, *supra* note 10.

> … In appearance he was a large, burly man, gradually growing corpulent, with a soft, oily face … it concealed the malice, treachery and selfishness which his face so plainly bore without it. His eyes were light, large and bright…his mouth was very large, and his lip heavy, and he carried a huge pair of brick coloured whiskers. His dress was somewhat dandified.[34]

Thady's sister, Feemy, considered herself engaged to Captain Ussher, a police officer charged with the detection and destruction of the illegal poteen stills scattered throughout the neighboring mountains, and who was, quite naturally, hated by the local peasants.[35] Joe Reynolds, leader of a gang of poteen distillers, plotted to kill Ussher and tried in vain to persuade Thady to join them, but Thady's confidential, servant Pat Brady had become Keegan's spy and stool pigeon and succeeded in involving Thady in the conspiracy.[36]

Another corrupt solicitor is Mr. Moylan, who appears in Trollope's second novel, *The Kellys and the O'Kellys*.[37] Trollope used the device of a double plot.[38] Francis O'Kelly, Lord Ballindine, had as near neighbors, distant relations, and tenants Mrs. Kelly and her son Martin. Another neighbor was Barry Lynch, whose father had stolen from the Ballindine estate a considerable fortune, which he left in equal portions to his worthless son, Barry, and to his ill-educated daughter Anastasia or Anty. Barry attempted to force Anty into an asylum, declaring her to be mentally unfit to manage her fortune, and, failing this, tried to murder her. She fled to the Kellys, where Martin, not unmindful of her £400 dowry, planned to woo and marry her.[39]

Moylan, the solicitor and Anty Lynch's agent, is bribed by Barry to perjure himself by charging the Kellys with conspiracy to obtain Anty's fortune. Trollope describes Moylan as "an ill-made, ugly, stumpy man, about fifty; with a blotched face, straggling sandy hair, and grey shaggy whiskers. He wore a long, brown greatcoat, buttoned up to his chin, and this was the only article of wearing apparel

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34 *Id.* at 10, 147-49.

35 Poteen or potheen (pronounced puhcheen) is Irish moonshine. It was traditionally distilled in a small pot still, and the term is a diminutive of the Irish word "pota", meaning pot. *See Poitin / Poteen*, Difford's Guide, https://www.diffordsguide.com/beer-wine-spirits/category/538/poteens-poitins (last visited April 24, 2021).

36 Feemy becomes pregnant and when Captain Ussher was given a promotion that would take him out of the county, Feemy confessed that she was bearing his child and begged him to marry her. He claimed that was impossible but arranged to take her with him. By chance Thady surprised them as they were departing and, believing that Feemy was being abducted against her will, struck Ussher and killed him. Thady was tried, convicted of murder, and hanged. During the trial Feemy died and their father became completely insane. Some have suggested that if Trollope was alive today, he would be writing for soap operas or Netflix series. The plot seems out of that genre, but this was his first literary effort.

37 The Kellys and the O'Kellys (Oxford Univ. Press 1978) (1848).

38 The first plot concerns the aristocratic Fanny Wyndham, the ward of Lord Cashel, who, upon discovering that Fanny is heiress to her brother's fortune, attempts to marry her off to his dissolute and debt-ridden son. However, Fanny is already engaged to (and in love with) Francis O'Kelly, Lord Ballindine. The conflict really begins when Lord Cashel demands that Fanny breaks this engagement.

39 Before he made his sordid proposal, Martin fell in love with Anty--and she with him.

visible upon him." Moylan and Barry are foiled.[40] Both Keegan and Moylan are scheming and disreputable, but their flaws are of character. Trollope's objections to barristers are based on the tools and ideals of their legal practice. Despite these examples, solicitors did not draw the distain Trollope had for barristers in his earlier novels.

E. The Problem with Barristers

Initially, Trollope detested nearly all barristers:

> A barrister can find it consistent with his dignity to turn wrong into right and right into wrong, to abet a lie, nay to disseminate, and with all the play of his wit, give strength to the basest of lies, on behalf of the basest of scoundrels.[41]

A useful source to examine Trollope's early antagonism to barristers is *The New Zealander*, his nonfiction ruminations on the condition of England, its morals and the social institutions of the time.[42] In a chapter "Law and Psychic" Trollope criticizes the legal profession through a fictional situation where a murderer is enabled by his barrister and the law to escape just punishment.

His scenario demonstrates that the legal system seeks not the discovery of the truth but is more interested in aiding the guilty defendant to escape punishment. Trollope assumes the apprehended criminal may be willing to confess through a guilty conscience, but the arresting constable, and later the magistrate won't ask a question without warning the accused that he answers at his peril. According to Trollope the magistrate should urge the accused to cleanse his guilty breast, speak the truth and make peace with God.[43] Instead the accused remains silent. Trollope then suggests that a barrister would be struck with horror that a prisoner is lured into giving evidence against himself.[44]

Trollope acknowledges that barristers retain a high position in the community and are gifted at what they do but censures the legal profession for making the

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40 The Kellys and the O'Kellys, *supra* note 37, at 228-29. In what became a common theme in Trollope's novels: true feelings of love triumph over the pursuit of someone for the financial bounty the betrothal would bring.

41 The New Zealander 63 (Trollope Society 1995) 1972.

42 The New Zealander was written in 1855-56 after publication of The Warden. Trollope submitted the manuscript to his publisher at the time, William Longman, who rejected it. Though Trollope substantially rewrote the manuscript, it remained unpublished until 1972. N. John Hall, *Editor's Introduction* to The New Zealander, *supra* note 41, at *xiv*. The title, The New Zealander, has nothing to do with New Zealand. According to N. John Hall, it derives from a prophecy made in 1840 by the historian and Whig politician, Thomas Babington Macaulay, that England would eventually decay, that one day a visitor from New Zealand would sketch the ruins of St' Paul's Cathedral. *Id.* at vi. Trollope recycled material from several chapters in The New Zealander into his novels, notably in The Three Clerks and Doctor Thorne. *Id.* at xx-xxii. Some of the themes of The New Zealander, particularly relating to his view of lawyers, appear throughout his work.

43 The New Zealander, *supra* note 41, at 55.

44 *Id.* at 56.

object of the law not facilitation of the discovery of the truth, but rather the escape of the criminal from justice.[45] Mr. Allewinde, a barrister, is a foil for the legal system's faults.[46] According to Trollope, all lawyers would be struck with horror at the idea that any man would be lured into giving evidence against himself. Allewinde undermines the cause of justice by delaying tactics, pushing trivial points, browbeating witnesses, playing loose with the truth, and even though the jury finds the criminal guilty, makes appeals which delay the imposition of justice. The criminal's penalty of doom is eventually commuted to transportation, and after a few years the murderer will reappear with a ticket of leave to commit more crime.[47]

Trollope believed the legal system should reach just results. Social justice concerned the meting out of rewards and punishments as the consequence of right or wrong decisions. The law as he depicted it was often an impediment in this process.[48] Barristers assisted in the frustration of justice.

Trollope's objections to barristers were twofold. First, the law and the lawyers upholding it should seek the truth from which justice results. He was outraged that barristers put loyalty to their clients ahead of the search for truth and justice. The adversary system was all wrong as the enactment of laws in accord with the law of nature assumes an inbuilt moral compass in humans that contains self-evident truths of right and wrong.[49] There was no reason why a right-minded person could not intuitively recognize the truth, so that the adversary system of criminal law was unnecessary. His second grievance was that cross-examination in a trial submitted honest witnesses to torture and distracted them from testifying to the truth.

Many non-lawyers question how a defense attorney can represent a particularly heinous scoundrel, who seems obviously guilty of the pending charges. The answer is that every defendant, no matter how repugnant, has the right to an attorney zealously arguing on his or her behalf. Every defendant is entitled to a presumption of innocence until proven guilty. Representing an accused person of an evil act doesn't make a lawyer an evil person. There is a divergence between legal ethics and the ethics of the general community. The lawyer has a duty of utmost loyalty to the client.

F. Trollope in the Witness Box

From 1844 to 1860 Trollope was a supervisor and inspector in the postal service in Ireland with excursions to England and foreign jurisdictions. His familiarity with Irish trials, which were more frequent and cross-examination supposedly more vicious than in England, was largely gleaned from newspapers where cases and transcripts of testimony were reported.[50] Excepting two experiences with cross-

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45 Hall, *supra* note 42 at xxxi.

46 Mr. Allewinde appeared in The Macdermots of Ballycloran, *supra* note 10, as the Crown prosecutor at Thady Macdermot's trial for the murder of Myles Ussher, *see supra* note 36.

47 The New Zealander, *supra* note 41 at 57-61.

48 Lansbury, *supra* note 8, at 95.

49 R.D. McMaster, *Law and Society*, *in* Oxford Reader's Companion to Trollope 314 (R.C. Terry ed. 1999).

50 Drinker, *supra* note 3, at 51.

examination as a witness, he knew no barristers in early career save his father, who had no practice.

One of his postal responsibilities was to investigate and prosecute thefts from rural post offices in Ireland. In 1848 complaints were made about letters and cash lost from the mails that passed through the town of Tralee. He wrote a letter from a fictitious father in Newcastle to an equally fictitious daughter in Ardfert and enclosed a marked coin. The letter was sent in a bag of mail to its destination. The letter bag had to be opened in Tralee, a distributing center where letters were consigned to other bags for delivery. When the proper bag reached Ardfert, Trollope's letter was missing. Trollope and a constable with a search warrant rushed to Tralee and found the marked sovereign in the purse of Mary O'Reilly, assistant to the postmaster.[51] Ms. O'Reilly was committed to jail. The first trial ended in a mistrial when a juror became ill.

As a witness at a second trial in July 1849, Trollope was subject to cross-examination by defense counsel Isaac Butt, later leader of the Home Rule Party in the House of Commons. Trollope was affronted when it was suggested that he had placed the marked coin in Ms. O'Reilly's pocket, for both in private and in his public character as the supervisor and inspector, he was of impeccable probity. Trollope joked and jousted with Butt and seemed to get the better of the skirmish with the barrister, but the case resulted in a hung jury.[52] It has been suggested that Butt was the model for Mr. Chaffanbrass, the Old Bailey barrister, and that Trollope's experience under cross-examination colored his view of barristers.[53]

In *The Macdermotts of Ballycloran*, a barrister, Mr. Allewinde, engages in courtroom bullying, chicanery and obfuscation. He is not just a criminal attorney, but a lawyer for the Crown and thus a representative of the legal profession generally.[54] Trollope mentions that the legal profession runs the country, and lawyers fill the House of Commons.[55] Beyond the abuses of cross-examination one of the reasons lawyers are disliked is that in an increasingly complex and changing society as mid-nineteenth century England had become, they held the key to navigating through it. As is the case today, one needed a lawyer to accomplish many of life's important transactions.

G. The Old Bailey Barrister--Mr. Chaffanbrass

Trollope's most famous barrister is Mr. Chaffanbrass, who practices in the Central Criminal Court, the famous "Old Bailey", and is described as the "cock of this dunghill"[56] and "whom no barrister living or dead ever rescued more culprits from the fangs of the law."[57] The Chaffanbrass name is a combination of unattractive

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51 R.H. Super, Trollope in the Post Office 19 (1981).

52 Some of the transcript of the cross-examination appears in N. John Hall, Trollope 109 (1991). The most complete transcript is reproduced in McMaster, *supra* note 5, at 57-58.

53 Henry S. Drinker, *Introduction* to Orley Farm, at xi (Knopf ed. 1950). Professor Hall suggests Mr. Allewinde effloresced into Chaffanbrass, Hall, *supra* note 52, at 156.

54 McMaster, *supra* note 5, at 55.

55 New Zealander, *supra* note 41, at 62.

56 The Three Clerks 424 (Dover 1981) (1857).

57 Phineas Redux (Oxford Univ. Press 1973) (1874).

traits. "Chaff" means rubbish or garbage. It also is a derogatory synonym for lower class. "Brass" implies hardness or effrontery. Mr. Chaffanbrass appears in three novels: first in *The Three Clerks* at the trial of Alaric Tudor for embezzlement; then in *Orley Farm* defending Lady Mason accused of forging a will; and finally, in *Phineas Redux* defending Phineas Finn charged with murder. Tudor's case is hopeless, and he is found guilty. Lady Mason fares better, and in the third case the jury is instructed to acquit.

Chaffanbrass is a master of cross-examination, the weapon of choice in criminal cases:

> He confined his practice almost entirely to one class of work, the defence namely of criminals arraigned for heavy crimes. . . . . To such a perfection had he carried his skill and power of fence, so certain was he in attack, so invulnerable when attacked, that few men cared to come within reach of his forensic flair ...To apply the thumbscrew, the boot, and the rack to the victim before him was the work of Mr. Chaffanbrass's life, a little man, and a very dirty, little man. He has all manner of nasty tricks about him, which make him a disagreeable neighbour to barristers sitting near to him. He is profuse with snuff, and very generous with his handkerchief. He is always at work upon his teeth, which do not do much credit to his industry. His wig is never at ease upon his head, but is poked about by him, sometimes over one ear, sometimes over the other, now on the back of his head, and then on his nose; and it is impossible to say in which guise he looks most cruel, most sharp, and most intolerable. His linen is never clean, his hands never washed, and his clothes apparently never new."[58]

Felix Graham, the idealistic junior lawyer in *Orley Farm* is horrified at the prospect of assisting Chaffanbrass "as though he had been asked to league himself with all that was most disgraceful in the profession' – as indeed perhaps he had been."[59]

Trollope considered cross-examination a weapon of witness torture without regard to the witness's social status. In *Orley Farm* John Kenneby, an honest but mentally limited clerk who witnessed the will signed by Sir Joseph Mason but became confused in his testimony, concludes: "I ain't fit to live with anybody else but myself."[60] In *Phineas Redux*, Lord Fawn, a dull and timid nobleman is terrified to find himself 'in the clutches of the odious, dirty, little man [Chaffanbrass], hating the little man, despising him because he was dirty and nothing better than an Old Bailey barrister,—and yet fearing him with so intense a fear!"[61] Fawn gives such unconvincing and inaccurate testimony at the murder trial of Phineas Finn that the defendant is acquitted. He is so affected by the possibility that he might have condemned an innocent man that "his mind gave way; -- and he disappeared."[62] For Trollope, Chaffanbrass initially reflects the evils of cross-examination. He subverts justice, torments witnesses, and represents those accused of the most heinous crimes. His satisfaction is to thwart justice through the skills of advocacy.

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58 The Three Clerks, *supra* note 56, at 482, 420-22.
59 2 Orley Farm, *supra* note 19, at 73.
60 *Id.* at 375.
61 2 Phineas Redux, *supra* note 57, at 236-37.
62 *Id.* at 358.

Another unattractive barrister in the first period of Trollope's treatment of lawyers is Sir Abraham Haphazard, the Attorney-General[63], who appears in *The Warden*:

> He might be fifty years old, and would have looked young for his age, had not constant work hardened his features, and given him the appearance of a machine with a mind. His face was full of intellect, but devoid of natural expression. You would say he was a man to use, and then have done with; a man to be sought for on great emergencies, but ill adapted for ordinary services; a man whom you would ask to defend your property, but to whom you would be sorry to confide your love. He was bright as a diamond, and as cutting, and also as unimpressionable. He knew everyone whom to know was an honour, but he was without a friend; he wanted none, however, and knew not the meaning of the word in other than its parliamentary sense … .
>
> With him success alone was praiseworthy, and he knew none so successful as himself. No one had thrust him forward; no powerful friends had pushed him along on his road to power. No; he was attorney-general, and would, in all human probability, be lord chancellor by sheer dint of his own industry and his own talent. And so he glitters along through the world, the brightest among the bright; and when his glitter is gone, and he is gathered to his fathers, no eye will be dim with a tear, no heart will mourn for its lost friend.[64]

Haphazard is called upon to advise Reverend Septimus Harding as to whether Harding is entitled to keep the sinecure of Warden of Hiram's Hospital. The income has appreciated greatly, and Harding's prospective son-in-law no less, John Bold, has written in the local newspaper about what appears to be mismanagement by the Church. Harding is a man of conscience and seeks out his son-in-law, Archdeacon Grantly, his friend the aged Bishop, and Sir Abraham. Harding is more interested in being just and easing his conscience than being right.[65]

Sir Abraham bases his opinion not on grounds of justice and right, but procedure. Through his knowledge of process and technicality, he can take advantage of the weaknesses in his opponent's case. Since Mr. Harding is only a paid servant, he is not technically the correct defendant, and so long as the plaintiffs don't notice this and alter the technical defect in their papers, their case will be lost.[66]

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63 The Attorney-General, an officer of the Crown, is the titular head of the English Bar. His assistant and deputy is the Solicitor-General. They give advice to the sovereign and government, give opinions on international and constitutional law, and advise departments of government. Until 1895 they could have private practices in addition to their governmental responsibilities, which is how they came to represent certain characters in Trollope's novels. *See* McMaster, *supra* note 5, at 108-9.

64 The Warden 251-253 (Dent Everyman's Library 1977) (1855). Haphazard's primary appearance is in The Warden, though he has a minor role in Dr. Thorne where he examines the legality of Sir Roger Scatcherd's will.

65 "He was not so anxious to prove himself right as to be so." *Id.* at 35.

66 *Id.* at 255-57.

The Warden then meets with Sir Abraham. Harding asks if he is legally and distinctly entitled to the proceeds of the property. Haphazard evades an answer, offering qualifications. The barrister informs him that the attorneys for the plaintiff have withdrawn the suit. Harding still inquires whether he is legally entitled to the sinecure. Haphazard doesn't respond directly. Harding declares he can resign the Wardenship. Haphazard thinks he's crazy. The contrast between the clergyman of conscience and Sir Abraham seeking a victory in a legal case without regard to the issues of morals, conscience or pride is enormous. Haphazard has a similar attitude towards justice as displayed by Chaffanbrass.

In *The Bertrams* (1859) Trollope summed up his views of barristers performing their professional obligations:

> George Bertram: "I doubt whether a practicing barrister can ever be an honest man…They have such dirty work to do. They spend their days in making out that black is white; or, worse still, that white is black . . . . When two clear headed men take money to advocate the different sides of a case, each cannot think his side is true."[67]

II. London—Success, Recognition and a New View of the Bar

In 1860 Trollope left Ireland and returned to England to assume the surveyorship of the eastern district of the Post Office, which allowed him to live near London.[68] From this time on his profiles of lawyers moved beyond mere caricature and criticism. They became real people, some estimable; others not.

Orley Farm, published in monthly serial parts in 1861-1862, marked a shift in his treatment of barristers. The heart of the novel is the perjury trial of Lady Mason, who is accused of forging a codicil to her late husband's will. When in her twenties, Mary Johnson married Sir Joseph Mason, forty-five years her senior. They had a child, Lucius. Sir Joseph had an older son from a former marriage, Joseph Mason of Groby Park, who according to a duly executed will, would inherit Groby Park and Orley Farm. Sir Joseph died when Lucius was two.

After Sir Joseph's death, a codicil was discovered that had been executed with due formalities. The codicil granted Orley Farm to Lucius and gave £2000 to the daughter of Jonathan Usbech, the attorney who drafted the original will. Joseph, the older son, contested the document's validity. The codicil was in Lady Mason's handwriting because Usbech was ill with gout. It was signed in the presence of two witnesses. Lady Mason testified the language of the codicil was dictated to her by Usbech in the presence of Sir Joseph. The codicil was confirmed, and Lady Mason remained undisturbed at Orley Farm for twenty years.

Upon coming of age, Lucius wanted to try new intensive farming methods. He evicted from two fields a tenant, Samuel Dockwrath, a local attorney who had taken over Usbech's practice. Dockwrath investigated Usbech's old papers and found that

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67 The Bertrams 56 (Alan Sutton 1956) (1859).

68 Hall, *supra* note 52, at 187-8.

there was a second deed signed by the same witnesses on the same date, though the signatories could remember signing only one. Dockwrath convinces Joseph Mason to reopen the case.

Orley Farm shows a mastery of plot, which Trollope thought his best.[69] It is rich with wonderfully drawn characters and various subplots. Throughout flow lawyers and legal issues. There is introduced a change in attitude toward barristers. They are not now usually given names that reflect their style of advocacy such as Messieurs Allewinde and O'Blather of the *MacDermotts* and Mr. Neversaydie of *Castle Richmond*.

Thomas Furnival, Lady Mason's barrister, is presented as hardworking and competent, a man who had labored long and hard before achieving success:

> He was a constant, hard, patient man, and at last came the full reward of his constant industry. … Gradually, it came to be understood he was a safe man, understanding his trade, true to his clients, and very damaging to an opponent . . . .He had been no Old Bailey lawyer, devoting himself to the manumission of murderers or the security of the swindling world in general…Indeed there is no branch of the Common Law in which he was not regarded as great and powerful . . . .Mr. Furnival's reputation has spread itself wherever stuff gowns and horsehair wigs are held in estimation.[70]

The positive view of Furnival rests on his success, rather than his personal qualities, save for his ability to work hard. He is sympathetic to, and attracted by Lady Mason, who plays with his emotions as if they were strings on a violin.

Mr. Chaffanbrass returns but becomes more human.[71] He mentions to Mr. Furnival, that he understands Lady Mason is a pretty woman, and in contrast to his previous attitude to clients evinced in *The Three Clerks*, he admits that he can do better in a case when his heart is in it.[72] Trollope brings Chaffanbrass off the dung hill and places him within the legal profession and beyond as a competent and famous advocate.[73] Mr. Furnival whose success has led to a seat in Parliament, had

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69 In his autobiography Trollope writes his friends competent to form an opinion on the subject say Orley Farm is the best he has written, but he doesn't agree as the highest merit a novel can have to him "consists in the perfect delineation of character, rather than in plot." An Autobiography 106 (Oxford Univ. Press 2014) (1883). But he adds "the plot of Orley Farm is probably the best I have ever made, but it has the fault of declaring itself and thus coming to an end too early in the book" when Lady Mason tells Sir Peregrine Orme she forged the will. *Id.*

70 *Id*. at 95-97. A stuff gown is a woolen gown worn by a barrister, who is not a Queen's Counsel. *See*, footnote 106 for a description of a Q. C.

71 Even in The Three Clerks, Trollope as is his custom, shows all sides of his characters, strengths as well as flaws. In his private life: "[Mr. Chaffanbrass] is one of the most easy, good-tempered, amiable old gentlemen that ever was pooh-poohed by his grown-up daughters, and occasionally told to keep himself quiet in a corner... He is so placid he chooses to be ruled by his own children. He delights in his books, in his three or four live pet dogs, and birds, and squirrels, whom morning and night he feeds with his own hands. He is charitable too". The Three Clerks, *supra* note 56, at 414.

72 1 Orley Farm, *supra* note at 343-4.

73 "All the world knows Mr. Chaffanbrass—either by sight or reputation. Those who have been happy enough to see the face and gait of the man as, in years now gone, he used to lord it at the Old Bailey, may not have thought much of the privilege which was theirs.

been friends with Chaffanbrass for thirty years. The Old Bailey barrister though cannot escape his class:

> Mr. Chaffanbrass and Mr. Furnival were very old friends…but any results of their friendship were scanty. They might meet each other in the streets perhaps, once in a year; As to a meeting in each other's houses, or coming or coming together for the sake of friendship which existed,—the idea of doing so never entered the head of either of them.[74]

A. Furnival and Chaffanbrass as Jurisprudential Antipodes

Mr. Furnival's romantic fumbling with Lady Mason, combined with Mrs. Furnival's jealousy, and the Birmingham Congress on law reform seem to be comic sidebars to the plot, but as often occurs in Trollope, there are deeper meanings. Trollope's novels are not only about legal events and the actors involved but engage in the Victorian legal culture in a broader sense of history, traditions, community, change, and the meaning of "Englishness".[75] These subplots reflect jurisprudential, political, and social changes occurring in nineteenth century England.

Trollope's criticism of an adversary system that allows attorneys to defend a client he knows or should reasonably know is guilty plays out in the trial of Lady Mason in *Orley Farm*. Despite his dogmatic view Trollope offers a fair presentation of the subtleties and ambiguities of actual representation of clients. He creates a legal team of four, only one of which, the idealistic Felix Graham, truly believes Lady Mason innocent, and if he thought she was guilty would immediately withdraw from the case.[76] The other attorneys have initially reasonable and then increasingly dubious beliefs in Lady Mason's innocence of forgery charges.

Lady Mason directly approaches her barrister, Mr. Furnival. This was contrary to normal practice as barristers did not meet with a private client because of the concern they might lose their objectivity in the handling of a case.[77] The solicitor is a screen between the client and advocate. Initially, Furnival does not know whether Lady Mason is guilty. If he thought she was, he should decline the case and refer her to a solicitor, who would find another barrister to represent her. Furnival goes out of his way to maintain in his view her innocence. He is conflicted, hoping and ever more tentatively believing that Lady Mason is innocent. Furnival seeks

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But to those who have only read of him, and know of his deeds simply by their triumphs, he was a man very famous and worth to be seen. 'Look; that's Chaffanbrass. It was he who cross-examined—at the Old Bailey, and sent him howling out of London, banished forever into the wilderness.' *Id.* at 342.

74 *Id.*

75 Ayelet Ben-Yishai, *Trollope and the Law*, *in* The Cambridge companion to Anthony Trollope 156-157 (Carolyn Dever & Lisa Niles eds. 2012).

76 For an interesting discussion of this issue, see Marc M. Arkin, *Trollope and the Law: On the Victorian Novelist and the Moral Question of Defending the Guilty*, 26 New Criterion 23 (2007).

77 Usually, the solicitor is the barrister's client. The solicitor manages the general conduct of the case and engages whichever barrister seems likely under the circumstances to plead the case most effectively in court. McMaster, *supra* note 5, at 34. When Furnival seeks out Chaffanbrass, in a sense he is acting as a solicitor for Lady Mason.

to resile from direct representation. He discourages the use of solicitors Slow and Bidewhile on the ground that they don't handle this sort of matter, where the truth is that they have their own suspicions and decline to take the case. He then seeks out Chaffanbrass, the kind of attorney that Trollope criticizes, to assess the case against her. Chaffanbrass and his assistant Aram, view their task to convince the jury of their client's innocence regardless of actual guilt. They provide a cover for Furnival, who remains on the team, even though he knows the truth.

In meeting Chaffanbrass, Mr. Furnival emphasizes Lady Mason's status in society as proof of her innocence. He hoped that the accusation against her would be of forgery:

> The stronger and more venomous the charge made, the stronger would be public opinion in favour of the accused, and the greater the chance of an acquittal. But if she were to be found guilty on any charge, it would matter little on what. Any such verdict of guilty would be utter ruin and obliteration of her existence.[78]

Upon hearing Mr. Furnival's story, Chaffanbrass responds, "Ah…a clever woman! An uncommonly sweet creature too," said Mr. Furnival.[79] Furnival goes on to tell him all the prominent people she's friends with, including Judge Staveley, and assumes it will have great influence on the outcome of a trial. Their dialogue proceeds:

> Chaffanbrass: She is a pretty woman...
>
> Yes, and she has done her duty admirably since her husband's death. You will find too that she has the sympathies of all the best people in her neighbourhood. She is staying now at the house of Sir Peregrine Orme, who would do anything for her.
>
> Anything, would he?
>
> And the Staveleys know her. The judge is convinced of her innocence.
>
> Is he? He'll probably have the Home Circuit in the summer. His conviction expressed from the bench would be more useful to her. You can make Staveley believe everything in a drawing-room or over a glass of wine; but I'll be hanged if I can ever get him to believe anything when he's on the bench.
>
> But, Chaffanbrass, the countenance of such people will be of great use to her down there. Everybody will know she's been staying with Sir Peregrine.[80]

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78 1 Orley Farm, *supra* note 19, at 341.
79 *Id.* at 268.
80 *Id.* at 268-9.

Lady Mason still needs a solicitor. Chaffenbrass, suggests Solomon Aram. "Isn't he a Jew?" says Furnival. Chaffanbrass responds: "Upon my word I don't know. ... . He's an attorney, and that's good enough for me."[81]

This interchange between Furnival and Chaffanbrass represents more than the status differences between an esteemed barrister and member of Parliament and the Old Bailey practitioner, described as a "dirty little man."[82] The characters represent alternative visions of the relationship of the law and legal principles to English notions of community and the status of those involved in the legal process.

Furnival, a gentleman himself, describes Lady Mason in terms of her good character, social status and connections. She knows the best people, visits and stays with them and has standing in the community. In Furnival's view, the graver the charge against Lady Mason, the more likely an acquittal, as she is a member of good standing in the community and therefore adheres to the moral norms of society. People of her rank and position follow the law.

Chaffanbrass has a different world view as to the law and legal norms. Status and friends are immaterial. What matters is what can be proved against those accused. One's place in society and whether one holds the shared values of the community are irrelevant. Chaffanbrass's concern is what is posited by the law and whether the client's case be proven before a jury.

B. The International Congress in Birmingham

Seemingly all of the lawyers in *Orley Farm* are attending an International Conference in Birmingham at which the advantages of the European civil law system over English common law are presented by European lawyers, most prominently by Von Bauhr, who gives a three-hour speech in German, a language many of the attendees don't understand![83]

English law was common law, based on decisions by judges and ruled by the precedent of past judicial decisions.[84] It reflected the norms, customs and communal values of English society including deference and respect of the class structure. Traditionally, common law values reflected "natural law"—universal immutable principles of right and wrong. Natural law refers to the idea that principles of morals and rights are inherent in nature.

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81 *Id.* at 269.

82 *Id.* at 268.

83 A very perceptive recognition by Trollope is the role that bar associations play in the profession in bringing together at least temporarily, lawyers of differing status in the profession, so the Chaffanbrass's and Dockwraths of the profession can mingle with the good and great of the bar.

84 The common law is a body of law based on judicial decisions of courts and other bodies. It was "common" in that it applied in all of the Sovereign's courts. Its defining characteristic is *stare decisis*, the principle that previous judicial decisions serve as precedent for future cases. If a matter before a common law court has similar basic facts to a prior decision, a court is bound to follow the prior decision. If the parties disagree on the precedent or prior case law, a common law court will look at prior decisions on similar facts and synthesize them to apply to the facts before the court. If the facts in the current case are substantially different from a past decision, and statutes are silent or ambiguous on the issue, the court will issue a decision as a matter of first impression, which is based on past decisions that are relevant but will include the judge's opinion as how this new set of facts should apply.

A contrasting view of the law, emergent in the nineteenth century, was positivism. Positive law refers to those laws written as statutes or court decisions and enforced by society. Thus, positive law is man-made law, rather than based on inherent moral codes and rights. While common law is based upon published judicial decisions, in civil law systems codified statutes predominate.[85] The judge In a civil law system is more of an investigator, who brings charges, establishes facts through witness testimony, and applies appropriate remedies found in legal codes. Lawyers in civil systems have a less central role than those in common law trials. They advise their clients, prepare legal pleadings, and submit them to the court, but oral argument is of diminished importance compared to in common law systems.

Trollope's criticisms of cross-examination and the responsibility of attorneys to their clients as opposed to the pursuit of truth in seeking guilt or innocence would seem to be met by the civil law systems, where the judge makes the objective decision based on legal codes. Common law lawyers in Trollope's novels such as John Grey, Samuel Camperdown, and Thomas Dove believe the laws of inheritance and the passage of land and property represent natural law ideals of the fundamental truth and honesty of abstract justice, a reflection of divine will and absolute moral principles. This view contrasts with the positivist position that considers law merely the result of human preferences. Trollope's criticism of the adversary system is that it does not seek inalienable truths.

When Trollope refers to Felix Graham as the "English Von Bauhr" he means the young lawyer approaches his clients as if he was a civil law judge, pursuing right and refusing to represent wrong.[86] Trollope as the impartial narrator demonstrates that Graham's integrity does not necessarily lead to wisdom or a successful legal career.

What Trollope raises in the exchanges between Furnival and Chaffanbrass and in the description of the international congress in Birmingham are jurisprudential questions of natural law versus positive law and the future of the common law system in an English society that was undergoing demands for change in political participation and to the common law system. During the nineteenth century the English common law system was becoming more based upon statutory legislation and adopting positive approaches, a trend that has continued.

Orley Farm generally received good reviews, but critics commented upon Trollope's hostility to lawyers. As with some of his other novels, contemporary and subsequent commentators criticized his errors of legal procedure and the law.[87] Sometimes the twisting of legal rules and norms result from the necessities of the plot. In other cases, Trollope's ignorance of the law, legal procedure and ethics led to careless errors.[88]

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[85] Legal codes can be traced back to the sixth century Emperor Justinian (527-565), whose code ruled the Byzantine empire for nine hundred years.

[86] I Orley Farm, *supra* note 19, at 177-180.

[87] *See* Todd Shields, *Trollope's Legal Mistakes 'The Great Orley Farm Case'—Can You Forgive Him*, 107 Trollopiana 8-19 (Summer 2017); *Mr. Trollope and the Lawyers,* London Rev. 405 (Nov. 8, 1862) reprinted in Donald Smalley, Trollope: The Critical Heritage 156 (1969) "…Mr. Trollope ought to get his law right. As it is he always gets it wrong."

[88] For a description of some of the more serious lapses of legal, evidentiary, and ethical rules in Orley Farm, see Henry S. Drinker, *Introduction*, Orley Farm x (1950). Drinker,

In some sense, criticism of his mistakes resembles going to a circus sideshow to see a dancing bear and then quibbling about the beast's technique. The accuracy of the discussion of legal issues is usually subordinate to the novelist's plot or in Trollope's case the characterization of the leading participants in the story. Still, some of his legal errors are jaw-dropping to an attorney: Mr. Furnival sends his clerk, Crabwitz in disguise, to offer a bribe to Dockwrath to drop the matter concerning Lady Mason's perjury;[89] or at the trial of Phineas Finn in *Phineas Redux,* where a telegram arrives in the middle of the trial from Madame Max Goesler, and the judge allows it to be read to the jury;[90] or again in *Phineas Redux*, where after the attorney general's submission that Finn be acquitted, Mr. Chaffanbrass addresses the jury for the greatest part of an hour and the judge goes on for four hours.[91]

Trollope addressed the problems of accuracy for a novelist in *Phineas Finn*[92] and humorously suggested in *Dr. Thorne*:

> It has been suggested that the modern English writers of fiction should among themselves keep a barrister, in order that they may be set right on such legal points as will arise in their little narratives, and thus avoid that exposure of their own ignorance of the laws, which now, alas! they too often make. The idea is worthy of consideration, and I shall be happy to subscribe my quota.[93]

Responding to reviewers' criticism of *Orley Farm's* legal errors, Trollope thereafter referred legal issues to his friend Charles Merewether, who vetted them for accuracy, and actually drafted Mr. Dove's analysis of heirlooms and paraphernalia in *The Eustace Diamonds*.[94]

Trollope informs the reader early on that Lady Mason has forged the codicil. Though the plot turns from a "who done it" to a "why'd she do it," the ending still presents a surprise. The outcome depends not so much on the law, but the fact

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a prominent American lawyer and Trollopean, engaged in a transatlantic dispute with Sir Frances Newbolt over Trollope's knowledge of the law in Orley Farm. *See* Lansbury, *supra* note 8, at 82-3. In fact, the law played little part in the ultimate resolution of the case.

89 1 Orley Farm, *supra* note 19, at 317-20.

90 2 Phineas Redux, *supra* note 58, at 214-5.

91 *Id.* at 237-8.

92 "The poor fictionist very frequently finds himself to have been wrong in his description of things in general, and is told so, roughly by the critics, and tenderly by the friends of his bosom. He is moved to tell of things of which he omits to learn the nature before he tells of them—as should be done by a strictly honest fictionist. He catches salmon in October; or shoots his partridges in March… And then those terrible meshes of the Law! How is a fictionist, in these excited days, to create the needed biting interest without legal difficulties; and how again is he to steer his little bark clear of so many rocks,—when the rocks and the shoals have been purposely arranged to make the taking of a pilot on board a necessity? As to those law meshes, a benevolent pilot will, indeed, now and again give a poor fictionist a helping hand,—not used, however, generally, with much discretion." 1 Phineas Finn 267-8 (Oxford Univ. Press 1973) (1869).

93 Dr. Thorne, *supra* note 17, at 480-1 (1967).

94 Surprisingly, Merewether's analysis was criticized over a century later by a third year Stanford law student. *See* Alan Roth, *He Thought He Was Right (But Wasn't): Property Law in Anthony Trollope's The Eustace Diamonds*, 44 Stan. L. Rev. 879 (1992).

that the contending barristers failed to ask the witnesses the proper questions.[95] Lawyers can only provide partial truths while the novelist can reveal the whole truth to the reader.[96]

The success of *Orley Farm* marked a significant development in Trollope's writing career and status in life. He had come a long way from his beginnings. His move to London and later resignation from the Post Office reflected that. In *An Autobiography* he says of *Orley Farm* after its publication, he felt he had created a position among literary men and secured an income on which he could live in ease and comfort.[97] The move to London commenced a new period in his career and a reshaping of his views and presentation of lawyers. His readers would meet barristers who reflected real people of distinction and gravitas and were a credit to the bar and society.

III. A New Perspective on Lawyers

Trollope's move to London was more than a change in venue. It also constituted a cultural and upwardly mobile shift in status. In 1862, he was elected to the Garrick Club, known for its hospitality to writers and those in the theater.[98] The admission to the Garrick Club not only signified Trollope's recognition as an author, but also fulfilled a psychological need for acceptance that lay in his rejection by contemporaries when he was young. Joining the Garrick was the first time in his life that he felt he belonged.[99] He was now accepted as an English gentleman by English gentlemen.[100]

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95 SPOILER ALERT: DO NOT READ IF YOU ARE UNFAMILIAR WITH THE OUTCOME OF THE ORLEY FARM CASE! Lady Mason, as the reader knows is admittedly guilty but is acquitted because the plaintiff's attorneys failed to ask a specific question of Bridget Bolster, a witness to the signing of the document at issue in the lawsuit. After the lawsuit, Bolster is dining with Moulder, a commercial traveler and a minor character, who questions her and the second witness, John Kenneby. "'But the paper as we signed' said Bridget, 'wasn't the old gentleman's will—no more than this is;. And she lifted up her apron. 'I'm rightly sure of that.'…Moulder became angry with his guest…'Wasn't the old gentleman's will!' said Moulder. 'You never dared say as much as that in court.' 'I wasn't asked,' said Bridget.'" 2 Orley Farm, *supra* note 19, at 377-78.

96 Lansbury, *supra* note 8, at 83.

97 An Autobiography, *supra* note 69, at *106.*

98 The Garrick Club, named after the eighteenth-century actor David Garrick, was founded in 1831. Many of the good and great literary persons of the nineteenth century such as Dickens and Thackeray were members.

99 As he wrote in An Autobiography, *supra* note 69, at 100-1: "Having up to that time lived but very little among men, having known hitherto nothing of clubs, having even as a boy been banished from social gatherings, I enjoyed infinitely at first the gaiety of the Garrick…. I have long been aware of a certain weakness in my own character, which I may call a craving for love. I have ever had a wish to be liked by those around me—a wish that during the first half of my life was never gratified. In my schooldays no small part of my misery came from the envy with which I regarded the popularity of popular boys . . . .And afterwards, when I was in London as a young man, I had but few friends. Among the clerks in the Post Office I held my own fairly after the first two or three years; but even then I regarded myself as something of a Pariah . . . . The Garrick Club was the first assemblage of men at which I felt myself to be popular."

100 Though Trollope's family would be considered gentry by lineage, because of its desperate financial situation, his experiences at school where he was an outcast and

To his surprise, in 1864 the even more elite Athenaeum Club, home of prominent people in the arts, sciences, politics and the law, welcomed him to membership. His admittance came under a special rule that allowed particularly prominent candidates to bypass the years' long wait list.[101] The Athenaeum may have been the most prestigious club in London.

As an active clubman Trollope met leading members of the bar, many of whom had risen to the highest ranks of the legal profession.[102] He had arrived and was to socialize and befriend many of them. Their reputation, influence and friendship changed his view toward barristers. In this third period the change is present that first displayed itself in the evolution of Chaffanbrass's character in *Orley Farm* but applied to others as well.

Descriptions of barristers moved from caricatures (remember Allewinde and O'Blather) to individuals, who were realistic, competent, professional, ethical, and positive protagonists. One of Trollope's many gifts was his ability to show his characters' many sides and complexities that real people possess. His attitude towards solicitors did not change much, save for his recognition that ethical standards were declining among the younger practitioners, an age-old generational complaint.[103]

A. Chaffanbrass Redux

Mr. Chaffanbrass's third appearance occurs in *Phineas Redux*.[104] The evolution of his character continues. The erstwhile "cock of the dunghill" in *The Three Clerks*[105] is now an older, more reflective and insightful barrister with a definite moral code and standards. He has risen in professional esteem and deigned to "take silk" and become a Q.C., a badge of eminence at the bar.[106] Though Trollope offers a backhand compliment: "No barrister living or dead ever rescued more culprits from the fangs of the law,"[107] Chaffanbrass is now portrayed as a sympathetic, skilled and principled advocate.

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publicly shamed by his family's inability to pay his tuition, his status was anything but. After leaving school he described himself as an idle, desolate hanger on with no idea of a career. He obtained a position at the Post Office through connections, but initially did not fit in there and was in debt. He described his first twenty-six years as "years of suffering, disgrace and inward remorse. Autobiography, *supra* note 69, at 51. The emotional scars of his early experiences lasted with him for much of his life. He states that he always wanted to be more than a clerk in the Post Office. *Id.* at 92. Becoming a clubman, and a popular one mitigated his pain and restored him to a status as a gentleman, where he belonged.

101 Hall, *supra* note 52, at 263.

102 A listing of the prominent lawyers Trollope met and befriended after his election to the Garrick and Athenaeum Clubs can be found in McMaster, *supra* note 5, at 10-11.

103 In Mr. Scarborough's Family, Trollope's last novel, the solicitor Mr. Grey, is an upholder of traditional professional standards and believes that his approach to law practice has changed for the worse, and he retires. *See infra*.

104 Phineas Redux, *supra* note 57.

105 *Supra* note 56, at 418.

106 Q.C. stands for Queen's Counsel (or King's Counsel when the sovereign is male). It is an honorific title conferred by the Crown. Members get to wear a silk gown, thus the taking of silk, and are recognized as senior members of the bar.

107 2 Phineas Redux, *supra* note 57, at 152.

He defends Phineas Finn, who is charged with the murder of a political opponent, Mr. Bonteen. Chaffanbrass mistakenly believes Finn is guilty, but he develops a personal interest in him and in obtaining an acquittal.[108] This differs from the previous portrait of winning a case only for the sake of victory. Professor Hall describes Chaffanbrass at this point as "older now tempered somewhat, considerably more human and placed as he is [in defending Finn], he has the reader's complete sympathy."[109] At the trial, he destroys the hapless, bumbling Lord Fawn in cross-examination to gain an acquittal.

Chaffanbrass demonstrates the quality of introspection and his view of justice when Wickerby, Finn's solicitor, informs Chaffanbrass on the eve of the trial that Finn is anxious to speak with him.

> What's the use of it Wickerby? I hate seeing a client—what comes of it? What's the use of it? Of course he wants to tell his own story.
>
> But I don't want to hear his own story. What good will his own story do me? He'll tell me either one of two things. He'll swear he didn't murder the man.
>
> That's what he'll say.
>
> Which can have no effect upon me now one way or the other; or else he'll say that he did—which would cripple me altogether. . . . .
>
> In such a case as this I do not in the least want to know the truth about the murder.
>
> What we should all wish to get at is the truth of the evidence about the murder. The man is to be hung not because he committed the murder,—as to which no positive knowledge is attainable; but because he has been proved to have committed the murder,--as to which proof, though it be enough for hanging, there must always be attached some shadow of doubt. . . . .
>
> I will neither believe or disbelieve anything that a client says to me—unless he confesses his guilt, in which case my services can be of little avail. [110]

The evolution of Chaffanbrass indicates that Trollope has come to understand and even respect barristers and has learned more about the workings of the law. This change is reflected in his other novels in this period.

B. The Barrister as Problem Solver

The parish of Bullhampton, near Salisbury, was largely the property of the Marquis of Trowbridge. The Vicar of Bullhampton and Marquis were in a dispute, and

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108 *Id.* at 183.
109 Hall, *supra* note 52, at 396.
110 2 Phineas Redux, *supra* note at 57, 177-80.

to annoy the clergyman his lordship gave dissenters—primitive Methodists—land for a chapel just outside the vicarage gates. The unattractive chapel was in the process of construction when Richard Quickenham Q.C, a London barrister and the brother-in-law to the vicar came for a visit to enjoy himself for four days, if he could find enjoyment without his law practice.[111]

Trollope portrays the barrister as a workaholic and striver, a lawyer type all too familiar today. Quickenham sets goals, and once they are attained, receives no satisfaction but sets another.[112] The barrister's diligence reminds one of Trollope himself:

> He's at it every night, sheet after sheet…He was a man who allowed himself time for nothing but his law practice, eating all his meals as though the saving of a few minutes in that operation were rather of vital importance, dressing and undressing at railroad speed, moving even with a quick impetuous step, as though the whole world around him went too slowly.[113]

Mr. Quickenham is untidy; he could be difficult to deal with; and people were afraid of him. Trollope also makes fun of him:

> a tall, thin, man, with eager grey eyes, and a long projecting nose, on which, his enemies in the courts of law were wont to say, that his wife could hang a kettle, in order that the unnecessary heat coming from his mouth might not be wasted. His hair was already grizzled, and, in the matter of whiskers, his heavy impatient hand had nearly altogether cut away the only intended ornament to his face.[114]

Though on holiday, he is unable to ignore his brother-in-law's feud. Mr. Quickenham enables the vicar to triumph in his dispute. He notes that the Marquis has been in such a hurry to punish the vicar that he allowed the Methodists to build on the property based on a mere verbal assurance the land was his. The barrister discovers that the plot of land on which the building was situated was glebe land and finds the terrier of the parish to prove that the land belongs to the vicar's church.[115] The Marquis orders the chapel to be removed to another site. In this novel the barrister uses his legal skills to achieve the proper result and for all his foibles becomes a hero.

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111 Vicar of Bullhampton 265 (Dover 1979) (1870).

112 "He was at the Chancery bar, and after the usual years of hard and almost profitless struggling, had worked himself into a position in which his income was very large and his labours never-ending. *Id.* at 266.

113 *Id.* at 267.

114 *Id.* at 266.

115 A glebe terrier is a detailed list describing the church's property in the parish—its rectory or vicarage, its fields and the church itself. Originally, every church was entitled to a house and glebe. Glebe terriers form a survey of the sources of the benefice income and give details of landholdings (including glebe houses), tithing rights, customs and modus (compositions for tithe), and surplice fees.

C. The Lawyer as Fountain of Wisdom but Is He a Gentleman?

"Mr. Thomas Dove, familiarly known among club-men, attorneys, clerks, and perhaps even among judges when very far from their seats of judgment, as "Turtle Dove" was a counsel learned in the law."[116] He was so learned in the law that there was no opinion within the limits of an attorney's capability of putting to him, that he could not answer with the aid of his books. He was hermetic in that he rarely went out and spent much of his life in Lincoln's Inn among his law books. To be absent from them was to be wretched. [117]

Mr. Camperdown, on behalf or perhaps in spite of the wishes of the Eustace family for whom he was their solicitor, sought an opinion from Mr. Dove on whether the diamond necklace is an heirloom, and therefore remains with the Eustace family or paraphernalia, which can be readily given away, in this case to Lizzie Eustace. Mr. Dove concludes that it was not an heirloom but suggests that a bill in equity might be suitable to prevent Lizzie from keeping the necklace.

Dove is described as learned but also possessed of great gifts. He, like Mr. Camperdown, is honest and unwilling to sell his services to dishonest clients. Dove is a person, who once he has reached a conclusion on something, cannot change his mind. "When he was positive, no one on earth was more positive. It behoved him to be right if positive, and even though wrong or right, he was equally stubborn."[118] In fact, he was seldom wrong, and this helped his legal practice.

Mr. Dove was arrogant, "full of scorn and wrath, impatient of a fool, and thinking most men to be fools; eaten up by conceit, fond of law…but fonder perhaps of dominion; soft as milk to those who acknowledged his power [such as Mr. Camperdown], but a tyrant to all who contested it; conscientious, thoughtful, sarcastic, bright-witted and laborious."[119] He wanted to dominate and never to be beaten.

Mr. Dove was good at what he did, but was he a gentleman? Shirley Robin Letwin compares Dove to Chaffanbrass, in that he exhibits a good craftsmanship, but it is not an expression of the man's personality, rather a substitute for it. He never took on any matter where there was a chance of failure. Dove considered himself a great lawyer not a gentleman.[120] Trollope shows that while intelligence and scholarship are ideals of professional achievement, such competencies do not of themselves overcome basic flaws of personality and character.

D. The Law, the Land, and Inheritance

Trollope was fascinated by the relationships between law and morality and law and justice. The rules relating to inheritance assured that the power of landed gentry remained secured by the backing of the law, so that large estates remained intact. Property had a spiritual dimension for him as a symbol or acknowledgement of the English way of life and the practices and traditions that constitute English culture and society.[121]

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116 The Eustace Diamonds, *supra* note 13, at 225.
117 *Id.* at 256.
118 *Id.* at 226.
119 *Id.*
120 Shirley Robin Letwin, The Gentleman in Trollope 119 (1982).
121 McMaster, *Law and Society*, *supra* note 49, at 312-13.

The land law as it related to inheritance, primogeniture,[122] entail,[123] and fixed rules of descent of estates and their possible injustice between those in possession of property and their heirs was a frequent subject in Trollope's novels. As the following discussion demonstrates, where these issues arose, lawyers played an important positive role in resolving such conflicts.

E. Cousin Henry--An Ideal Attorney: Nicholas Apjohn[124]

Indefer Jones is the aged squire of a large manor in Carmarthen Wales. His niece Isabel Brodrick has lived with him for years. Though he loves his niece, Squire Jones believes that the estate must be passed down to a male heir. His sole male blood relative is his nephew Henry, who charitably can best be described as a loser. He is disliked by most people who know him; his debts have been paid by the squire; and he was sent down from Oxford. The squire attempts to solve the inheritance problem by suggesting Isabel and Henry marry, but she finds Henry detestable and refuses.

The squire feels the same about Henry. In the presence of two of his tenants he changes his will one final time in favor of Isabel but dies before anyone is told about the new will. Henry finds the will in a book of sermons but lacks the courage to break the law by destroying the document. He considers revealing its location but rationalizes that if he does nothing, he will not commit a crime. Instead, Henry hides the will and inherits the estate, but raises suspicions by acting in a guilty manner and locking himself in the library where the will is hidden. The local newspaper accuses him of destroying the will and stealing the estate from Isabel, who is known in the community. Isabel is no innocent heroine, and rather unlikeable herself, but Henry is not a villain. Trollope turns the guilt-ridden Henry into a sympathetic character.

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122 Primogeniture is the right of inheritance of a first-born child among several children of the same parents to succeed to the estate of an ancestor to the exclusion of younger male and female siblings as well as other relatives. The effect of English male preference primogeniture was to keep estates undivided wherever possible and to prevent inheritance of real property by female relatives unless only daughters survived in which case the estate normally resulted in division. The principle has also applied to inheritance of titles and offices.

123 An entail or fee tail is an interest in land that regulates the inheritance of an estate of real property, usually to ensure that the estate will remain intact and will descend in the male line. The tenant in tail of an entailed estate possesses only a limited interest in the property subject to the entail which will devolve to the heir at law on his death. The law permitted the tenant in tail to bar the entail in his lifetime but this required the consent of the heir at law, usually the eldest son. This would usually be accomplished by means of a resettlement, often on the occasion of the eldest son's marriage, thus enabling the entail to continue despite the existence of the rules against perpetuity. The Administration of Estates Act 1925 abolished the entail as a legal estate. Today existing entails are equitable interests behind a trust and can be overreached by a purchaser of the legal title on payment of the purchase price to the trustees. The equitable interests under the entail then attach to the purchase price. Following the Trusts of Land and Appointment of Trustees Act 1996, no new entails can be created. The problems associated with entails feature in Trollope's *The Belton Estate, Ralph the Heir* and *Mr. Scarborough's Family* and indirectly in *Sir Harry Hotspur of Humblethwaite*.

124 Cousin Henry (Oxford Univ. Press 1987) (1879).

Nicholas Apjohn, the solicitor for the old squire and drafter of all his wills, and now counsel to the new squire, suspects Henry knows more than he lets on about the will. He asks Henry about the newspaper articles and pressures him into taking legal action against the editor. For Henry, this makes things worse. He is terrified by the prospect of being cross-examined by John Cheekey, reputedly one of Great Britain's cruelest barristers, nicknamed "Supercilious Jack". Mr Apjohn and Isabel's father, Mr Brodrick, visit Henry at his home and hound Henry to disclose the will's whereabouts. Despite Henry's efforts to stop them, they find the document. Because he did not destroy the will, Henry is permitted to return to his job in London with his reputation intact and £4000, the amount Isabel was bequeathed in the earlier will.

Mr. Apjohn is Trollope's ideal of what an attorney should be, for he places the pursuit of truth above the interests of his client. He acts a detective rather than counsel to his client. In Coral Lansbury's words

> Mr. Apjohn is the lawyer that Trollope would like us all to admire, charging down on quaking rogues, shaking the truth from them with a fusillade of questions, and bypassing the finer points of the law to grapple with the truth. He personifies justice and speaks for the secular ethic that sustains Trollope's world. In a well-ordered society there is a measure of predictability that allows people to regulate their lives with some sense of security. Chance, coincidence, and providential events must be eliminated wherever possible and every action should seem the result of social, rather than of personal intention. Thus Mr. Apjohn sees to it that Llanfeare is entailed in order that there may no longer be any doubts as to future disposition.[125]

However, Apjohn clearly violates the attorney-client relationship by forcing Henry to disclose the truth.[126] Contrast the breach of legal ethics by Mr. Apjohn with the scene in *Orley Farm*, where before Lady Mason's trial, Sir Peregrine visits old Mr. Round of Round & Crook and suggests that she will give up the property if they will dismiss the criminal charges, whereupon Mr. Round voluntarily assures him that the disclosure will be kept confidential, and it was.

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[125] Lansbury, *supra* note 8, at 155.

[126] For example, New York law provides"[A] lawyer, as one in a confidential relationship and as any fiduciary, is charged with a high degree of undivided loyalty to his client." *Matter of Kelly*, 23 N.Y.2d 368, 376, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968). Accordingly, the attorney-client relationship is a "unique relationship . . . founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty on the part of the attorney[,]" and, as such, "remains one of the most sensitive and confidential relationships in our society." *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553, 556, 428 N.E.2d 387, 444 N.Y.S.2d 55 (1981). Given the special nature of that relationship, "[i]t follows . . . that an attorney cannot represent a client effectively and to the full extent of his or her professional capability unless the client maintains the utmost trust and confidence in the attorney." *Id.* For that reason, attorney-client retainer agreements are not treated like conventional commercial agreements. John T. Walsh Enters., LLC v Grace Christian Church, 2019 N.Y. Misc. LEXIS 815 *; 2019 NY Slip Op 50247(U).

F. Lady Anna—The Lawyer as Mediator

Lady Anna involves story elements that frequently appear in Trollope's novels: inheritance, status, class, issues of law and justice and law and morality, trials, and barristers.[127] Yet, the outcome differs from readers' expectations, and a barrister plays an unfamiliar role compared to those in most of his other works.

With neither fortune nor settlement, Josephine Murray married Earl Lovel and became Countess Lovel. Six months later the Earl informs her that their marriage is illegitimate as he has previously wed an Italian woman. The Earl returns to Italy, and Josephine gives birth to their daughter Anna. It becomes the sole aim of Josephine's life to reclaim her title and prove Anna is the legitimate heir of the Earl. She brings a suit for bigamy, but the Earl is acquitted as the Italian marriage was not proven. Josephine hoped the acquittal would establish her status, right and recognition to be called Lady Lovel. This did not happen in society's mind, and she was considered a *soi-disant* or self-styled wife.[128] With neither money nor lodging, she receives support and is taken in by a tailor, Thomas Thwaite, a widower with a son, Daniel.

Twenty years pass and Lovel returns with a new Italian woman, a Signorina Spondi, but he is aged, reputedly mad, and soon dies. His will bequeaths substantial personal property to the Signorina but the entailed land goes with the title to a distant heir, Frederic Lovel.[129] If the Earl was mad, his will would be invalid, and his personal property would not go to the Signorina. The male heir would have all should the Earl's first marriage to Josephine be invalid. If that marriage could be made good, then Lady Anna as legitimate heir would have all the personal property, except such portion as could be claimed by her mother as widow.

Lady Anna's complicated plot contains many legal and moral issues. Is Anna the legitimate daughter of Earl Lovel? If so, she can be called "Lady" Anna. The Italian woman and the young lord (Frederic Lovel) were allied against the mother and daughter as regarded the first marriage. Lovel and the mother and daughter joined forces against the Signorina as regarded the will. The young lord had to act alone against the Italian woman to set aside the will and against the mother and daughter whom he and his friends considered swindlers. Additionally, he had to bear their assault on him.[130]

Into this legal morass came Sir William Patterson, the Solicitor General, who represented Frederic Lovel. Sergeant Bluestone was counsel to Lady Anna and Josephine. Patterson in his first appearance seems a typical Trollopean barrister. Initially, the idea of a convenient marriage between Anna and Frederic seemed abhorrent:

> Sir William Patterson stood aghast and was dismayed. Sir William intended to make mincemeat of the Countess. It was said of him that he intended to cross-examine the Countess off her legs, right out of her claim, and almost into her grave.[131]

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127 Lady Anna (Oxford Univ. Press 1984) (1871).
128 *Id.* at 8-9.
129 The title but not the personal property went with the entail.
130 Lady Anna, *supra* note 127, at 17-18.
131 Lady Anna, *supra* note 127, at 23.

However, he quickly changed his attitude and became in the words of R.D. McMaster "a sort of benign legal deity ruling over the novel, a role similar to that of Prospero in *The Tempest.* "[132] Sir William turns into a mediator, if not manipulator, attempting to bring the parties together and working out a compromise that is favorable to all, a role that has raised questions.

For Henry Drinker, a prominent lawyer from Philadelphia and an avid Trollopean, Sir William represents the ideal of what a lawyer should be.[133] Drinker finds Patterson great, because he can make people do what the barrister correctly seems to think is the best for all around. His strong personality gets others to compromise their positions to reach a fair solution. Yet lawyers in the novel come to somewhat different conclusions about Sir William. His opponent Sergeant Bluestone, who represents Anna and her mother says: "He always thinks he can make laws according to the light of his own reason."[134] The Attorney-General opined: "he might be a clever philosopher, but certainly no lawyer."[135]

Patterson's actions seem more appropriate to a mediation than a trial in a courtroom.[136] In his opening statement at the trial, Sir William indicates he intends "to state a case as much in the interest of my opponents as of my clients."[137] An attorney has an absolute duty to his/her client.[138] Sir William though gives away the claim of his client that the Countess's marital status is invalid. He hopes to join forces with Sgt. Bluestone to fight the Signorini"s claim.[139] This is contrary to the belief of the general practice of the bar. The Reverend Charles Lovel calls Sir William "This apostate barrister." Patterson is accused of thinking of himself, instead of bolstering the case of his client.[140]

Patterson sends Mr. Flick, a solicitor employed to substantiate the position of the new Earl Lovel, to Sicily to inquire whether the Italian countess was deceased before Josephine's marriage to the old earl. Mr. Flick concluded she had died. Therefore, the estate would go to Josephine and Anna. It would not be in the interest of Patterson's clients to admit this, so Sir William suggested a compromise

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132 McMaster, *supra* note 5, at 128.

133 "Sir William is preeminently a *great* lawyer as well as an eminently *successful* one, great and successful not merely in court—in this novel he has no real court battle—but in a way that every lawyer would like to be—able, by farsighted wisdom, suavity, and force of character, to make people do what he correctly senses to be best for all concerned. The others come to realize this only after they have all, against their will, but under the influence of his strong personality, done what they ultimately recognized was much the best thing for them." Drinker, *supra* note 3, at 56.

134 Lady Anna, *supra* note 127, at 57.

135 *Id.* at 58.

136 Mediation is a method of alternative dispute resolution available to parties in a lawsuit. It is a negotiation between the parties facilitated by a neutral third party, the mediator. Unlike the litigation process, where a neutral third party (usually a judge) imposes a decision over the matter, the parties and their mediator ordinarily control the mediation process. The mediator does not make the decision but encourages the parties to reach a mutually satisfactory solution. This is what Sir William did.

137 Lady Anna, *supra* note 127, at 292.

138 *See supra* note 126.

139 "There is no reason why my learned friend and I shall not sit together, having our briefs and our evidence in common." Lady Anna, *supra* note 127, at 296. Well, yes there are reasons, but Sir William gave up his client's claims.

140 *Id.* at 203.

whereby the new Earl would marry Anna and there would be no further effort to challenge Anna's legitimacy.

In the trial of Lovel v. Murray, Patterson offers an opinion that Josephine and Anna were entitled to legitimate status. That seems to be a breach of his legal responsibility, as Frederic might have won the trial and the estate. In the end, Anna's claim is recognized, but she refuses to marry Frederic and instead weds the tailor's son with whom she grew up and fell in love.[141] Though Anna is entitled now to the whole estate, she gives half to the Earl. Patterson has brokered the settlement. Unlike most of Trollope's barristers, Patterson seeks the truth and compromise though at the expense of legal niceties.

G. Mr. Scarborough's Family—John Grey, the Lawyer as an Honorable Gentleman

Mr. Scarborough's Family was posthumously published in 1883.[142] It is a remarkable achievement not only for its ingenious multiple plots, interesting characters and keen insight into human behavior, but also for Trollope's recognition of how England has changed from the idyllic rural setting of the Barsetshire novels in the 1840s.

The England of the late 1870s and early 1880s had suffered a sudden and dramatic collapse of the agricultural base because of the massive influx of cheap foreign goods from North America, Australia and New Zealand. A rural depression led to a collapse in agricultural rents and the price of land. This affected the often heavily indebted agrarian elite severely and led to discontent among agrarian workers.[143] The politics of deference gave way to the politics of demos, an increasing movement toward democracy and challenge to the traditional order.[144]

The role of law in a changing society was also altered as the balance of power moved from the landed gentry to the middle classes.[145] Mr. Scarborough, the novel's leading character, is the owner of Tretton Park, over whose grounds a town had been built and instead of being put to agricultural use, mining activity and pottery works had been established, which have greatly increased its value.

In most of Trollope's novels gentlemen stabilize society, and it is essential that a gentleman shares society's values and conforms to its ways.[146] . . . .Though a squire and gentleman, Mr. Scarborough acts contrary to those expected standards. He believes in justice but has a moral hatred of the laws of entail and primogeniture, which he considers the "gross injustice[s] of the world."[147] Throughout the novel Mr. Scarborough is on his deathbed. His goal is to manipulate facts to avoid the entail on his estate through an ingenuous, if fiendish plot and to give the land to the

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141 Trollope's readers were aghast that Lady Anna would marry beneath her station to a tailor instead of the earl. He defended his ending in the Autobiography, *supra* note 69, at 347.

142 Mr. Scarborough's Family, *supra* note 7. It was written between March and October 1881 and appeared in serial form from May 1882 to June 1883.

143 David Cannadine, The Decline and Fall of the British Aristocracy 26-28 (1990).

144 *Id.* at 38.

145 Harvey, *supra* note 7, at viii.

146 Robert Tracy, Trollope's Later Novels 92 (1976).

147 Mr. Scarborough's Family, *supra* note 7, at 73.

heir of his choice. He has two sons: Mountjoy, a compulsive gambler, who as the eldest will inherit the estate under the entail, and Augustus, a barrister.

To execute his plan, Mr. Scarborough married his late wife twice, one ceremony before the birth of Mountjoy and the second, after it. He therefore can select his heir by claiming that either the first or second wedding ceremony was valid. If Mr. Scarborough says the second ceremony was the legitimate one, Mountjoy is illegitimate, and the entail goes to Augustus, who becomes the legitimate heir.

As often occurs in Trollope's novels, there are multiple story lines.[148] They are interrelated and sometimes difficult to follow, but all are driven by Mr. Scarborough. In one subplot Squire Prosper is a bachelor, whose estate Buston Hall is entailed on his sister's son, Harry Annesley, who loves Florence Mountjoy, Mr. Scarborough's niece. Mr. Prosper becomes annoyed with Harry, because he believes he shows disrespect while listening to the squire's sermons. Prosper determines to embark on a late marriage and produce an heir, thereby foiling Harry's succession to the estate.[149] The insulted squire proposes to marry Miss Thoroughbung, a brewer's daughter. In a humorous scene, the bride to be, who has an income of her own, tries to negotiate for her rights and privileges including disposal of her income, protection of inheritances for offspring and household expenses for champagne, ponies and a carriage as a condition of the marriage.[150] Squire Prosper is scared off and restores Harry as the heir.

Initially, Mr. Scarborough intended Mountjoy as the elder son should inherit the estate. Because of Mountjoy's incurable gambling habit and the debts generated therefrom, the estate would go to satisfy Mountjoy's creditors. To avoid this result, Mr. Scarborough produces the second marriage certificate showing that his second son, Augustus, who is debt-free, is the legitimate heir. Augustus is no angel either. He plots to steal Harry's girl, Florence, and treats his father with increasing disrespect. However, Augustus, using his own funds, settles with Mountjoy's creditors, leaving them with no claim on the estate. Then, Scarborough reverses his position and once again leaves his estate to Mountjoy.

Another subplot involves Mr. Scarborough and John Grey, his foil, counsel, and opposite in character. Mr. Grey seeks the truth in any matter, is honest and does his duty: "he certainly was an honest man and had taken up the matter [Scarborough's inheritance] simply with a view of learning the truth."[151] To Mr. Grey, Scarborough's manipulations are the acts of an immoral individual. Grey believes in fixed rules, morality, and the law.

Mr. Grey is scandalized by Scarborough's attitude toward the law. However, the attorney "did not regard him as an honest man regards a rascal and was angry with himself in consequence. He knew that there remained with him some spark of love

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148 This is a device that occurs in Elizabethan and Jacobean drama, of which Trollope was very knowledgeable and had a large collection of plays from that era. Tracy, *supra* note 148, at 39-41, 44-46**.**

149 This scenario actually happened to Trollope's father with calamitous financial consequences to the family. An expected estate from an unmarried uncle never came to him because late in life the uncle married and had a family. *See* Autobiography, *supra* note 69, at 10.

150 Mr. Scarborough's Family, *supra* note 7, at 249-50.

151 *Id.* at 145.

for Mr. Scarborough which to himself was inexplicable."[152] Mr. Scarborough has mixed emotions too about his attorney. "Thinking Mr. Grey to be in some respects idiotic, nevertheless he respected him, and almost loved him. He thoroughly believed Mr. Grey to be an ass for telling so much truth unnecessarily."[153]

Scarborough and Grey resemble an old married couple who disagree on everything but are bound together through a kind of love as well as habit. The two differ over the nature and dignity of the law and the relationship of law to justice. Mr. Scarborough's cynicism contrasts with his counsel's belief in the law. Scarborough considers himself a moral man merely in pursuit of justice. "Justice" to him means getting what he wants. The law be damned. "If a man has property, he should be able to leave it as he pleases; or else he doesn't have it."[154] Scarborough, feels the law in reference to his property is unjust, and scorns and laughs at it.[155] He is unfazed by the opinion of Mr. Grey or of the public and obtains whatever he wishes.

Mr. Grey has the greatest respect for the law, which to him is a holy writ.[156] He also believes in the rules of society and the existing legal system.[157] Whereas Grey believes in the stability of facts, Scarborough—to use modern jargon—uses alternative facts to serve his purposes without regard to the facts or the law. Mr. Grey loses all his disputes and differences with his client. Scarborough outwits him time and again.

Trollope uses Grey as a metaphor for the changes affecting English society through the lens of the legal profession. He now recognized that lawyers could be gentlemen, and Mr. Grey was such an example. He treated his clients as children or members of the family. The fees earned were secondary. He sees a case not just for his clients but also for their ancestors and descendants and perhaps others. Grey is not just observing the letter of the law but upholding it, while searching for a just outcome. [158]

Mr. Grey also symbolizes the passing of an older attitude towards a lawyer's work and professionalism. While he thinks Scarborough is a cad for his manipulations, his partner Mr. Barry admires Mr. Scarborough as the best lawyer he ever knew.[159] Grey feels he is losing his place in the legal profession as the mores of legal practice have changed. He noticed that Barry was 'tending towards sharp practice' and beginning to love his clients not with a proper attorney's affection, as his children, but as sheep to be shorn.[160]

By the end of the novel, the decent Mr. Grey is full of self-doubt and feels his style of law practice is superannuated as compared with that of his law partner, who

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152 Mr. Scarborough's Family, *supra* note 7, at 373.
153 *Id.* at 195.
154 *Id.* at 389.
155 Of Scarborough, Mr. Grey says: "He hasn't got a God. He believes only in his own reason--and is content to do so, lying there on the very brink of eternity. He is quite content with himself…He has no reference for property and the laws which govern it… It is his utter disregard for law--for what the law has decided, which makes me declare him to have been the wickedest man the world ever produced." Mr. Scarborough's Family, *supra* note 7, at 157.
156 Mr. Scarborough's Family, *supra* note 7, at 526.
157 McMaster, *supra* note 5, at 136.
158 Letwin, *supra* note 120, at 120.
159 Mr. Scarborough's Family, *supra* note 7, at 599.
160 *Id.* at 559.

reflects values closer to Mr. Scarborough. Grey concludes this is a symbol of the disintegrating standards of practice, and his time has passed, "I have been at my business long enough. Another system has grown up which does not suit me … . It may be that I am a fool, and that my idea of honesty is a mistake".[161] He decides to retire.

IV. Conclusion

This random stroll through Trollope's gallery of lawyers has attempted to show that as he matured as a writer his understanding and appreciation of the legal profession evolved. From the beginning of his London period, Trollope's descriptions of lawyers became more realistic. Instead of caricatures, lawyers were in many cases men of ability and honor. They generally reflect accurate portraits of real people. From the variety of solicitors and barristers introduced one finds in his later period, lawyers with a professionalism that one might encounter today.

Trollope's novels are not only about the legal problems of the actors in the plots but engage the Victorian legal culture in a broader sense of history, traditions, continuity and change. There is a backdrop of philosophical and jurisprudential issues that the legal system and members of the bench and bar were dealing with during the nineteenth century. Trollope's attention to the faults of the adversary system had its source in principles of natural law, which posited that God-given universal axioms of right and wrong gave individual guidance or a map for reaching the right result in a legal controversy. Natural law principles were challenged during the Victorian era by positivist notions that law is what the statute books and court decisions say.

These issues are in the background of what seem at first glance to be merely interesting plot developments. The rigidity of primogeniture, entail, and the lack of women's rights also were concerns during the nineteenth century. Essentially a conservative, Trollope favored the land laws for their stabilizing role in English society and culture but recognized their unfairness. His "good" lawyers strive to uphold this system.

In his later portrayals of lawyers, Trollope created a realistic characterization of the legal profession of the time that offers universal insights into human nature, a perspective that is relevant today. Trollope's great accomplishment is the creation of believable human beings who challenge his readers to evaluate them as one judges one's friends.[162] Among his lawyers, we feel we are with some familiar acquaintances, who could be in practice today and attending a contemporary equivalent of the International Congress at Birmingham.

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[161] *Id.* at 600.

[162] Tracy, *supra* note 147, at 330.

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From the Company Town to the Innovation Zone: Frontiers of Public Policy, the State Action Doctrine, and the First Amendment

Bruce Peabody* & Kyle Morgan**

ABSTRACT

This article draws on the state action doctrine and the case Marsh v. Alabama *to evaluate a recent proposal to create an unprecedented public-private partnership in the state of Nevada. In* Marsh*, the Supreme Court of the United States held that a private citizen was protected under the U.S. Constitution's First and Fourteenth Amendments in distributing religious literature on the sidewalk of a "company-owned" town. We make the case that both the state policy under consideration and a number of political and economic trend lines indicate that the issue central to* Marsh *remains pressing at the start of our new millennium: what are the circumstances under which concentrated private power amounts to something akin to government authority, thereby implicating the protections of the national Constitution? Our goal in this piece is not to offer an exhaustive or thorough review of the particulars of the "Innovation Zone" bill under consideration, but to consider, in advance, constitutional problems that might arise from granting corporations broad powers traditionally wielded by governments.*

KEYWORDS

Constitutional Law, First Amendment, Free Exercise of Religion, Free Speech, State Action Doctrine, Supreme Court

CONTENTS

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I. Introduction

In his January 2021 State of the State Address, Nevada Governor Steve Sisolak outlined a legislative proposal to foster "Innovation Zones" throughout the state.[1] As the Governor explained "[n]ew companies creating groundbreaking technologies" would commit to substantial economic and technological development within their identified Zone, in exchange for considerable autonomy and policymaking authority. Indeed, once created, each Zone and its "smart city" population centers would be geographically and legally demarcated from the rest of the state.[2] According to Sisolak, one company, Blockchains, LLC, had already promised to make "an unprecedented investment in our state to create a smart city in northern Nevada . . . making [the state] the epicenter of this emerging industry and creating the high paying jobs and revenue that go with it."[3]

The Governor's plans are contingent on the passage of authorizing Innovation Zone legislation.[4] Under the terms of a draft bill, companies would be eligible for occupying Innovation Zones if they meet certain criteria. Among other requirements, the businesses would need to acquire territory comprising "at least 50,000 contiguous acres of undeveloped land owned or controlled by the applicant" and make "a total capital investment of at least $250 million within the territorial boundaries proposed for the Zone" and additional investments "of at least $1 billion in the Zone during the 10 years following" its official approval.[5]

In exchange, the investing company would have considerable sway in selecting the members of the Innovation Zone's Board of Supervisors: two of the three members of the Board would come from a list provided by the company. The Board itself would "have the powers and duties of a board of county commissioners"[6] within the Zone. This authority would include being able to levy taxes (with statutory restrictions including bars against taxation on "real property within the zone), hire and fire Zone officers (including the equivalent of county clerks, recorders, sheriffs, treasurers, assessors, auditors, district attorneys, and public administrators), develop and oversee school districts, license businesses, and establish a "justice court" system.[7]

Three months after the Governor's State of the State Address, the Nevada Senate Committee on Legislative Operations decided to review the proposal more carefully, directing it to a bipartisan "special joint committee" for review and commentary.[8] As State Senator and Majority Leader Nicole Cannizzaro explained,

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1 *Full Transcript, Annotations of Sisolak's 2021 State of the State Address*, The Nevada Independent (Jan. 20, 2021, 2:00 AM), https://thenevadaindependent.com/article/full-transcript-annotations-of-sisolaks-2021-state-of-the-state-address.

2 *Id.*

3 *Id.*

4 *See Nevada bill would allow tech companies to create governments*, AP State News (Feb. 4, 2021).

5 *Bill Draft Authorizing the Creation of Innovation Zones*, Jan. 31, 2021, https://www.scribd.com/document/493267147/Innovation-Zone-Bill-Draft-update-1-31-2021.

6 *Id.*

7 *Id.*

8 *Governor Sisolak, legislative leadership announce plans to create special joint committee to study Innovation Zones concept*, Nevada Governor Steve Sisolak (Apr. 26, 2021), https://gov.nv.gov/News/Press/2021/Governor_Sisolak_legislative_

this step would allow for "additional time to vet this proposal and include critical stakeholders, including tribal leaders, water authorities, environmental groups, labor organizations, economic development authorities, local jurisdictions, and interested tenants."[9] The Governor himself explained that he wanted Nevada citizens to be "enthusiastic" about the Innovation Zone initiative, "not skeptical about a fast-tracked bill."[10]

Nevada's Innovation Zone law may never see the proverbial light of day. Nevertheless, the state's proposal to forge a creative public-private partnership raises important legal and constitutional issues that are worth considering—in the context not simply of Nevada's specific initiative and the cognate bills it may directly inspire, but also of more distant, future legislation that pursues some analogous arrangement in which private industry acquires greater formal authority to, in effect, govern those under its jurisdiction.[11]

In this article, we make the case for evaluating the proposed Nevada legislation in light of the venerable "state action doctrine" (which holds that the Constitution, for the most part, only controls the actions of governments and their agents, not private parties), and, more specifically, the precedent of *Marsh v. Alabama*.[12] In *Marsh*, the Supreme Court of the United States held that a private citizen was protected under the U.S. Constitution's First and Fourteenth Amendments in distributing religious literature on the sidewalk of a "company-owned" town. At the time, the Gulf Shipbuilding Corporation owned many of the buildings and much of the infrastructure of Chickasaw, Alabama, and directed a range of traditional government services and operations.[13]

Over the years, the *Marsh* decision has come to be seen as something of a legal outlier, in part because it has been difficult to think of a twenty-first century parallel to the so-called "company town."[14] But in the analysis that follows, we make the case that both the Nevada bill under consideration and a number of political and economic trend lines indicate that the issue central to *Marsh* remains pressing for this new millenium: what are the circumstances under which concentrated private power amounts to something akin to government authority, thereby implicating

leadership_announce_plans/. *See generally* Ryan Johnston, *Nevada presses pause on 'innovation zones*,' Statescoop (Apr. 26, 2021), https://statescoop.com/nevada-presses-pause-innovation-zones/; *Legislation introduced to create a joint special committee to review the Governor's Innovation Zones proposal*, Nevada Governor Steve Sisolak (May 6, 2021), https://gov.nv.gov/News/Press/2021/Legislation_introduced_to_create_joint_special_committee_to_review_Innovation_Zones_Proposal/.

9 Johnston, *supra* note 8.

10 *Id.*

11 Innovation Zones, or Innovation Districts, are not a new concept. *See generally* Bruce Katz & Julie Wagner, *The Rise of Innovation Districts, A New Geography of Innovation in America*, Metropolitan Policy Program at Brookings (May 2014), https://www.brookings.edu/essay/rise-of-innovation-districts/.

12 326 U.S. 501 (1946).

13 Shaun Richman, *Company Towns Are Still with Us*, The American Prospect (Mar. 21, 2018), https://prospect.org/economy/company-towns-still-us/.

14 *Marsh* itself does not use the term "company town," but instead references a "company-owned town" without providing a specific definition. *Cf.,* e.g., Lloyd Corp. v. Tanner, 407 US 551, 569 (describing a "company town [as] performing the full spectrum of municipal powers, and st[anding] in the shoes of the State.").

the protections of the U.S. Constitution? Put more bluntly, this article engages the following question: constitutionally speaking, what do we do with twenty-first century company towns?

Drawing on the (admittedly confusing) state action jurisprudence, including the guidelines set out in the *Marsh* decision and subsequent case law, we lay out basic standards for evaluating when private action so resembles public authority that it falls under constitutional restrictions. We then apply these standards to the proposed Nevada legislation by superimposing the central facts and legal controversy in *Marsh* to an imagined Innovation Zone. Our ensuing review delineates four different conclusions judges or other legal analysts might come to in working through the state action problems that would ensue if a visitor to a Zone sought to express her religious views within its confines. We conclude by reflecting upon the broader significance of our argument.

Our goal in this piece is not to offer an exhaustive or thorough review of the particulars of the Innovation Zone bill. Governor Sisolak's original policy proposal may well undergo (substantial) revision, be tabled, or otherwise end up interred in the legislative graveyard. But we invoke the bill's specific language and underlying ideas to put broader constitutional issues (especially concerning the application of the First Amendment to private citizens within privately held enterprise and innovation zones) into the foreground. Whatever the fate of the Nevada Zone program, we think it likely that the challenges it presents will recur in the future in different venues or forms.

II. State Action and the Twenty-First Century

Beyond the specific prompt of the Nevada Innovation Zone proposal, four trends lead us to think that the problem of the "company town," and the more general puzzle of demarcating the contours of state action, are likely to persist for the foreseeable future, at least in the United States.

First, we simply note that a number of states are likely to face fiscal imbalances (gaps between their revenues and expenditures) and consequent pressures to find new sources of revenue in the years ahead. An audit of the fifty United States by the Pew Charitable Trusts from fiscal years 2004-2018 revealed that New Jersey, Illinois, Massachusetts, Hawaii, Kentucky, New York, and Connecticut suffered budget deficits in at least 10 of the 15 years covered in this span. In some cases these conditions likely arise from "serious structural deficit[s] in which revenue will continue to fall short of spending [in the future] absent policy changes."[15]

Whether facing entrenched fiscal challenges or not, it seems plausible that some states, not to mention the federal government, will consider innovations in public-private partnerships to tackle budget challenges. Indeed at the federal level, the Trump administration's 2018 "Delivering Government Solutions in the 21st Century" report called for increased "collaboration across the public (Federal, State, and local) and private sectors" to address areas in which "Government is failing to

[15] Barb Rosewicz et al., *9 States Struggle With Long-Term Fiscal Imbalances*, Pew (Mar. 18, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/03/18/9-states-struggle-with-long-term-fiscal-imbalances.

fulfill both citizen expectations and stewardship responsibilities."[16] More explicitly, the plan called for restructuring "the U.S. Postal System to return it to a sustainable business model or prepare it for future conversion from a Government agency into a privately-held corporation."[17] This proposal is just one of many under consideration that raise questions about state action that are central to our concerns.[18]

We bolster these general observations about how fiscal challenges will spur the search for new revenue streams with a second claim. The economic and demographic repercussions of Covid-19 are likely to induce policy changes that will surface many of the questions we grapple with in this article. Indeed, some of these innovations are already well underway. As scholars like Richard Florida and Joel Kotkin report, the U.S. response to the pandemic has given rise to fresh thinking about how we regard the relationship between where people live and where (and how) they work.[19] The Covid-induced shuttering of central business districts in "superstar cities like New York and London," combined with the flexibility offered by online platforms like Zoom have accelerated a measurable population shift from cities to suburbs and rural areas.[20] Florida and Kotkin argue that this movement "may augur a long-overdue and much-needed geographic recalibration of America's innovation economy"—away from a handful of sprawling metropolitan centers to a wider variety of settings.[21]

Some of this growth has been and will continue to be facilitated by state and local policies impacting such areas as taxation, affordable housing, regulation, land use, available energy, and physical and intellectual infrastructure. Indeed, Florida claims that "we are in the early stages of a new wave of urban policy innovation, which is occurring from the bottom up in [a variety of] cities, our true laboratories of democracy."[22] It seems reasonable to anticipate that some subset of these innovation laboratories will follow the example of Nevada and attempt to forge new relationships between public and private actors, and new institutions that blur traditional government powers with private authority to wield them.

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16 *Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations*, https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf. *See also* William J. Henderson, *End of the Route: I Ran the Postal Service—It Should be Privatized*, Wash. Post (Sep. 2, 2001); Chris Edwards, *Privatizing the U.S. Postal Service* (Apr. 1, 2016), Cato Inst., https://www.cato.org/tax-budget-bulletin/privatizing-us-postal-service#_edn1.

17 *Id.*

18 *See generally* Henry Graber, *The Big Problem With Little Island*, Slate (Jun. 7, 2012), https://slate.com/business/2021/06/little-island-new-york-city-barry-diller-thomas-heatherwick.amp (arguing that New York City's Little Island pier is the "apotheosis of a movement toward private control of public parks").

19 Richard Florida & Joel Kotkin, *America's Post-Pandemic Geography: Covid-19 is transforming all types of communities, from big cities to suburbs to rural areas*, City Journal (Spring 2021), https://www.city-journal.org/americas-post-pandemic-geography.

20 *Id.*

21 *Id. Cf.,* Steve Case, *Helping the 'Rise of the Rest' Cities*, Wall St. J. (Nov. 26, 2013), https://www.wsj.com/articles/BL-232B-2047.

22 Richard Florida, *This Is Not the End of Cities: Both the coronavirus pandemic and the Black Lives Matter movement create opportunities to reshape cities in more equitable ways*, Bloomberg CityLab (Jun. 19, 2020), https://www.bloomberg.com/news/features/2020-06-19/cities-will-survive-pandemics-and-protests.

The allure of privatization and the impact of the Covid-19 pandemic also find expression in a third factor relevant to our argument: movement in public opinion. Long-term public opinion data has shown a consistent decline in support for government.[23] At the same time, more recent soundings of the U.S. public point to greater trust in private corporations, especially in responding to the pandemic.[24] This longitudinal loss of trust in government and increasing (perhaps short-term) confidence in the private sector is arguably reflected in polling from February of 2020 showing that a third of voters said that "American businesses have a responsibility to take positions on political or social issues facing the country."[25]

The fourth development that leads us to believe that state action questions will have continued prominence in the future is the ubiquitous use of (privately controlled) social media as the central medium for democratic (and corporate) expression and speech. Former President Donald Trump's aggressive and innovative use of Twitter in campaigning and governing is an especially dramatic, but by no means the first or last display of this phenomenon.[26] Consider in this regard President Trump's July 2017 Tweets, which appeared to ban transgender individuals from serving in the military, triggering a series of debates within and outside of government concerning whether this communication possessed the full force of law.[27]

Since the most popular platforms for internet communication are hosted and superintended by private companies, this general phenomenon raises a series of questions about the nature of these environments, when they might be tantamount to constitutionally protected public forums, and what are reasonable limits on speech (and speech regulation) in this context. These were among the issues at hand in the litigation sparked by the Knight First Amendment Institute after it brought suit against former President Trump for blocking seven plaintiffs from commenting on his Twitter account.[28]

All of these developments highlight the importance (and difficulty) of demarcating the lines distinguishing public action from private action. Since, in the modern era, political questions tend to become judicial questions,[29] we think it is

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23 *See generally* Marc Hetherington & Thomas J. Rudolph, Why Washington Won't Work: Polarization, Political Trust, and the Governing Crisis (2015); Feature: *Public Trust in Government: 1958-2021,* Pew Research Center (May 17, 2021), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021/.

24 Sara Fischer, *Axios Harris Poll 100: Corporate trust soars during the pandemic*, Axios (Jul. 30, 2020), https://www.axios.com/coronavirus-clorox-amazon-disney-groceries-public-approval-bb24d50c-f77a-4e2e-ac2e-3760123b8755.html.

25 Carl M. Cannon, *'Woke' Capitalism and the 2020 Election*, RealClear Opinion Research (Feb. 27, 2020), https://www.realclearpolitics.com/real_clear_opinion_research/woke_capitalism.html.

26 *See, e.g.,* Douglas B. McKechnie, *Government Tweets, Government Speech: The First Amendment Implications of Government Trolling*, 44 Seattle U. L. Rev. 69 (2020).

27 *See Recent Social Media Posts*, 131 Harv. L. Rev. 934 (2018); Jeannie Suk Gersen, *Trump's Tweeted Transgender Ban Is Not a Law*, The New Yorker (Jul 27, 2017), https://www.newyorker.com/news/news-desk/trumps-tweeted-transgender-ban-is-not-a-law.

28 Biden v. Knight First Amendment Institute at Columbia University, 593 U.S. ____ (2021), 141 S.Ct. 1229 (2021).

29 Alexis De Tocqueville, 1 Democracy in America 280 (Phillips Bradley ed., 1945). *Cf.* Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 Const. Comm. 485 (2004) (arguing that important

advisable to use the proposed Nevada policy as a prompt to consider, in advance, how courts might tackle some of these issues.

III. Four Judicial Standards for Evaluating State Action

As indicated, perhaps the most important touchstone for thinking about the constitutional implications of the proposed Nevada Innovation Zones (and other "smart cities" that conjoin public powers with private resources) is the state action doctrine. This legal concept is simultaneously straightforward in its basic exposition and elusive in practice and jurisprudential development—in part because public and private actions are legally intertwined. As Sidney Buchanan notes, on some level "every action engaged in by a private person is either compelled, prohibited, or permitted, i.e., authorized, by the legal system."[30]

As a result the state action doctrine has been labeled at various turns as a "mystery,"[31] a "conceptual disaster area,"[32] and "analytically incoherent."[33] The developed case law in this area may actually deepen the theoretical confusion. As Wilson Huhn charitably explains, the "factual circumstances of the state action cases are varied and diverse, and accordingly, the standards that have evolved to resolve these cases are equally varied and diverse."[34]

Nevertheless, one can identify several basic principles that rise above this thicket, providing relatively fixed points for assessing when private activity amounts to action by the state, thereby triggering constitutional rights, limits, and responsibilities.

Speaking broadly, the state action doctrine holds that the U.S. Constitution only applies to actions that can "be fairly attributable" to government actors and institutions.[35] This idea can be traced to a variety of sources including specific provisions of the constitutional text,[36] original understandings of the Constitution's scope and purposes (as articulated by the founding generation and the framers of the

political questions during the period of the "Jacksonian Presidents" were not resolved into judicial questions).

30 *See* G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (Part II of II),* 34 Hous. L. Rev. 665, 724 (1997).

31 Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice,* 34 Hofstra L. Rev. 1379, 1380 (2006).

32 Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95 (1967).

33 Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 Geo. L. J. 779, 789 (2004).

34 Huhn, *supra* note 31, at 1388.

35 Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). The Constitution's obvious explicit exception to the state action requirement is found in U.S. Const. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction").

36 *See* 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" (emphasis added)).

Constitution's amendments),[37] the Constitution's history and development,[38] and case law, especially decisions by the Supreme Court of the United States.[39] With respect to this last category, we can identify four broad standards or benchmarks the Court has used to identify private activities that amount to state action.[40]

A. The State Association or Cooperation Standard

The first is what we might identify as a *state association or cooperation* standard (what Buchanan calls the "State Nexus Issue").[41] As the Court articulated in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, "state action may be found…only if…there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[42] In essence, private action can be converted into public action with significant state involvement, as might occur through licensing, delegation of political responsibilities, or vesting powers through statutes or other legal authorities.[43]

In *Lugar v. Edmondson Oil Co.*, a truckstop operator alleged that a private party (the Edmonson Oil Company) acting jointly with state agents, including a state court clerk and a County Sherriff, had denied him property without due process of law. In evaluating this claim, the Court set out a two-part test that was supposed to give greater clarity for how one determines when a private actor's "deprivation of a federal right [can] be fairly attributable to the State."[44] Justice White's opinion explained that

> First, the deprivation [of a constitutional right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is

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37 *See* Huhn, *supra* note 31, at 1394.

38 *See* The Heritage Guide to the Constitution 386-8 (Matthew Spalding & David Forte eds., 2005); Joseph E. Slater, *Will Labor Law Prompt Conservative Justices to Adopt a Radical Theory of State Action?*, 96 Neb. L. Rev. 62, 69 (2017) ("[t]he basic requirement that the Constitution limit the acts of the state but not acts of private parties…was established in the nineteenth century).

39 *See, e.g.,* Barron v. Baltimore, 32 U.S. 243 (1833) (finding that the Bill of Rights applies only to the federal government not state governments).

40 *Cf.* Huhn, *supra* note 31, at 1382 (arguing that "that the state action doctrine is actually not one doctrine, but four related strands of doctrine); Buchanan, *supra* note 30, at 345-352 (identifying six categories of state action cases).

41 Buchanan, *supra* note 30, at 346–47. *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) ("[t]he State has so far insinuated itself into a position of interdependence with [a privately held restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment"); Moose Lodge v. Irvis, 407 U.S. 163, 177 (1972) (the Pennsylvania Liquor Control Board's regulations do not "sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action'…").

42 531 U.S. 288, 295 (2001) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

43 Huhn *supra* note 31, at 1388.

44 *Lugar*, 457 U.S. at 923.

> responsible…Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.[45]

The Court, applying this test, found that Lugar was eligible to sue for damages related to incursions on his constitutional rights since the Edmonson Oil Co. had "obtained significant aid from state officials."[46]

Almost a decade later, *Edmonson v. Leesville Concrete Company*[47] elaborated upon these guidelines, especially by providing a further explanation of the second prong of the *Lugar* test (requiring that a private party "may fairly be said to be a state actor"). *Leesville Concrete* found that a private company became a state actor (responsible for upholding the Equal Protection Clause of the Fourteenth Amendment) when it took part in the jury selection process for a civil trial. Justice Kennedy's opinion explained that "[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose."[48] The opinion went on to say that the Court's precedents "establish that, in determining whether a particular action or course of conduct is governmental in character" a judge must consider "the extent to which the [private] actor [causing constitutional injury] relies on governmental assistance and benefits… and whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[49]

How clear are these legal principles? While it does not seem especially difficult to conclude that private parties participating in the jury selection process are subject to the same constitutional constraints that bind government lawyers and judges, other cases show the ambiguities inherent in applying these and other judicial precedents.[50] In *Blum v. Yaretsky*, the Court determined that a private nursing home was not covered within the scope of state action despite being "extensively regulated" by the federal government.[51] Subsequently, in *San Francisco Arts & Athletics v. United States Olympic Committee,* the Court found that the U.S. Olympic Committee (USOC), a federally created private corporation, was not bound by the state action doctrine even though federal law chartered the organization, mandated annual reports to Congress "on its operations and expenditures of grant moneys," and governed such matters as how the USOC could amend its constitution ("only after providing an opportunity for notice and hearing") and how its membership should be comprised.[52] As the

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45 *Id.* at 937. *See also* Buchanan, *supra* note 30, at 416–18.

46 *Lugar*, 457 U.S. at 937.

47 500 U.S. 614 (1991).

48 *Leesville*, 500 U.S. at 624.

49 Kennedy's opinion went on to consider a third criterion (discussed in greater detail below): "whether the actor is performing a traditional governmental function…" *Id.* at 621.

50 *See generally* Terri Peretti, *Constructing the State Action Doctrine, 1940-1990,* 35 Law & Soc. Inq. 273 (2010).

51 457 U.S. 991, 1004, 1011 (1982). *Cf. Jackson*, 419 U.S. at 350 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment") (citations omitted).

52 483 U.S. 522 (1987).

Blum and *Olympic Committee* opinions suggest, the Court does not readily extend constitutional restrictions on private actors and organizations—even when they are extensively regulated and supported by the state.

Conversely, even for obviously governmental actors, the reach of state action can be stopped by relatively modest private barriers or legal circuit breakers. Thus, *NCAA v. Tarkanian* found that a public university's suspension and demotion of a public employee (basketball coach Jerry Tarkanian) did not amount to state action.[53] In the Court's judgment, in sanctioning Tarkanian, the University of Nevada, Las Vegas (UNLV) was merely responding to the investigation, fact finding, and penalties imposed on the school by the National Collegiate Athletic Association (NCAA), a private "unincorporated association of approximately 960 members, including virtually all public and private universities and 4-year colleges conducting major athletic programs in the United States."[54] The Court found that the "NCAA cannot be deemed to be a state actor on the theory that it misused power it possessed by virtue of state law" because it sat as a national body composed of public and private participants.[55] Consequently, Tarkanian did not prevail in arguing that his Fourteenth Amendment due process rights had been violated by the state of Nevada's role in creating and imposing his NCAA suspension.[56]

B. The Affirmative Acts Standard

Besides looking to the direct or implicit nexus between a private actor and the state, a second, and admittedly overlapping consideration the Court turns to in state action cases is what we might label an *affirmative acts* standard. As Huhn explains, in assessing whether the government's relationship with private individuals or organizations creates state action, courts look to "affirmative acts" by government rather than "failures to act."[57] The Court's opinion in *Blum* noted that governmental tacit "approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives."[58] Some more proactive decision is needed to turn something into state *action*.

The affirmative acts standard was at the heart of the famous civil rights case *Shelley v. Kraemer*.[59] In *Shelley*, the owners of property subject to a racially restrictive covenant sought to enforce these provisions (and prevent the Shelleys, a Black family, from acquiring the property) through use of the courts. But in a unanimous opinion, the Supreme Court denied this request as comprising state action and a violation of the Fourteenth Amendment's Equal Protection Clause. Racially restrictive housing covenants do not give rise to state action and challenges

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53 488 U.S. 179 (1988).

54 *Id.* at 183.

55 *Id.* at 192.

56 *Id.* at 193 (finding that the NCAA Collegiate Athletic Association is not a state actor). Cases like *Tarkanian* help us to see that state action claims face many obstacles under today's doctrine. *See* Slater, *supra* note 38, at 75.

57 Huhn, *supra* note 31, at 1385.

58 *Blum* at 1004–05. *Cf.* Buchanan, *supra* note 30, at 762 (There is a "wide range of private activities that the legal system permits to occur but with respect to which government participation does not extend significantly beyond the 'mere' act of permission.").

59 334 U.S. 1 (1948).

under the Fourteenth Amendment "[s]o long as the purposes of those agreements are effectuated by voluntary adherence to their terms" by private parties.[60] But active "judicial enforcement of private agreements" provided a sufficient basis for a state action claim, and covenant restrictions based on race denied the Shelley family their constitutional guarantee of "equal protection of the laws."[61]

The courts have sounded similar and perhaps even clearer notes about the necessity of the "action" component of state action in other cases. Thus, in *Flagg Bros., Inc. v. Brooks* the Court affirmed that it "has never held that a State's mere acquiescence in a private action converts that action into that of the State."[62]

C. The Coercion Standard

A third analytic guidepost, appearing (somewhat intermittently) in state action jurisprudence involves considering whether the state has leveraged private behavior through coercion or encouragement. This *coercion standard* builds on the idea that when the state merely authorizes a private party to engage in behavior or pursue a course of action it does not create state action. Instead, the courts require either a more involved and ongoing, cooperative relationship (or state nexus) or private behavior that is induced by government incentives or pressure. As the Court stated in *Jackson v. Metro. Edison Co.* (echoing *Shelley*), the mere "exercise of…choice allowed by state law" does not create state action "where the initiative comes from… [private parties] and not from the state."[63] On the other hand, as Huhn notes, "where the government coerces, encourages, or influences one individual to invade the rights of another, it *is* state action."[64] Thus, in *Reitman v. Mulkey,* the Court supported the judgment of the California Supreme Court in finding that a state referendum on the sale, leasing, and rental of property violated the Equal Protection Clause insofar as it would "significantly encourage and involve the State in private discriminations."[65]

As mentioned previously, the rise of "big tech" and social media has further complicated this analysis of what comprises state action. Privately held social media websites and "apps" (applications) have become *de facto* public forums, at least for online communication and expression. But new rules or parameters placed on these companies and platforms by legislatures and other regulators invite us to consider whether the nexus between public authority and private power establishes state action through association or coercion. Consider the example of Florida which passed a "Big Tech" law in May 2021 that would impose $100,000 fines on certain social media companies for removing statewide political candidates from their online platforms, and $10,000 fines for other removed candidates.[66]

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60 *Id.* at 13.

61 Both Buchanan and Slater question whether *Shelley* still stands for the general proposition that judicial enforcement of private contracts and sales agreements gives rise to state action, or whether subsequent case law has substantially narrowed its application. *See* Slater, *supra* note 38, at 75; Buchanan, *supra* note 30, at 709.

62 436 U.S. 149, 164 (1978).

63 *Jackson*, 419 U.S. at 357.

64 Huhn, *supra* note 31, at 1389 (emphasis added).

65 Reitman v. Mulkey, 387 U.S. 369, 381 (1967).

66 Steven Lemongello & Gray Rohrer, *DeSantis Signs Big Tech Censorship Bill,*

Again, identifying a more or less discrete coercion standard for state action does not resolve how we ascertain or define the necessary level of influence, pressure, or encouragement that turns private action into public action. In many instances, these issues are difficult, and the Court's conclusions and judgments are not self-evident. In *Rendell-Baker v. Kohn*, for example, the Court declined to identify a private school as a state actor even though a state body (the State Committee on Criminal Justice) needed to approve some of its hiring decisions and "public funds accounted for at least 90% [of the school's operating budget], and in one year 99%."[67]

D. The Public Functions Standard

A fourth and final standard the Court has often looked to in evaluating state action is whether a private organization or individual engages in or contributes to distinctive government activities or *public functions.* Returning to *Marsh*, the Court found that a privately held town was subject to the protections of the Constitution because it possessed "all the characteristics of any other American town."[68] As the Court elaborated,

> The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant, and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman …[Merchants and residents] make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office…In short, the town and its shopping district are accessible to and freely used by the public in general, and there is nothing to distinguish them from any other town…except the fact that the title to the property belongs to a private corporation.[69]

Such an emphasis on how a corporation or business has assumed government operations, responsibilities, or powers necessarily shifts our attention away from the state's behavior to that of a private party.

Like other areas of state action jurisprudence, the courts have not been clear or consistent in how they understand this public functions argument or what tools we need to apply it. Perhaps most obviously, private action becomes public action when it effectively replaces the historical operations of the state, including when a private actor engages in "public functions that have heretofore been exclusively performed by government."[70] This orientation is again evident in *Marsh*. In providing law enforcement through a privately paid deputy, the Gulf Shipbuilding Corporation was assuming one of the quintessential roles of the organized state.[71]

Despite Constitutional Concerns, Orlando Sentinel (May 24, 2021), https://www.orlandosentinel.com/politics/os-ne-desantis-signs-big-tech-bill-20210524-dvycnrscjjbfnnh7vbs3wimv5q-story.html.

67 Rendell-Baker v. Kohn, 457 U.S. 830, 832 (1982).

68 *Marsh*, 326 U.S. at 502.

69 *Id.* at 503.

70 Huhn, *supra* note 31, at 1389-90.

71 *See* Max Weber, From Max Weber: Essays in Sociology 78 (1958) (identifying the

In *Manhattan Community Access Corp. v. Halleck*, Justice Kavanaugh's majority opinion emphasized that "to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function."[72] Whether Justice Kavanaugh's statement represents a new judicial rule or simply an interpretation of existing doctrine, it is unclear precisely how his two standards ("traditionally" and "exclusively") work together. While the imposition of income tax would seem to be an "exclusive" power of government, it may not be a "traditional" power in the U.S., given that it was only authorized at the national level with the ratification of the Sixteenth Amendment in 1913.[73] On the other hand, while the power of courts to resolve cases and controversies appears to be a "traditional" government power, the rise of Alternative Dispute Resolution via non-governmental third parties subverts any claim that the judiciary has an "exclusive" hold on this public function.[74] In short, it isn't obvious whether privatizing customary state operations (in such areas as taxation, dispute resolution, and even in providing basic security) pass, fail, or undermine the Kavanaugh test.

In any event, whatever its judicial formulation, an historical or traditional "public functions" approach does not give much guidance when it comes to relatively new (or more controversial) aspects of government performance or policy. Is coordinating climate change policy a distinctive or signature public activity? How about regulating health care insurance markets?

In a subset of pertinent cases, judges emphasize that private action becomes constitutionally protected state action when it occurs in a space or locale where the public has general access (or a reasonable expectation of access). Again, *Marsh* is explicit on this point: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[75]

In still other instances, the courts note that private action and organizations become subject to the Constitution when they become an intrinsic part (or a potential veto point) of government operations. Thus, in the "white primary" case of *Terry v. Adams,* the Court ruled that an ostensibly private Texas county political organization, the "Jaybird Democratic Association or Jaybird Party" could not exclude Blacks from participating in its elections because doing so would effectively undermine the state's fair and free "election machinery."[76]

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state as the entity possessing a "*monopoly of the legitimate use of physical force* within a given territory") (emphasis in original).

72 587 U.S. ____ (2019), 139 S.Ct. 1921 (2019) (emphasis in original).

73 U.S. Const. amend. XVI.

74 *See* Sarah Staszak, No Day in Court: Access to Justice and the Politics of Judicial Retrenchment (2015).

75 *Marsh*, 326 U.S. at 506. *Cf.* Republic Aviation Corp. v. Labor Board, 324 U.S. 793 (the National Labor Relations Act does not allow employers to prohibit solicitation by employees outside of working hours but on company property). *But see* Cyber Promotions v. America Online, 948 F. Supp. 436, 442 (E.D. Pa. 1996) (America Online is not required to provide free speech protections to its users even though it has opened up its servers to the general public).

76 Terry v. Adams, 345 U.S. 461, 466 (1953). *See also* Smith v. Allwright, 321 U.S. 649, 663 (1944) (a political party's primary election is state action); Peretti, *supra* note 50, at 276 (discussing the "white primary" cases); *Marsh*, 326 U.S. at 506 (musing that a

These different takes on the public functions standard are not exclusive or incompatible. But they often entail distinct analyses of legal sources: historical or inductive review of the customary operations of governments in some cases, evaluations of the behavior and purposes of private actors in others, and, at times, pragmatic judgments about the facts on the ground.

Before passing on to consider how the four judicial standards for evaluating state action might apply to the issues posed by Nevada's Innovation Zones, we take note of Huhn's observation that there "are two general approaches to applying these various tests."[77] The first is a more formalistic, rule-oriented "approach to state action analysis, separately invoking and applying the various specific tests… for determining whether or not the challenged party is a state actor."[78] Alternatively, some judges assume a more holistic, "totality of the circumstances" interpretive approach, culling through the specific facts and circumstances of a case to weigh and evaluate each standard and "the nonobvious involvement of the State in private conduct."[79]

For our purposes, we do not find it especially helpful or rewarding to choose between these two interpretive approaches. A thoroughgoing state action analysis of all four standards necessarily requires a careful review of the facts and particulars of a case and requires courts to consider a full range of factors that could turn private action into constitutionally proscribed government action.

IV. Innovation Zones in Practice: *Marsh* in the Twenty-First Century?

How can one draw on this jurisprudence to evaluate the Innovation Zone legislation under consideration in Nevada? At first glance, the question seems misguided. In the U.S., the judiciary develops legal doctrine not to assess the advisability or legal status of pending legislation but to render judgment in specific cases and controversies.[80] We attempt to circumvent this problem by adapting the facts present in *Marsh v. Alabama* to an imagined Innovation Zone within the state of Nevada.

More than seventy-five years ago, Grace Marsh, a member of the Jehovah's Witnesses, "came onto the sidewalk" of Chickasaw, Alabama, a suburb of Mobile.[81] As noted previously, a private corporation, the Gulf Shipbuilding Corporation owned the sidewalk along with the roads that connected the town, as well as Chickasaw's "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block.'"[82]

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company owning a private highway could not restrict its usage in a manner that "gave it power to obstruct through traffic or to discriminate against interstate commerce").

77 Huhn, *supra* note 31, at 1391.

78 *Id.*

79 *Burton*, 365 U.S. at 722. Huhn associates the rule-oriented approach with conservative justices and the totality of the circumstances orientation with liberals, and notes that the Court has "vacillated" between these two approaches. Huhn, *supra* note 31, at 1391.

80 *See* Robert G. McCloskey, The American Supreme Court 12 (2010).

81 *Marsh*, 326 U.S. at 503.

82 *Id.* at 502.

After Marsh attempted to "distribute religious literature" she was "warned that she could not distribute the literature without a permit and told that no permit would be issued to her."[83] After she persisted, a deputy sheriff employed by the Gulf Shipbuilding company arrested her under the terms of the Alabama Code "which makes it a crime to enter or remain on the premises of another after having been warned not to do so."[84] At trial, Marsh argued that applying this statute to her activities violated "her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution."[85] But she was found guilty and her conviction was upheld by the Alabama Court of Appeals. The Alabama Supreme Court denied certiorari, declining to review the case. The Supreme Court of the United States reversed and overturned her conviction on the grounds that Marsh's "use of a company-owned" sidewalk open "for use by the public in general" entitled her to "liberty of press and religion" which the company could not curtail.[86]

Again, in order to unpack some of the key constitutional issues posed by the Nevada Innovation Zone proposal, we transpose these basic facts to the twenty-first century. How would courts evaluate a similar case, in which a citizen attempted, against clear company prohibitions, to share her ideas and religious beliefs on the sidewalks of an Innovation Zone?

We divide the resulting possible judgments, and ways of seeing the case, into four groups, represented in Table 1. We see two paths for our hypothetical citizen petitioner to win: 1) where the Innovation Zone and its authorities are deemed to give rise to a state action claim (Judgment A), and 2) under circumstances where the corporate Innovation Zone does not amount to state action (Judgment C). Similarly, we see two scenarios in which the corporation running the Innovation Zone prevails: where 3) one determines that the Zone and its Board meet the state action threshold (Judgment B) and 4) where state action is absent (Judgment D). We consider, in turn, some of the likely arguments and precedents that one might draw upon for each of these determinations.

Table 1: Marsh *in the Innovation Zones: Four Potential Outcomes.*

Party that Prevails	**Status of the Innovation Zone**	
	State Actor	*Not a State Actor*
Citizen	Judgment A	Judgment C
Corporation	Judgment B	Judgment D

A. Finding State Action in the Zone: Judgments A & B

Judgment A (finding state action and ruling for the citizen's First Amendment claims) fits most squarely with the majority opinion in *Marsh*. Imagine a future corporation acting under the proposed Nevada legislation (or something like it)

83 *Id.* at 503.
84 *Id.* at 504.
85 *Id.*
86 *Id.* at 503.

and assuming effective authority over a Board of Supervisors that can exercise the "powers and duties of a board of county commissioners."[87] Therefore, the company (through its Board) could impose taxes, hire employees with responsibilities that mimic traditional city workers, and even establish a set of private courts for adjudicating local disputes.

In *Marsh*, the powers assumed by the Gulf Shipbuilding Corporation fell short of these rather sweeping authorities. Gulf Shipbuilding owned most of the infrastructure, commercial, and residential properties in Chickasaw, and, as noted, employed the town's sole law enforcement agent. But the Alabama Corporation did not directly control the educational system,[88] the judiciary,[89] and licensing, taxation, and regulatory powers[90]—all of which would be assumed by Innovation Zone companies according to the Nevada draft legislation. Just as the company-owned "business block" in Chickasaw, Alabama was functionally equivalent to "any other town," an Innovation Zone would resemble a small city, with the caveat that a Zone would have the discretion to possess a near monopoly on public *and* private functions within its jurisdiction. This discretion is important as Section 20 of an early version of the legislation allowed for the Board of the Innovation Zone to enter into (or terminate) agreements with any local government in the state, including the county in which the Zone exists, to share responsibilities, officers, and duties. If the basic *Marsh* holding "that under some circumstances property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held" remains good law, it appears easy enough to extend this logic to our imagined Innovation Zone.

Once the Innovation Zone Board and the territories under its control fall under the aegis of state action, one can find abundant precedent to then establish that a citizen's right to distribute literature and share her (religious) views is central to our cherished constitutional protections.[91] As Marsh explained,

> [t]he managers appointed by [a] corporation cannot curtail the liberty of press and religion of [the] people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.[92]

Viewed through the lens of the four standards enunciated earlier, this conclusion (Judgment A) is best supported by the "public functions" standard. While Innovation Zones would need to be authorized by state statutes like the one under consideration in Nevada, such legislation, on its own, does not obviously entangle government in the work of the Zone or amount to coercing corporations to take on governance tasks.[93] Under the proposed legislation, Innovation Zones are only approved after a

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87 *Bill Draft*, *supra* note 5.
88 *Id*. at Section 24.
89 *Id*. at Section 19.
90 *Id*. at Section 20.
91 *See, e.g.,* Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).
92 *Marsh*, 326 U.S. at 508.
93 Obviously, different facts could change the relationship. If Innovation Zones within a

company designee "submits an application" and the corporation invests substantial resources in the proposed Zone. What makes Innovation Zones like Chickasaw, and what makes them akin to municipal governments, is that they do "not function differently from any other town."[94]

The case for applying *Marsh* analysis to twenty-first century Innovation Zones, and finding them constitutionally comparable to twentieth century company towns is rather compelling. But is there a sensible argument for arriving at what we have described as Judgment B? Once one determines that a company directing activities in the Innovation Zone is a state actor, is there a plausible claim that would allow the Zone's Board to prevail in a dispute with a citizen asserting constitutional rights like free speech and freedom of religion?

To begin with, one might note that the liberties enshrined in the Bill of Rights are not inviolate. Even if the Innovation Zone Board and its agents are cognizable as government actors, they might conceivably overcome First Amendment claims with a demonstration of a "compelling state interest" and otherwise meeting the test of strict scrutiny.[95] Imagine, for example, that instead of a single religious demonstrator, a gathering of hundreds of protestors occupied the sidewalks of an Innovation Zone for weeks. If one further stipulates that the Zone in question has contracted with the Department of Defense to build a critical military technology (during an active war), it is not farfetched to construct national security considerations that might overcome the free speech and free exercise rights of ordinary citizens, especially considering the Court's historic sympathy to security concerns during periods of international conflict, strife, and declared or *de facto* war.[96]

Perhaps more plausibly, even after ascertaining that an Innovation Zone qualifies for state action, a judge might still turn to a public forum analysis to determine the extent of a citizen's rights to use the Zone's sidewalks, streets, and other locales.[97] Current doctrine recognizes three classes of government space where individuals might seek to exercise their constitutional civil liberties: traditional public forums, designated forums, and nonpublic forums.[98]

The first category includes those "places which, by long tradition or by government fiat, have been devoted to assembly and debate."[99] These settings hold "a special position in terms of First Amendment Protection,"[100] such that the state's

state begin to supply a substantial amount of state revenues, the state association or cooperation standard might well come into play.

94 *Marsh*, 326 U.S. at 508.

95 *See generally* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny,* 48 Am. J. Legal Hist. 355 (2006).

96 *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944); Schenck v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919), Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). *See generally* Geoffrey R. Stone, Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism (2005).

97 *See generally* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 Ohio St. L. J. 1535 (1998); Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713 (1987).

98 Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

99 *Id.* at 45. *See also* Cornelius v. NAACP Leg. Def. Fund, 473 US 788, 800 (1985).

100 United States v. Grace, 461 U.S. 171 (1983).

powers "to limit expressive activity are sharply circumscribed."[101] Restrictions on free speech in these contexts are generally limited to "time, place, and manner" regulations or "content-based" exclusions of speech that "serve a compelling state interest and [are] narrowly drawn to achieve that end."[102] In the context of the hypothetical considered here, with protestors or religious adherents on a public sidewalk or street, we seem to have what the Court has identified as "an archetype of a traditional public forum."[103] However, it is precisely this "public" element that deserves closer scrutiny, a point we return to below.

Designated or limited forums are sites or venues the government *chooses* to open and identify as public forums,[104] although this decision may be reversed in the future. For designated forums, unlike traditional public forums, the government may put into place reasonable access restrictions. Thus in *Widmar v. Vincent*,[105] the Court allowed a state university to restrict certain meeting spaces to student groups, excluding non-students from using these facilities. Such a distinction opens up the possibility that a court might identify a Zone as a designated public forum and restrict its free speech and free exercise rights to employees or those with permanent residency.

Finally, in nonpublic forums "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[106]

This backdrop helps us to understand that in a case pitting the First Amendment rights of an individual against a corporation's Innovation Zone interests (in, say, protecting property and conducting business), the outcome could well turn on the specifics of the space in which the sought communication or expression takes place or, more broadly, in how we understand the nature of the Zone itself. If the entire Zone can be regarded as a nonpublic forum, dedicated to promoting commerce or technological innovations, it seems possible that a Zone visitor's distribution of religious literature might be reasonably restricted. Indeed, the draft Nevada legislation makes clear at the very outset that its purpose in creating Zones is to yield benefits to the state as a whole and the "general welfare of its inhabitants."[107] This may strengthen the argument that the Zone is more akin to a national bank, military base, or state owned utility than a local public park.

Alternatively, given the expanse of the Zone, an evaluating judge might distinguish some "common areas" (sidewalks, streets, parks, shared dining areas) where the First Amendment fully attaches from others dedicated more directly to say, business, production, research, or technology development—not dissimilar to

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101 *Perry Educ. Ass'n*, 460 U.S. at 45.
102 *Id*.
103 Frisby v. Schultz, 487 U.S. 474 (1988).
104 *Perry Educ. Ass'n.,* 460 U.S. at 45.
105 454 U.S. 263 (1981).
106 *Perry Educ. Ass'n*., 460 U.S. at 46.
107 *Bill Draft*, *supra* note 5, at Section 1.5 ("[t]he Legislature hereby find and declares that: The diversification of the economy of the State is vitally important to the general welfare of its inhabitants and the fiscal viability of the state. The state must pursue inventive and creative programs… to attract new forms and types of businesses and to foster economic development…").

other "free speech zones" that have been established by governments.[108] To some degree, engaging in this inquiry requires finding the right analogy. Is an Innovation Zone like an army base, prison, public library, government-owned power plant, or a hotel that state actors rent for closed meetings? If so, the Zone may well be a nonpublic forum that can be closed to speech and religious expression on the grounds that these activities are outside the core reasons for possessing and using the space in question. On the other hand, if the Zone, or portions of it, are properly regarded as creating a venue "for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[109] the petitioning citizen will likely win against the claims of the corporation and the Zone Board.

In the end, we should not forget that *Marsh's* majority freely embraced a balancing test between "the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion."[110] While the opinion notes that free speech, press, and religion offer "a preferred position" in our constitutional order, as soon as one begins to conceive of a Zone (or portions of it) as a limited or nonpublic forum, it becomes easier to imagine circumstances in which property rights (and the Zone's primary purposes) overpower free expression claims, especially where these are better consigned to other environments.

B. No State Action: Judgments C & D

Given this discussion, and the apparent parallel between the *Marsh* company town and the comprehensive powers of the proposed Innovation Zones, it might be hard to think one could find support for judgments (C and D) that find *no* state action in a company's operation of a Zone. But a closer look at the specific arguments in *Marsh* points to at least one avenue for concluding that a Nevada-style Innovation Zone might not give rise to such a claim.

Again, Justice Black's majority decision in *Marsh v. Alabama* emphasized the "public functions" standard for recognizing state action. It further provided three reasons for concluding that the Gulf Shipbuilding Corporation's company-owned town was mostly indistinguishable from a traditional municipality governed by public officials.

First, the Court indicated that Chickasaw, in its appearance, layout, and provided services closely resembled a government entity: "there is nothing to distinguish [Chickasaw] from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[111] Second and closely related, the *Marsh* majority emphasized the openness and ease of access of Chickasaw to the general public: the town's business block "serves as the

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[108] *See, e.g.*, Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8, 55 Cal. 4th 1083 (2012) (interpreting the California State Constitution to conclude that "common areas" of privately owned shopping malls are public forums since they "generally have seating and other amenities producing a congenial environment that encourages passing shoppers to stop and linger, to leisurely congregate for purposes of relaxation and conversation" and distinguishing these "from areas immediately adjacent to the entrances of individual stores" which offer fewer free speech protections).

[109] *Hague*, 307 U.S. at 515.

[110] *Marsh*, 326 U.S. at 509.

[111] *Id.* at 503.

community shopping center and is freely accessible and open to the people in the area and those passing through."[112] The third functional argument concerned not the physical characteristics, layout, and operations of the town but citizens' political expectations. The public had a valid "interest in the functioning of the community in such manner that the channels of communication remain free."[113] The only way the citizens of Chickasaw could exercise their full rights as "free citizens of their State and country" and capably "make decisions which affect the welfare of community and nation" was to be "properly informed" with "uncensored" information and open channels of communication and debate.[114]

Justice Black's analysis is worth recapitulating because it is easy to imagine that Nevada, or other state Innovation Zones, would *not* closely match the Chickasaw profile. The draft legislation under consideration in Nevada stipulates that an Innovation Zone can only be established on "50,000 contiguous acres of undeveloped land owned or controlled by the applicant…within a single county."[115] Furthermore, the Zone cannot "be part of a city, town, tax increment area or redevelopment area established by law" and already populated with preexisting "permanent residents," and it specifically defines the "innovative technology" that would be considered acceptable as "Blockchain, Autonomous technologies, The Internet of things, Robotics, Artificial intelligence, wireless technology, Biometrics, and Renewable resource technology."[116]

This context leads to the inference that, unlike "freely accessible and open" company towns like Chickasaw, Nevada Innovation Zones are likely to be somewhat remote, difficult to access, and distinct from more settled communities. Moreover, given the Zone legislation's stipulation that the acquiring company "will incorporate innovative technology throughout the Zone"[117] it also seems plausible that, unlike Chickasaw, the Zone might well operate and look quite different from other population centers. Existing Innovation Zones have sought to reshape cities and communities, at times engaging in large scale renovations and revitalization that remake an existing populated area where people already live and work. The proposed Nevada bill offers even more of a blank slate for urban and business planners, and the community they create might well look unlike traditional towns or settlements.

Of course, even if the Innovation Zone's Board could convince a court that in its appearance, operations, and accessibility the Zone is distinct from an ordinary municipality, the argument might founder on *Marsh's* public interest argument. After all, shouldn't Zone residents have a right to free and uncensored channels of expression and communication regardless of where they work and live?

But even this contention might not prevail if the corporation could establish that the Zone was primarily a workplace and that its inhabitants had other, more suitable and clearly public venues for their exercise of free expression rights. For example, an Innovation Zone might be less analogous to a *Marsh*-style company town if its employees lived in a different location (and merely worked in the Zone)

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112 *Id.* at 508.
113 *Id.* at 507.
114 *Id.* at 508.
115 *Bill Draft*, *supra* note 5.
116 *Id.*
117 *Id.*

or if they only inhabited the Zone for finite periods before transferring to other areas more permanently.

These arguments might also assume greater force if judges, in the future, take up the suggestion that online and digital platforms might be regarded as constitutionally protected public forums or "common carriers or places of public accommodation."[118] If online chatrooms, social media sites, and accounts owned by public (and private) officials have, in effect, replaced sidewalks, streets and town squares as venues for communication and expression, perhaps company towns no longer have the same responsibility to keep their physical forums open to all in order to ensure that the community's "channels of communication remain free." Stated differently, the new conditions of the twenty-first century may allow us to reconsider Marsh's assumption that "the functioning of the community" requires that an Innovation Zone be recognized as a public entity with a responsibility to allow the "people to enjoy freedom of press and religion"[119] throughout its private property holdings.

It is challenging but possible, therefore, to reason one's way to Judgment D—where one concludes that the Innovation Zone and its governing Board are not state actors and, therefore, that a citizen claiming free expression and religious free exercise rights would not prevail. Getting to Judgment C (no constitutional state action but the citizen still wins) would require the additional step of finding rights outside of the federal Constitution to allow a petitioning citizen to secure a favorable judgment. Such rights might be found, for example, in state statutes or a state constitution.[120]

V. Conclusion

This article makes the case that the state action doctrine and the precedent of *Marsh v. Alabama* can help us analyze state legislation that would create a unique public-private partnership. Given that the specific legislative prompt for this argument may never even pass, it seems incumbent to reflect briefly on the broader implications of our argument.

To begin with, as noted earlier, there are good reasons for thinking that regardless of the fate of the Nevada bill, states (and the federal government) will continue to look for policy innovations that draw on the resources and capacities of private enterprises while raising difficult legal questions about how we draw the line between public and private authority.[121]

In addition, by unpacking the complexity of state action issues posed by Innovation Zones—and the possibility that courts could plausibly draw on existing

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118 *Biden*, 141 S. Ct. at 1226 (2021).

119 *Marsh*, 326 U.S. at 509.

120 *See, e.g.,* G. Alan Tarr, Understanding State Constitutions (2000); Robert F. Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgement*, 8 U. Puget Sound L. Rev. 157 (1985).

121 Beyond this observation, we note that Joseph Slater has speculated that the state action doctrine may become a future battleground for judges seeking "to revive an extraordinarily broad theory of state action" to curtail private-sector union power. Slater, *supra* note 38, at 63.

doctrine to come to quite different judgments concerning the Zones' constitutional responsibilities—we underscore the necessity (and difficulty) of cutting through the tangled jurisprudence in this area. While beyond the scope of this article, it may well be time for a dramatic rethinking of the purposes of the state action doctrine and how courts approach it. Huhn, for example, calls for a reorientation of state action decisions in favor of reinforcing "democratic choice" (that is, "the right of the people to govern themselves"[122]) rather than making the doctrine about placing a premium on private, "individual freedom" (including our private liberty to ignore constitutional protections).[123]

More generally, we might note that the state action doctrine "matters because it is a core doctrine in our nation's constitutional framework"—an effort to balance three competing values or interests: individual autonomy, federalism, and our commitment to constitutional rights.[124] Indeed, numerous constitutional provisions place a premium on dividing public and private authority to protect our freedoms and better preserve good government.[125] A non-exhaustive list includes: the Emoluments clauses, the guarantee of "a Republican Form of Government," the prohibition on "Title[s] of Nobility," the impeachment and removal provisions (which identify "Bribery" as one of two enumerated "high Crimes and Misdemeanors"), and the First Amendment's "establishment" clause. These examples suggest that grasping the parameters of and rationale for U.S. state action is foundational for comprehending not only the public-private divide, but the very basis of American political authority.[126]

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122 Huhn, *supra* note 31, at 1386.

123 *Id*. at 1456.

124 Buchanan, *supra* note 30, at 339-40.

125 For related arguments, *see* Gordon Wood, The Radicalism of the American Revolution (1993); Akhil Reed Amar, The Constitution Today: Timeless Lessons for the Issues of Our Era (2016).

126 *See generally* Huhn, *supra* note 31, at 1396 (providing historical examples of how "private individuals and organizations" wielded power over U.S. citizens and their governments).

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Abolitionist John Brown's Treason against the Commonwealth of Virginia: A Lesson for State Governments about the Culpability of Non-Residents for Treason against the State

James A. Beckman*

ABSTRACT

This article analyzes the specific issue of whether an individual could be tried for treason by a State government if that individual is not a resident or citizen of that State. This issue is analyzed through the prism of the landmark case of John Brown v. Commonwealth of Virginia, a criminal prosecution which occurred in October 1859. Brown, a resident of New York, was convicted of treason against the Commonwealth of Virginia, insurrection, and murder after he attempted to overthrow the institution of slavery by force on October 16-18, 1859. After a prosecution and trial which occurred within a matter of weeks following Brown's crimes, Brown was executed on December 2, 1859. To this day, John Brown's trial and execution remains one of the leading examples of a State government exercising its power to enforce treason law on the State level and to execute an individual for that offense. Of course, the John Brown case had a major impact on American history, including being a significant factor in the presidential election of 1860 and an often-cited spark to the powder keg of tensions between the Northern and Southern States, which would erupt into a raging conflagration between the North and South in the American Civil War a short eighteen months later. However, in the legal realm, the Brown case is one of the leading and best-known examples of a state government exercising its authority to enforce its laws prohibiting treason against the State. The purpose of this article is not to discuss treason laws generally or even all the issues applicable to John Brown's trial in 1859. Rather, this article focuses only on the very specific issue of the culpability of a non-resident/non-citizen for treason against a State government. With the increased array of hostile actions against State governments in recent years, and criminal actors crossing state lines to commit these hostile acts, this article discusses an issue of importance to contemporary society, namely whether an individual can be prosecuted and convicted for treason by a State of which the defendant is not a citizen or resident.

KEYWORDS

treason, John Brown, issurrection, homeland security, crimes agains state

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I. Introduction

Can someone in the United States be tried for treason by a State government if the individual is not a resident or citizen of that State? One of the most famous treason prosecutions in United States history that occurred on the State level was the prosecution of the radical abolitionist John Brown for treason against the Commonwealth of Virginia in October 1859.[1] To this day, the Brown case remains one of the most consequential cases in American history. Robert A. Ferguson, the George Edward Woodberry Professor of Law at Columbia University characterized the Brown case as one of the most telling and important cases in United States history.[2] Steven Lubet, Professor of Law at Northwestern University, stated that the *Brown* case was "the most significant" and "consequential" in American history.[3] *Brown* remains one of the leading examples of an individual being executed by a State government for the offense of treason. Further, the *Brown* case also serves as the best example of a non-resident being held accountable under the treason laws of a sister State to which he was not a resident or citizen.

In just the last several years, the country has witnessed numerous acts of violence and arguable insurrection including events such as armed protests inside the Michigan Statehouse by right wing militia members to obstruct the Michigan legislature and protest the Governor's "Stay at Home" COVID order in May 2020,[4] multiple attempted seizures of the Oregon capitol and other state resources,[5] a thwarted plot to kidnap Michigan Governor Gretchen Whitmer in order to overthrow the government and institute civil war in October 2020,[6] and most recently, the riots and attempted insurrection at the U.S. Capitol complex on January 6, 2021.[7] While the January 6, 2021, Capitol riots in Washington, DC,

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1 Since the ratification of the United States Constitution, there have been only two treason prosecutions that have been completed on the state court level—one being the John Brown case and the other predating the Brown case by a decade: J. Taylor McConkie, *State Treason: The History and Validity Against Individual States*, 101 Ky. L.J. 281, 282, 300 (2013).

2 Robert A. Ferguson, The Trial in American Life 117-152 (2007).

3 Steven Lubet, *John Brown's Trial*, 52 Ala. L. Rev. 425 (Winter 2001).

4 *See, e.g.*, Abigail Censky, *Heavily Armed Protestors Gather again at Michigan Capitol to Decry Stay-At-Home Order*, NPR, May 14, 2020, https://www.npr.org/2020/05/14/855918852/heavily-armed-protesters-gather-again-at-michigans-capitol-denouncing-home-order; *see also*, Dareh Gregorian, *Calls to Violence: Michigan Gov. Whitmer Says Armed Protests Could Lengthen Stay-at-Home Orders*, NBC News, May 13, 2020, https://www.nbcnews.com/politics/politics-news/calls-violence-michigan-gov-whitmer-says-armed-protests-could-lengthen-n1206296.

5 *See, e.g.*, Azmi Haroun, *Anti-Lockdown Protestors Storm Oregon Capitol Building Clashing with Police Officers*, BUSINESS INSIDER, Dec. 22, 2020, https://www.businessins*Id.*er.com/far-right-protestors-storm-oregon-state-capitol-building-2020-12; *See also*, Erika Bolstad, *Emboldened Far-Right Groups Challenge Cities, States*, Pew Institute, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/13/emboldened-far-right-groups-challenge-cities-states.

6 Robert Snell &Melissa Nann Burke, *Plans to Kidnap Whitmer, Overthrow Government Spoiled, Officials Say*, The Detroit News, Oct. 9, 2020, https://www.detroitnews.com/story/news/local/michigan/2020/10/08/feds-thwart-militia-plot-kId.nap-michigan-gov-gretchen-whitmer/5922301002/.

7 Alex Woodward, *Pro-Trump Rioters hold Capitol under Siege as President Falsely Insists Election was Stolen from Them*, Independent, Jan. 7, 2021, at https://www.

are outside of the purview of this article as such acts would be crimes against the Federal government, and not a State government, the incident is referenced briefly here to illustrate that over 400 participating individuals who were charged came from forty five of the fifty states.[8] As of the date of this article, only Alaska, Maine, North Dakota, South Dakota and Vermont has not had a citizen prosecuted for the events which occurred on January 6, 2021.[9] Indeed, in the thwarted plot to kidnap the Michigan Governor and overthrow the State government, several of the roughly fourteen indicted defendants were residents/citizens of states other than Michigan, namely a defendant from Wisconsin[10] and another defendant from Delaware.[11] These events have indicated that people attend the planned activities from places far and wide and often involve non-residents and non-citizens.

To the extent "out-of-state" individuals intend to "levy war" against a State government (Michigan or Oregon, for example), could a State prosecute and successfully convict those individuals for treason against that State? Along with forty-three other States,[12] Michigan[13] and Oregon[14] (like the United States) criminalize the act of treason as a matter of state constitutional law. However, does such a law apply to a non-resident who arguably does not owe the state any allegiance or loyalty as a citizen or resident would? According to an October 2020 analysis by the PEW Institute, most states have laws that could be used to prevent armed vigilantes and right-wing militia.[15] Some of these state-by-state laws are delineated in a guide entitled "Prohibiting Private Armies at Public Rallies: A Catalogue of Relevant State Constitutional and Statutory Provisions;"[16] however, charges of treason against the State are rarely, if ever, cited or considered as a viable option for the State in prosecuting malevolent actors against the State. In the span of country's history since 1789, there have been fewer than thirty cases of individuals being prosecuted for treason, and virtually all these prosecutions occurred at the federal level.[17] Mary McCord, the Legal Director of the Institute for

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independent.co.uk/news/world/americas/us-politics/capitol-riots-what-happened-washington-dc-timeline-b1783562.html.

8 Dinah Pulver et al., *Capitol Riot Arrests: See Who's Been Charged Across the U.S.*, USA Today, June 7, 2021, https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/.

9 *Id.*

10 Paul Egan, *Wisconsin Man is 14th to face charges in alleged Whitmere kIdnap plot*, The Detroit News, Oct. 15, 2020, https://www.freep.com/story/news/local/michigan/2020/10/15/whitmer-plot-charges-nessel/3661482001/.

11 Fox 10 (Phoenix), *Delaware man accused in plot to kIdnap Michigan Government Whitmer pardoned by Gov. Carney in 2019*, Oct. 9, 2020, at https://www.fox10phoenix.com/news/delaware-man-accused-in-plot-to-k*Id.*nap-michigan-gov-gretchen-whitmer-pardoned-by-gov-carney-in-2019.

12 McConkie, *supra* note 1, at 296, 320. *See also* McConkie, at 296, n. 95, for a complete delineation of the provisions in each of the forty-three states which criminalize treason.

13 Mich. Const., art. I, §22

14 Or. Const., art. I, §24

15 Bolstad, *supra* note 5.

16 *Prohibiting Private Armies at Public Rallies: A Catalogue of Relevant State Constitutional and Statutory Provisions,* Institute for Constitutional Advocacy and Protection at Georgetown Law Center (3d ed., Sept. 2020).

17 Pamela J. Podger, *Few Ever Charged or Convicted of Treason in U.S. History/Many Americans fought for other religious, political, cultural beliefs,* San Francisco Chronicle, Dec. 9, 2001, at https://www.sfgate.com/crime/article/Few-ever-charged-

Constitutional Advocacy and Protection at Georgetown Law Center has expressed the view that "States haven't been doing nearly enough and have not been taking advantage of the tools that they have."[18] This lack of aggressive action by State governments comes at a time when "white supremacists represent the top and most lethal domestic terror threat to Americans" as of 2020.[19]

Yet, at least forty-three states have laws criminalizing the offense of treason against the state.[20] Of the forty-three states, twenty states criminalize treason by way of a constitutional provision, sixteen criminalize treason by both a constitutional provision and a state statute, and six criminalize treason solely by statute.[21] Without question, the *Brown* case, along with one other state prosecution in 1844, has illustrated that a state prosecution for the offense of treason is a legitimate exercise of the powers of a state government.[22] Further, the United States Supreme Court has never "specifically decided or discussed the validity of state treason laws."[23] It is a dormant police power that state governments may utilize to handle cases where a criminal defendant's intentions are to overthrow the existing government. More to the point of this article, even over 160 years later, the *Brown* case remains instructive as to the issue of the viability of treason charges *against a non-resident* and should be helpful in instructing prosecutors, courts and judges who might be grappling with this issue in 2021 or beyond.

Numerous books and articles have been written about John Brown and his attempt to overthrow the institution of slavery by force in October 1859.[24]

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or-convicted-of-treason-in-U-S-2843242.php .

18 Bolstad, *supra* note 5, at 16.

19 *Id.*

20 McConkie, *supra* note 1, at 296, 320; for a listing of each of the 43 states with treason provisions and where each state defines treason in either its constitution or statutorily law, see McConkie, *supra* note 1, at 296, n. 95.

21 *Id.* at 298.

22 *Id.* at 314; the other notable successful State prosecution for treason is Rhode Island's prosecution of Thomas Dorr in 1844. *Id.* at 300-305.

23 *Id.*

24 While the list of John Brown related books are literally too numerous to delineate for purposes of this article, some of the leading books on John Brown and his actions are as follows: F.B. Sanborn, The Life and Letters of John Brown (Robert Brothers) (1891); Oswald Garrison Villard, John Brown 1800-1859: A Biography Fifty Years After (1910); Richard J. Hinton, John Brown and His Men (1894); Tony Horowitz, Midnight Riding: John Brown and the Raid. That Sparked the Civil War (2011); Merrill D. Peterson, The Legend Revisited: John Brown (2002); Evan Carton, Patriotic Treason: John Brown and the Soul of America (2006); Truman Nelson, The Old Man: John Brown at Harper's Ferry (1973); W.E.B. Dubois, John Brown: A Biography (M.E. Sharpe, 1997) (1909); Richard Warch & Jonathan Fanton, eds , John Brown (1973); Richard O. Boyer, The Legend of John Brown: A Biography and History (1973); Robert E. Mcglone, John Brown's War Against Slavery (2009); Stephen B. Oates, To Purge This Land With Blood: A Biography of John Brown (1970); Louis A. Decaro, Jr., Fire From the Midst of You: A Religious Life of John Brown (2002); Jules Abels, Man on Fire: John Brown and the Cause of Liberty (1971); David. S. Reynolds, John Brown, Abolitionist, The Man Who Killed Slavery, Sparked the Civil War, and Seeded Civil Rights (2005); Laurence Greene, The Raid (1953); Bruce A. Ronda, Reading the Old Man: John Brown in American Culture (2008); NPS Office of Publications John Brown's Raid. (National Park Service History Series, 1973);

Books[25] and articles[26] have also been written about certain aspects of the subsequent legal proceedings against him. This article will not re-hash the general historical facts surrounding John Brown, his "war against slavery," or his attack on the federal armory and arsenal at Harpers Ferry, Virginia, in 1859, that gave rise to his treason prosecution by the Commonwealth of Virginia. Neither will this article engage in a discussion about Brown's trial generally. This has been done previously by this author[27] and others.[28] Rather, this article will focus and discuss only the issue of whether residency or citizenship is required to proceed with charges of treason against an individual by a State government, using the *Brown* case as the primary vehicle and precedent in which to explore this issue in detail.

II. Confusion Among Historians on the Legitimacy of the Charge of Treason Against John Brown

Reduced to its core, John Brown's raid on the federal armory and arsenal at Harpers Ferry, Virginia, in 1859, was designed to depose the slaveocracy element from American governance and to purge the legally sanctioned practice of slavery from the landscape of American constitutional law. Brown's intentions and goals were simple; namely, to raid the U.S. Armory and Arsenal at Harpers Ferry, Virginia, arm enslaved individuals in the area, and start a slave insurrection that Brown hoped would sweep throughout the South. As Truman Nelson noted in his book *The Old Man*, Brown's raid "was a Declaration of Independence from the United States [he and his followers] knew: from the tolerance of slavery as a sectional problem, from the political power of the slaveocracy, from the *Dred Scott* decision [stating] that blacks had no rights that white men needed to respect, and from all the built-in inequities and compromises that had encrusted and befouled the old promises."[29] Often, in the rich genre of John Brown related literature and folklore, John Brown's actions are often described or referenced as treasonous with little or no legal analysis or explanation. For instance, Evan Carton's 2009 book on the life of John Brown is entitled *Patriotic Treason: John Brown and the Soul of America*, even though Carton does not include the term "treason" in his index or discuss the specific treason charge in any significant way in his book. Laurence Greene, in a 1953 book entitled *The Raid*, avoids all analysis of the charges against Brown and obscured the issue even further in his book by stating: "I am not going into all the legal mumbo-jumbo of the trial."[30] And in his celebratory and still famous1909 biography of John Brown, W.E.B. Du Bois praises Brown's "treasonous" intent,

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Jonathan Earle, John Brown's Raid on Harper's Ferry (2008); Brian Mcginty, John Brown's Trial (2009).

25 *See, e.g.*, Brian Mcginty, John Brown's Trial (2009).

26 *See, e.g.*, Lubet*, supra* note 3; Thomas J. Fleming, *The Trial of John Brown*, American Heritage, 28-33, 92-100 (Aug. 1967); James Beckman, *John Brown Trial of 1859 and Virginia Insanity Defense Laws Explored*, Mag. Of The Jefferson Cnty. Hist. Society 45-60, (Oct. 2009).

27 *Id.*

28 Lubet*, supra* note 3; Fleming, *supra* note 26*,* at 28-33, 92-100.

29 Nelson, *supra* note 24, at 90.

30 Greene, *supra* note 24, at 196.

without specifically analyzing the treason charge, or why Brown committed treason against the Commonwealth of Virginia.[31]

More problematically, many scholars over the last 160 years have erroneously argued that John Brown could not have committed treason against the Commonwealth of Virginia because he was not a resident or citizen of Virginia. For instance, J. Reuben Sheeler, in a re-issue of Benjamin Quarles' classic book entitled *Blacks on John Brown*, explicitly asserts that "treason is an act committed by a resident or citizen against a state. John Brown was neither a resident nor a citizen of Virginia."[32] Additionally, in his book *Fire from the Midst of You: A Religious Life of John Brown*, Louis A. DeCaro, Jr. implicitly endorses this legal understanding when he remarks, "nor was it explained how a man from the State of New York could be charged with treason by a state he had invaded."[33] Renowned historian Thomas Fleming, in presumably summarizing the opening statement of one of Brown's lawyers (Lawson Botts) at trial, stated that "[a]ccording to the common law tradition in the United States, treason could be committed only by a resident against his own state. Surely no stretch of logic could make Brown a citizen of Virginia."[34]

The notion that Virginia was incapable of trying a non-resident for treason was an idea that was not created out of whole cloth by scholars and authors in the decades and century following the case. Rather, the concept was introduced by Brown's lawyers themselves. A significant defense in Brown's case was that the charge of treason against Brown by the Commonwealth of Virginia was not only politically motivated, but invalid. In closing arguments to the jury, one of Brown's defense lawyers (Hiram Griswold) made the argument that scholars sympathetic to Brown would later echo, that "no man is guilty of treason, unless he be a citizen of the State or government against which the treason so alleged has been committed… Rebellion means the throwing off [of] allegiance to some constituted authority. But we maintain that this prisoner was not bound by any allegiance to this State, and could not, therefore, be guilty of rebellion against it."[35] Samuel Chilton, another of Brown's lawyers, added that "the word treason is derived from a French word signifying betrayal. It means the betrayal of trust. Treason means betrayal of trust or confidence, the violation of fidelity or allegiance to the Commonwealth."[36] Put simply, Brown's lawyers argued that Brown could not possibly be convicted of treason by the Commonwealth of Virginia because he was not a citizen of Virginia, had no meaningful legal ties to the State, and did not therefore breach a supposed duty of loyalty to Virginia. Brown's only conceivable treason under the circumstances (again, as the argument went) was against the Federal government, and a proper indictment and conviction for treason would only be possible if

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31 DuBois, *supra* note 24, at 200-201.

32 J. Reuben Sheeler, *John Brown: A Century Later*, in Blacks on John Brown, 131 (Benjamin Quarles, ed., Da Capo Press, 2001) (1972).

33 Louis A. Decaro, Jr., Fire From The Midst of You: A Religious Life of John Brown 268 (2002).

34 Fleming, *supra* note 26, at 93.

35 The Life, Trial and Execution of Capt. John Brown: Being a Full Account of the Attempted Insurrection at Harpers Ferry, Va 86 (1859); see also, McGinty, *supra* note 25, at 202.

36 *Id*. at 90.

brought by the United States. Brown was clearly not a citizen or resident of Virginia leading up to the raid. In the years immediately preceding 1859 attack in Virginia, Brown resided most frequently in Ohio, New York, and the Kansas territory. He owned a home and his wife, and several children lived in upstate New York, and thus New York was Brown's most likely legal domicile.[37] Thus, Brown's own lawyers' line of reasoning held that Brown's conviction and execution for treason by the Commonwealth of Virginia was unlawful as he owed no legal allegiance to Virginia. Further, Brown himself testified that he lacked the intent or the requisite *mens rea* to commit the offense alleged. At his trial, Brown remarked that he "never did intend murder or treason, or the destruction of property, or to excite or incite the slaves to rebellion, or to make insurrection."[38]

III. Basic Principles and Rules Regarding the Offense of Treason Against the Commonwealth of Virginia and the Issue of Allegiances Owed to a State by a Non-Resident

Several questions must be posed and answered to determine the basis of Virginia's treason charge against Brown and the legitimacy or illegitimacy of his conviction as a non-resident. First: what were the classic legal elements of the offense of treason and what is their bearing on the question of whether it was—or is—legally possible to commit treason against the Commonwealth of Virginia (or any other State), as opposed to the Federal government? Second: who is specifically subject to treason laws on the federal or the State level? Third: did the evidence against Brown support a conclusion that Brown in fact violated Virginia's treason statute? That is (to preview some of Virginia's statutory language on the point) did Brown "levy war" against the Commonwealth? Did he "establish, without authority of the legislature, any government within its limits separate from the existing government?"

A proper understanding of the laws of treason at play in Brown's case, and the ultimate propriety of the court's ruling on the issue, begins with a consideration of what treason meant during the founding period of the United States. This in turn requires knowledge of the elements of earlier English legal definitions of treason that the United States retained. Historically, the charge of treason was the most serious offense that one could commit against the State.[39] Its importance is reflected by the fact that it is the only criminal offense delineated in the Constitution (Article III, section 3) and by the fact that several of the most important key operative phrases of the American treason clause reflect concepts first developed by the English and found in an English statute enacted during the reign of Edward III in 1351.[40] Those important operative phrases included defining treason to include a person "who do levy war" against the King or to "be adherents to the King's enemies in his realm, giving them aid and comfort" in the realm.[41] Treason as "levying war" against the

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37 Stan Cohen, John Brown: The Thundering Voice of Jehovah 125 (1999).

38 *The Proceedings of the Court,* 3 New York Herald, Nov. 3, 1859 (morning edition).

39 McGinty, *supra* note 25, at 77; *see also*, McConkie, *supra* note 1, at 281, 283; Hanauer v. Doane, 79 U.S. 342, 347 (1870) ("No crime is greater than treason").

40 Treason Act 1351, 25 Edw. 3 Stat 5, c.2 §2 (Eng.), https://www.legislation.gov.uk/aep/Edw3Stat5/25/2/section/II.

41 Id.

United States or "… adhering to their Enemies, giving them aid and comfort" are the two sole prohibited acts in the United States Constitution pertaining to treason and clearly directly informed by the very similar wording in the English Statute of 1351. James Wilson, the framer most frequently credited with the crafting of the treason clause in Article III, said in 1790 (referring to the English Statute of 1351 on treason), that the legal offense of treason in the United States was intentionally "transcribed from a part of the statute of Edward the third" so that the American understanding of the offense would be influenced "by the mature experience, and ascertained by the legal interpretation, of numerous revolving centuries."[42]

Wilson advocated that any subsequent American application of treason law be based upon the wording of the Statute of 1351, explaining that the 1351 treason law was "like a rock, strong by nature, and fortified...," and "impregnable by all the rude and boisterous assaults, which have been made upon it, at different quarters, by ministers and judges; and as an object of national security, as well as of national pride, it may well be styled the legal Gibraltar of England."[43] Wilson's insistence on interpreting American treason law consistent with English common law was subsequently endorsed by Chief Justice John Marshall, and as late as 1945, by the majority opinion of the United States Supreme Court.[44] Thus, even at the outset of the American constitutional journey in 1789, the law of treason had been maturing and ripening in English Common Law for over four centuries. Its elements and requirements were established and uncontroversial long before Brown's trial in 1859.

According to the text of Article III, section 3, clause 1, of the U.S. Constitution, "treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."[45] Similarly, a decade earlier in drafting a colonial treason law in Virginia in 1776, the Virginia Assembly emulated the same 1351 statute and its application in subsequent English case law. The Virginia Assembly enacted a treason prohibition which stated that

> [w]hereas divers opinions may be what case shall be adjudged treason, and what not," the General Assembly stipulated, "[t]hat if a man do levy war against this commonwealth in the same, or be adherent to the enemies of the commonwealth within the same, giving to them aid and comfort in the commonwealth or elsewhere, and thereof be legally convicted of open deed by the evidence of two sufficient and lawful witnesses, or their own voluntary confession, the cases above rehearsed shall be judged treason, which extendeth to the commonwealth.[46]

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42 James Wilson, *Of Crimes, Immediately Against the Community*, in Works of James Wilson, 663-665 (Robert Green McCloskey ed., 1967).

43 *Id.* at 664.

44 *Cramer v. United States*, 325 U.S. 1, 18 (1945).

45 U.S. Const. art. III, §3.

46 *An Act Declaring What Shall Be Treason, Laws of Virginia* (*1776),* The Founders' Constitution, (U. Chi. P.) https://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s11.html (last accessed on June 10, 2021).

As is apparent, the elements and requirements between Article III of the U.S. Constitution and the Virginia Law of Treason of 1776 are almost identical in substance—not surprisingly, as both sources were copying the well-established English legal precedent from 1351.

After the Revolution, the Constitution of the Commonwealth of Virginia did not contain a treason clause. Rather, the authorities of the Commonwealth of Virginia opted to define the offense of treason through statutory law, as it had done previously in 1776. However, by 1803, Virginia had expanded the definition of treason beyond that of the 1351 English statute or Article III of the United States Constitution to also consist in the

> erecting or establishing or causing or procuring to be erected or established, any government separate from, or independent of the government of Virginia, within the limits thereof, unless by act of the legislature of this commonwealth for that purpose first obtained; or in holding or executing under any such usurped government any office legislative, executive, judiciary, or ministerial, by whatever name such office may be distinguished, or called; or in swearing or otherwise solemnly professing allegiance or fidelity to the same; or, under pretext of authority derived from or protection afforded by such usurped government, in resisting or opposing the due execution of the laws of this commonwealth.[47]

Thus, the Virginia Code of 1849 (the statute in effect at the time of Brown's trial in 1859) defined treason as including any of the following acts: "(1) Levying war against the Commonwealth; (2) Adhering to its enemies, giving them aid and comfort; (3) Establishing, without authority of the legislature, any government within its limits separate from the existing government; (4) Holding or executing, in such usurped government, any office, or professing allegiance or fidelity to it; or (5) Resisting the execution of the laws under color of its authority."[48]

Thus, the viability of the offense of treason against the Commonwealth of Virginia was well established in Virginia statutory and case law leading up to Brown's trial. Further, the offense of treason is not a criminal charge within the exclusive domain of the Federal government (i.e., the charge of treason is not the exclusive jurisdiction of the Federal government). The charge of treason, like many criminal offenses, allows for the possibility of concurrent jurisdiction. That is, assuming a defendant has "levied war" or otherwise met the definition of treason on the State level as well as against the federal government, that person could therefore be prosecuted by either the state or federal government, or both. The "double jeopardy" clause ("[no person shall] be subject for the same offense to be twice put in jeopardy of life or limb") of the Fifth Amendment to the United States Constitution does not attach or apply to charges or prosecutions by separate sovereigns.[49] As legal scholar Brian McGinty has asserted, "Governor Wise himself recognized that the federal government could properly exercise jurisdiction over Brown" after Virginia

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47 St. George Tucker, *Concerning Treason*, in Blackstone's Commentaries: With Notes of Reference, Appendix, Note B (William Young Birch & Abraham Small, 1803).

48 McGinty, *supra* note 25, at 80.

49 Bartkus v. Illinois, 359 U.S. 121 (1959).

had completed its proceedings.[50] On October 26, 1859, Governor Wise apparently told the *New York Herald*: "I told the officers of the United States that they might have the bodies of the prisoners after Virginia tribunals were done with them."[51] Concurrent jurisdiction for treason was indeed contemplated and agreed upon by a majority of the framers of the Federal Constitution, despite the views of a minority number of members.[52] For instance, George Mason asserted that "the United States will have a qualified sovereignty only. The individual States will retain part of the Sovereignty. An act may be treason agst [sic] a particular State which is not so against the U. States."[53] James Wilson indicated that treason would usually be a crime against the United States, "yet in many cases it may be otherwise."[54] Oliver Ellsworth, a framer to the Constitution, a Senator, and the third Chief Justice to the United States Supreme Court, opined that "the U.S. are sovereign on one side of the line dividing the jurisdictions—the States on the other—each ought to have power to defend their respective Sovereignties."[55] Finally, Roger Sherman stated that treason against both sovereigns was possible, indicating that "resistance agst [sic] the laws of the U-States as distinguished from resistance agst [sic] the laws of a particular State, forms the line."[56]

Brown's lawyers did not contest the sovereignty of Virginia's courts to adjudicate cases of treason generally; instead, they argued that Brown could not be subject to Virginia's treason laws because, as they saw it, one must owe an allegiance to a sovereign State before being prosecuted for the breach of that allegiance or obligation of fidelity.[57] Brown's lawyers were in essence arguing that proof of allegiance was a condition pre-requisite to the prosecution for treason. That is: there is an implicit element of allegiance (and breach of that duty) that must be proven in each treason case. Specifically, during the trial, Brown's lawyers argued that "no man is guilty of treason, unless he be a citizen of the State or Government against which the treason so alleged has been committed."[58] Since Brown was not a Virginian, he "was not bound by any allegiance to this State, and could not, therefore, be guilty of rebellion against it."[59] And again later in the proceedings, Brown's lawyers argued "treason could not be committed against a Commonwealth except by a citizen thereof."[60] This position was in accordance with generations of jurists going back several centuries. Most recently, in connection with the Brown trial, in the 1820 case of *United States v. Wilberger*, U. S. Supreme Court Chief Justice John Marshall stipulated the pre-requisites for a proper treason charge as follows: "treason is a breach of allegiance, and can be committed by him

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50 McGinty, *supra* note 25, at 81.

51 *Speech of Governor Wise at Richmond,* New York Herald, Oct. 26, 1859 (morning edition), at 1.

52 McConkie, *supra* note 1, at 287-289.

53 2 The Records of the Federal Convention of 1787 347 (Max Farrand, ed. 1911).

54 *Id.* at 348.

55 *Id*. at 349.

56 *Id.*

57 *The Trial of John Brown for Treason and Insurrection, Charlestown, Virginia, 1859,* in 6 American States Trials 782 (Lawson, ed. 1916).

58 *Id.*

59 *Id.*

60 *Id.* at 792.

only who owes allegiance (to the sovereign) either perpetual or temporary."[61] At about the same, English jurist William Blackstone explained that treason "imports a *betraying*, treachery, or *breach of faith*."[62]

At a minimum, the class of persons owing loyalty and obedience to the sovereign or the State comprises its citizens and residents. Citizens who breach that loyalty are subject to prosecution for treason. But the precedent set by the text and application of the 1351 treason statute--hailed in 1833 by U. S. Supreme Court Justice Joseph Story as "the polar star of English jurisprudence upon this subject" and "the well-settled interpretation of these phrases in the administration of criminal law"—defines the subjects of allegiance more broadly.[63]

However, writing around 1600, Sir Edward Coke, one of England's most eminent common law jurists and legal scholars, explained: "[a]ll aliens that are within the realm of England, and whose sovereigns are in amity with the king of England, are within the protection of the king, and do owe a local obedience to the king . . . and if they commit high treason against the king, they shall be punished as traitors."[64] Thus, mere presence in the realm of England, rather than actual residence, would seem to be sufficient to create a local allegiance in Coke's interpretation of the 1351 statute. In support of this view, Coke cited his own precedent in a famous common law decision entitled *Calvin's Case*. In the early eighteenth century, William Hawkins contended similarly that "it seems clear, that the subjects of a foreign prince coming into England and living under the protection of our king, may, in respect of that local allegiance which they owe to him, be guilty of high treason."[65] Indeed, "even an ambassador committing a treason [sic] against the king's life, may be condemned and executed here." Finally, William Blackstone, an English jurist whose legal expertise and authority rivaled Coke's (and who was massively influential among American colonial jurists), simply stated that "local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection."[66]

Additionally, the 1776 Continental Congress "Committee on Spies" Resolution offers strong evidence that the eventual framers of the United States Constitution were well aware of the above interpretations of the "allegiance" requirement for treason law (i.e., that even a temporary and passing presence in a territory could make one subject to that territory's treason laws). The "Committee on Spies" was composed of John Adams, Thomas Jefferson, John Rutledge & Robert Livingston. The committee's resolution, obviously enacted at the onset of the Revolutionary War, specified that any person "passing through, visiting, or making a temporary

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61 United States v. Wilberger, 18 U.S. 76, 96 (1820) (emphasis added).

62 4 William Blackstone, Commentaries On The Laws Of England 74-75 (Philadelphia, Everty Duychkinck, George Long, Collins & Co., Collins & Hannay, & Abraham Small, Last London ed. 1822).

63 Carlton F.W. Larson, *Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. Penn. L. J. 853, 873, n. 37 (quoting Joseph Story, Commentaries on the Constitution of the United States §§ 1791, 1793 (1833)).

64 *Id.* at 875 (quoting Edward Coke, Third Part of the Institutes of the Laws of England 2 (London, 5th ed. 1671)).

65 *Id*. at 875-876 (quoting 1 William Hawkins, A Treatise of the Pleas of the Crown, 35 (Savoy 1716)).

66 *Id.* at 877 (quoting William Blackstone's Commentaries on the Laws of England).

stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same time, allegiance thereto." Furthermore, according to the resolution, all persons

> owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony.[67]

Finally, approximately only two years after the Brown case, the United States District Court in Massachusetts (in an 1861 charge to a grand jury as to the definition of treason), instructed that "every sojourner who enjoys our protection, is bound to good faith toward our government, and although an alien, he may be guilty of treason by cooperating either with rebels or foreign enemies."[68] While this statement was made two years after Brown's case, it is a reflection of the common understanding of the jurists of this era in regard to treason--that treason may be committed even by those whose presence in the State is temporary.

The Commonwealth prosecutor of Brown (Andrew Hunter) focused in on the views of Coke and Blackstone delineated above, and argued that treason charges did not require citizenship. The prosecution argued that "the evidence of this case shows, without a shadow of a question, that when this man came to Virginia and planted his feet on Harper's Ferry, he came there to reside and hold the place permanently."[69] While there was not really solid evidence that Brown came to Virginia to "reside" or to "hold the place permanently" beyond his statement to Virginia Governor that he intended to set up a provisional government in Virginia,[70] the court deemed his brief presence in Virginia to be sufficient for purposes of treason charges. Indeed, after closing statements, Brown's lawyers tried one last time, asking for a jury instruction instructing the jury that "if they believed the prisoner was not a citizen of Virginia, but of another State, that they cannot convict on a count of treason."[71] The court refused this jury instruction and Brown was convicted of treason, insurrection and murder after the jury had deliberated for about 45 minutes.[72]

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67 Continental Congress, Committee on Spies (5 June 1776), The Founders' Constitution, U. Chi. P., at https://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s9.html (last accessed on June 10, 2021); *see also*, Journals of the Continental Congress, 1774-1776, Monday, June 24, 1776, at https://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID.+@lit(jc00517)) (last accessed on July 8, 2021).

68 Charge to Grand Jury—Treason, 30 F. Cas. 1039-40 (D. Mass. 1861) (No. 18,273).

69 The Life, Trial And Execution of Capt. John Brown: Being A Full Account of the Attempted Insurrection at Harpers Ferry, Va 92; *see also*, 6 American States Trials, *supra* note 57 at 797.

70 *See infra*, note 89.

71 6 American States Trials, *supra* note 57, at 799.

72 *Id*. at 799-800, 802.

IV. If Legal Residence Is Not Required to Be Charged for Treason Against a State, What Minimum Connections With a State Are Needed? Did Brown Commit Treason Under Virginia Law?

Considering the above laws which clearly indicated that one could be charged with treason even if the charged individual was not a resident or citizen of the State, then what sufficient ties will suffice against a non-resident? The facts of the Brown case are instructive as to this issue. Beyond Brown's appearance in Virginia to conduct his raid from October 16-18, 1859, there is good evidence that Brown visited Virginia multiple times between July and October 1859—thus subjecting himself to the laws and protections of the Commonwealth during those visits. Exactly how many times Brown visited or passed through Virginia during this period is still subject to debate. However, at a minimum, many John Brown sources indicate that Brown arrived at the train depot in Harpers Ferry, Virginia, in early July 1859, before crossing over the Potomac River to find shelter at Sandy Hook, Maryland.[73] Brown had also purchased "picks and shovels in Harpers Ferry" (ostensibly to contribute to his cover story, that he was a mineral prospector) in July 1859.[74] In a summary of Brown's insurrection and trial published immediately after the events in 1859, it is indicated that Brown "bought a large number of picks and spades, that this confirmed the belief that they intended to mine for ores. They were frequently seen in and about Harper's Ferry, but no suspicion seems to have existed that 'Bill Smith' was Capt. Brown, or that he intended embarking in any movement so desperate or extraordinary."[75] In a subsequent inquiry by the United States Senate six months later, John Allstadt was called as a witness and asked if he had ever seen Brown before his attack on Harpers Ferry in October. Allstadt responded as follows:

> I had seen him at Harper's Ferry, on the street; and I had seen him also at the cars [rail station] when the cars would land there; I inquired who he was; he was walking up and down; he was a stranger to me, and I asked who that old gentleman was; they told me his name was Smith; I recognized him when we got to the Armory yard as being that Smith, but they called him Brown then.[76]

And then when asked when and how often Allstadt had seen Brown prior to his attack in October, Allstadt responded that he "had seen him at different times, perhaps a month before that, and perhaps I saw him not two weeks before that; I do not recollect exactly; I saw him at different times."[77] The Senate report also contained

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73 *See, e.g.*, Mason Report, Select Committee of the Senate of the United States on the Harpers Ferry Invasion, June 15, 1860, at 5; Abels, *supra* note 26; Oates, *supra* note 24, at 275); Lubet, *supra* note 3, at 48.

74 Abels, *supra* note 24, at 242.

75 The Life, Trial and Execution of Capt. John Brown, *supra* note 69 at 9.

76 Mason Report, Select Committee of the Senate of the United States on the Harpers Ferry Invasion, June 15, 1860, at 42.

77 *Id.*

numerous documents and letters from Brown, including a letter dated June 30, 1859, where he wrote in part that he was to "leave today for Harper's Ferry…you can write I. Smith & Sons, at Harpers Ferry, should you need to do so."[78] Another townsperson (Wager House clerk W.W. Throckmorton) gave a sworn statement indicating that, again during the late summer, he remembered seeing Brown at the train depot in Harpers Ferry, awaiting the arrival of trains. Jules Abels, in his 1971 book on Brown entitled *Man on Fire*, states that Brown was seen frequently in Harpers Ferry where he purchased "picks and shovels in Harpers Ferry" and received boxes from the train depot which Brown claimed contained mining equipment.[79] Additionally, in fellow-raider John Cook's printed confession, Cook indicates that he met John Brown in the streets of Harpers Ferry, Virginia, outside Tearney's store on Shenandoah Street in downtown Harpers Ferry, in late summer 1859 (i.e., late July or early August).[80] Law Professor Steven Lubet has described Brown's trips to Harpers Ferry, Virginia, as both frequent and conspicuous: "[H]e traveled freely around the area…he made a point of reconnoitering Harpers Ferry in person, familiarizing himself with the layout of the streets, bridges, trestles, as well as the locations and entranceways of important buildings…[and] the two men boldly met in broad daylight on Shenandoah Street in the center of Harpers Ferry."[81]

At Brown's trial, at least two witnesses testified that they recognized Brown as the same man they had previously seen in town. Another eyewitness to the event wrote that Brown had bought a horse "from a Harper's Ferry horse trader."[82] Further, in his famous post-Civil War era book, *I Rode with Stonewall*, Henry Kyd Douglas recalls an incident in which he helped a man (whom he realized, after the raid, to have been Brown) to get his stuck wagon out of the mud. This incident occurred "outside" of Shepherdstown, Virginia, "at the foot of the hill which rises from the [Potomac] river."[83] Brown traveled extensively in late July and early August and very likely passed through points in Virginia on his way to Chambersburg, Pennsylvania, and elsewhere, as he did in the incident with Henry Kid Douglas. Any of these incidents, or some combination of them, would be sufficient to show Brown's temporary presence in Virginia at various times from July through October 1859. And if Brown was in Virginia temporarily, benefiting from the protection of Virginia laws, even if not residing there, he was arguably also bound by Virginia's laws (including its treason law)— "allegiance and protection being reciprocal," as one of Brown's lawyers put it.

At the time of Brown's trial, there seems to have been very little debate outside of court among lawyers (North or South) about the possibility of whether an alien could nonetheless be convicted of treason by a State "foreign" to the alien. Indeed, most lawyers seemed to have taken this proposition for granted. For instance, on the day of Brown's execution on December 2, 1859, Abraham Lincoln gave a speech in Troy, Kansas, condemning the Harpers Ferry raid. While Lincoln's condemnation of Brown is commonly referenced, his emphasis on the crime of treason against a

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78 *Id.* at 71.

79 Abels, *supra* note 24, at 242.

80 Richard J. Hinton, 2 John Brown and His Men 705 (1894).

81 Lubet, *supra* note 3, at 53 (2012).

82 Joseph Barry, Strange Story of Harpers Ferry 71 (The Shepherdstown Register) (1994) (1903)

83 Henry Kyde Douglass, I Rode With Stonewall 2 (U. N. Ca. P.) (1969) (1940)

State and on the propriety of the verdict is particularly relevant here: "Old Brown has been executed *for treason against a State. We cannot object,* even though he agreed with us in thinking slavery wrong. That cannot excuse violence, bloodshed, and treason."[84] William Seward, another prominent lawyer and legislator, soon to be Lincoln's Secretary of State, commented that all good citizens would agree "that this attempt to execute an unlawful purpose in Virginia by invasion, involving servile war, was an act of sedition and treason, and criminal in just the extent that it affected the public peace and was destructive of human happiness and life."[85]

Finally, there are strong arguments, summarized by Brian McGinty in his book, *John Brown's Trial*, that Brown owed allegiance to Virginia based upon the Privileges and Immunities Clause of the U.S. Constitution (Article IV, sec. 2), which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The Clause, in essence, sets forth the requirement that a citizen of one State who goes to another State enjoys the same protections (privileges and immunities) in that second State as that second State affords to its own citizens. Virginia prosecutor Andrew Hunter attempted to articulate this concept when he said in court:

> Brown came here with the immunities given by the Constitution. He did not come divested of the responsibilities belonging to those immunities. Let the word treason mean breach of trust, and did he not betray that trust with which, as a citizen, he is invested when within our borders? By the Federal Constitution, he was a citizen when he was here, and did that bond of Union--which may ultimately prove a bad bond to us in the South--allow him to come into the bosom of the Commonwealth, with the deadly purpose of applying the torch to our buildings and shedding the blood of our citizens?[86]

The fact that two of the black raiders who were tried (Shields Green & John Copeland) were not ultimately convicted of treason—because they were not citizens of the United States under the infamous *Dred Scott v. Sanford* ruling—reinforces McGinty's argument.

The most damning evidence of Brown's treasonous intent and his guilt as far as treason was concerned, as defined by Virginia's treason statute, lay not in any act of violence that he committed between October 16-18, 1859, but rather in a document that he authored eighteen months earlier. As most Brown scholars are aware, Brown's "Provisional Constitution and Ordinances for the People of the United States" (drafted partially in the home of Frederick Douglas in February of 1858) was roughly modeled on the U.S. Constitution, which it sought to reform by excising—indeed criminalizing and rendering subject to extreme penalties—the institution of slavery. Brown's *Provisional Constitution*, a blueprint for the organization and governance of his followers if their abolitionist enterprise should last, was read to all his men on Sunday morning, October 16, 1859, immediately

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84 Oswald Garrison Villard, John Brown 1800-1859: A Biography Fifty Years After 564 (Houghton Mifflin) (1910) (emphasis added).

85 *Id.*

86 The Life, Trial And Execution of Capt. John Brown: *supra* note 69,at 3.

preceding the raid. As described by Truman Nelson, "it was a Declaration of Independence from the United States they knew."[87]

Brown's *Provisional Constitution* was submitted as evidence in Brown's trial and the Preamble, along with Articles 7, 45, and 48, were read into the record.[88] Article 48 directed that all persons associated with Brown's *Provisional Constitution* should take an oath of allegiance to the newly constituted government. While Article 46 of Brown's Constitution specified that it was not designed to overthrow the U.S. Government or State governments, the document nonetheless established a competing government designed by Brown, with offices and officers (including Brown as Commander in Chief, John Kagi as Secretary of War, etc.).[89] When Brown was asked by Governor Wise on October 17, 1859, where he intended to set up his "provisional government," Brown responded "here, in Virginia, where I commenced operations."[90] This statement not only lent strength to the argument that Brown intended to stay in Virginia for some time and was not merely a transitory character, but also that he violated a very peculiar aspect of Virginia's treason statute (as explained directly below).

Under Virginia's treason statute, "establishing, without authority of the legislature, any government within its limits separate from the existing government; ... or [h]olding or executing, in such usurped government, any office, or professing allegiance or fidelity to it" constituted treason.[91] The prosecutor Andrew Hunter very persuasively argued as follows:

> The prisoner had attempted to break down the existing Government of the Commonwealth, and establish on its ruins a new Government: he had usurped the office of Commander-in Chief of this new government, and, together with his whole band, professed allegiance and fidelity to it; he represented not only the civil authorities of the state, but his own military; he is doubly, trebly and quadruply [sic] guilty of treason.[92]

Brown's lawyers weakly argued that his *Provisional Constitution* represented a "social club" of sorts, a claim obviously belied by the revolutionary purposes that it articulated and actions that it underwrote. Brown's lawyer (Griswold) tried to explain away the treasonous *Provisional Constitution* as a harmless "pamphlet"[93] that encouraged comradery akin to a "debating society."[94] Specifically, Griswold argued

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87 Nelson, *supra* note 24, at 90.

88 *Id.* at 220.

89 For a complete copy of John Brown's "Provisional Constitution for the People of the United States," see Mason's Report, Select Committee of the Senate of the United States on the Harpers Ferry Invasion, June 15, 1860, at 48-59.

90 Andrew Hunter, *Testimony of Andrew Hunter before the Senate Select Committee on Harper's Ferry*, January 13, 1860, Masons Report. Washington, DC, 1860 at 61.

91 Virginia Code of 1849, chap. 190, §1.

92 The Life, Trial And Execution of Capt. John Brown, *supra* note 69.

93 *Id.* at 86.

94 *Id*.

> how many harmless organizations have existed in the world at various times, surrounded with all the outside forms and machinery of government! Aye, even as harmless things as debating societies have been so organized, congresses created, resolutions and laws discussed, and anyone reading the bulletins and reports issued from time to time from these associations would say, why here is a miniature government within the very limits of our state.[95]

Brown's other lawyer (Chilton) was equally unconvincing, describing the *Provisional Constitution* as creating "an association or copartnership….it did not contemplate a Government, but merely a voluntary association to abolish Slavery."[96] A plain reading of this document makes clear that Brown intended to create a new government devoid of slavery, with himself named as Commander-in-Chief, and with other offices and even a Congress.

The other aspect of Brown's criminal culpability for treason came in his "levying war" against the Commonwealth. What constitutes "levying war?" James Wilson, relying quite heavily on English jurists like Coke and Blackstone, defined "levying war" as including any of the following actions:

> [i]nsurrections in order to throw down all inclosures, to open all prisons, *to enhance the price of all labour*, to expel foreigners in general, or those from any single nation living under the protection of government, *to alter the established law, or to render it ineffectual--insurrections to accomplish these ends, by numbers and an open and armed force, are a levying of war* against the United States.[97]

In addition to establishing an unauthorized government within Virginia, holding office under this new government, and taking an oath of fidelity to it, Brown also "levied war" against the Commonwealth in several of the senses stipulated above. Indeed, the whole point of Brown's raid was to render the law of slavery in Virginia "ineffectual" and thus to "alter the established law." Based on this evidence, Brown was guilty of the crime of treason, as defined by Virginia.

However, it is interesting to briefly consider whether Brown himself considered his actions to be treasonous against the Commonwealth of Virginia. At his trial, Brown remarked that he "never did intend murder or treason, or the destruction of property, or to excite or incite the slaves to rebellion, or to make insurrection."[98] This comment by Brown seems disingenuous, as the whole point of the Brown's attack on Harpers Ferry was to spirit away the enslaved from bondage, and violence was certainly foreseeable. Indeed, Brown told one of his major financial supporters that if he were successful in his southern plans, "the whole country from the Potomac to Savannah would be ablaze."[99] Phrased another way, while his primary motivation may not have been to commit "murder" or "treason," he certainly intended actions where "murder" and/or "treason" were quite foreseeable. Additionally, at least

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95 *Id.*
96 *Id.* at 90.
97 Wilson, *supra* note 42, at 668 (emphasis added).
98 *Proceedings of the Court,* New York Herald, Nov. 3, 1859 (morning edition) at 3.
99 Oates, *supra* note 24, at 48.

one of Brown's hostages testified that Brown acknowledged that his actions were treasonous while he was still under siege by U.S. forces while holed-up in the Armory Engine House on October 17, 1859. Ironically, this witness, John E.P. Daingerfield, was called by Brown's lawyers as a defense witness in the case and was not called as part of the Commonwealth's case against Brown. As part of his testimony, Daingerfield recounted a conversation that he overheard just before the Engine House was assaulted by the U.S. Marines. During this conversation, according to Daingerfield's sworn testimony, Brown was asked by one his men if they were "committing treason," to which Brown answered in the affirmative.[100] There is no recorded objection by Brown to Daingerfield's comments in court.

Further, in 1885, Daingerfield wrote an article about his experiences during John Brown's raid, from the perspective of one of the hostages. In the article, which was published in June 1885 by *The Century* magazine, Daingerfield recounted the story of a conversation he had with Brown on the eve of the storming of the Engine House by U.S. Marines (the one to which he testified in October 1859):

> During the night I had a long talk with Brown and told him that *he and his men were committing treason against the State and the United States*. Two of his men, hearing the conversation, said to their leader, 'Are we committing treason against our country by being here?' Brown answered 'Certainly.' Both said, 'If that is so, we don't want to fight anymore. We thought we came to liberate the slaves, and did not know that was committing treason.'[101]

If the conversation did take place as told by Daingerfield, then it shows that Brown realized that he was committing a treasonous act, not only against the United States, but also against the Commonwealth of Virginia.

As illustrated above, contrary to the many accusations of legal errors in Brown's case, his indictment and conviction for treason were sound. Brown had a temporary presence in Virginia prior to his raid, and he consequently breached his duty of allegiance by both attempting to form an illegitimate government within the Commonwealth, as well as "levying war" against it. Thus, the chief lesson of Brown's case that is still pertinent today is obvious: One does not need to be a citizen or resident for treason laws to apply; only a stay of a temporary nature or minimum contacts with the State is required. This means that the most serious criminal offense that a State may levy against an accused--the crime of treason--may be utilized against those who silently enter a territory for purposes of levying war or crimes against the State--even if the individual is not a citizen or resident of the State.

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[100] *The Fourth Day's Proceedings,* New York Herald, Oct. 31, 1859, at 1 (emphasis added).

[101] John E.P. Daingerfield, *John Brown at Harpers Ferry: The Fight at the Engine House, as Seen by One of His Prisoners*, in The Century 265-267 (1885).

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The Fate of Lethal Injection: Decomposition of the Paradigm and Its Consequences[1]

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ABSTRACT

This article examines the use of lethal injection from 2010-2020. That period marks the "decomposition" of the standard three-drug protocol and the proliferating use of new drugs or drug combinations in American executions. That development is associated with an increase in the number and type of mishaps encountered during lethal injections. This article describes and analyzes those mishaps and the ways death penalty jurisdictions responded, and adapted, to them. It suggests that the recent history of lethal injection echoes the longer history of the death penalty. When states encountered problems with their previous methods of execution, they first attempted to address these problems by tinkering with their existing methods. When tinkering failed, they adopted allegedly more humane execution methods. When they ran into difficulty with the new methods, state actors scrambled to hide the death penalty from public view. New drugs and drug combinations may have allowed the machinery of death to keep running. New procedures may have given the lethal injection process a veneer of legitimacy. But none of these recent changes has resolved its fate or repaired its vexing problems.

KEYWORDS

death penalty, lethal injection, execution methods, botched executions

CONTENTS

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Introduction

In April 2017, with its supply of lethal injection drugs about to expire and with 32 inmates still on its death row,[2] the state of Arkansas announced that it would perform eight executions over 11 days. Though legal problems halted half of them, the other half were carried out as planned. At the time, Arkansas's last execution had taken place in 2005. In that execution, the state used the well-established, "traditional" three-drug lethal injection cocktail: sodium thiopental, pancuronium bromide, and potassium chloride.

Eight years later, in 2013, after failing to obtain new supplies of those drugs, Arkansas adopted a new execution protocol which called for the use of lorazepam and phenobarbital.[3] Critics noted that those drugs had never before been used in an execution and that they were unlikely to cause death quickly, if at all.[4] In 2015, the state retreated and once again changed its drug protocol. This time, it adopted a three-drug cocktail that was being used by some other states. It began with midazolam, a sedative, and followed it with vecuronium bromide and potassium chloride.[5]

The first of Arkansas's 2017 executions, and its first using midazolam, was that of Ledell Lee, who had been sentenced to death in 1995 for the rape and murder of his 26-year-old neighbor, Debra Reese. Lee had two trials. Several alibi witnesses testified during his first trial, which ended in a hung jury. At his second trial, the defense inexplicably called no alibi witnesses, and the jury found Lee guilty.[6] On the eve of his execution, The Innocence Project and the ACLU appealed to the Arkansas Supreme Court on the grounds that DNA evidence from the crime scene had never been tested with modern technology. The court refused to stay Lee's execution, arguing that this last minute appeal came too close to the scheduled execution date. The execution proceeded on April 20th, ten days before Arkansas's batch of new lethal injection drugs would expire.

After placing intravenous lines (IVs) in Lee's arms, Arkansas's execution team started the flow of midazolam at 11:44 p.m.[7] Slowly, Lee's eyes shut as he swallowed repeatedly. The coroner pronounced him dead 12 minutes after the execution began. Unlike some of the midazolam executions[8] in other states, Lee's appeared to go off without a hitch. Emboldened by its apparent success, Arkansas went ahead with its plan to kill Jack Jones four days later.

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2 This figure was found by taking Arkansas's current death row population, subtracting the number of people sentenced since 2017, and adding the number of people executed in 2017 ("Death Row" 2021; "Executions" 2021).

3 Ark. Dep't of Corrections, Lethal Injection Procedure (Attachment C) (2013).

4 Jeannie Nuss, Arkansas Turns to Different Lethal Injection Drug, AP News, April 19, 2013, sec. Prisons, https://apnews.com/article/2dc13f1b27904f18ae322a587c21db99.

5 Ark. Dep't of Corrections, Lethal Injection Procedure (Attachment C) (2015).

6 Ed Pilkington, *'The New Evidence Raises Deeply Troubling Questions': Did Arkansas Kill an Innocent Man?*, The Guardian (Jan. 23, 2020), https://www.theguardian.com/us-news/2020/jan/23/arkansas-death-penalty-ledell-lee-execution.

7 Aziza Musa, Eric Besson & John Moritz, *Arkansas Carries out 1 execution; at 11:56p.m., drugs end Lee's life*, Arkansas Democrat Gazette (Apr. 21, 2017), https://www.arkansasonline.com/news/2017/apr/21/state-carries-out-1-execution-20170421/.

8 Previous midazolam executions had been botched and riddled with mishaps. The Associated Press, *Witnessing Death: AP Reporters Describe Problem Executions*, AP News (Apr. 29, 2017), https://apnews.com/article/bd583ccb99544d9cbe45a60f0afeed55.

As a young child, Jack Jones's father abused him, and he suffered "sexual abuse at the hands of three strangers who abducted and raped him."[9] By 1994, Jones was a suicidal 30-year-old with bipolar disorder, depression, and ADHD. On a June night in 1995, Jones broke into an accountant's office in Bald Knob, Arkansas. There, he found a book-keeper named Mary Phillips and her 11-year old daughter, Lacy. After attempting to rob Mary, Jones bound her to a chair, raped her, and strangled her with a cord. Jones then assaulted Lacy, strangling her and crushing her skull.[10]

When they arrived, investigators found Lacy in a closet tied to an office chair.[11] Miraculously, she survived and was able to testify at her assailant's trial. There was, however, little doubt about Jones's guilt. When first questioned by police, he waived his Miranda rights and confessed to the crime.[12] During his sentencing, the jury found that aggravating factors, including the cruelty of his crime and his previous criminal record, outweighed his troubling childhood. They sentenced him to death.

More than two decades after the sentencing, guards steered the wheelchair-bound Jack Jones[13] into Arkansas's death chamber. When the witnesses arrived at 7:00 p.m., Jones was already strapped to a gurney, intravenous lines sticking out of his arms. At 7:06 p.m., the warden wiped a hand over his face, signaling the start of the execution.[14]

Throughout the fourteen-minute execution, correctional staff checked Jones's consciousness by sticking a tongue depressor in his mouth, "lifting his eyelids and rubbing his sternum."[15] According to Jones's lawyer, Jack began to gasp and gulp for air four minutes into the execution—a sign that he was experiencing physical pain. Witnesses said that his mouth moved like a "fish... chomping on bait."[16] Soon, the movement slowed and the team declared Jones dead at 7:20 p.m..

His legal team and state officials interpreted the movement of the inmate's mouth in different ways. Jones's lawyers contended that he "was moving his lips and gulping for air [which is] evidence that the [midazolam] did not properly sedate him."[17] They called Jones's death "torturous." A Department of Corrections spokesperson

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9 Lindsey Millar, *The Jack Jones, Marcel Williams Execution Thread*, Ark. Times (Apr. 24, 2017), https://arktimes.com/arkansas-blog/2017/04/24/the-jack-jones-marcel-williams-execution-thread.

10 *Id.* Eric Besson, John Moritz & Lisa Hammersly, *2 Killers Executed Hours Apart*, Ark. Times (Apr. 24, 2017), https://www.arkansasonline.com/news/2017/apr/25/2-killers-executed-hours-apart-20170425.

11 Rolly Hoyt, *Lawmen Recall Jack Jones' Chilling Murder, Rape of Mary Phillips,* THV11 (Apr. 25, 2017), https://www.thv11.com/article/news/local/lawmen-recall-jack-jones-chilling-murder-rape-of-mary-phillips/91-433258301.

12 Jones v. State, 329 Ark. 62, 947 S.W.2d 339 (Ak. Sup. Ct. 1997).

13 He developed diabetes in prison and had a leg amputated.

14 Andrew DeMillo & Kelly P. Kissel, *Arkansas Executes 2 Inmates on the Same Gurney, Hours Apart*, AP News (Apr. 25, 2017), https://apnews.com/article/health-us-news-arkansas-ar-state-wire-ap-top-news-f5105c1f0d4e4accab1130e0fe4d7ef3.

15 Ed Pilkington, Jamiles Lartey & Jacob Rosenberg, *Arkansas Carries out First Double Execution in the U.S. for 16 years*, The Guardian (Apr. 25, 2017), https://www.theguardian.com/us-news/2017/apr/24/arkansas-double-executions-supreme-court-jack-jones-marcel-williams.

16 Besson, Hammersly & Moritz, *supra* note 10.

17 *Id.*

disagreed, stating that, "the inmate was apologizing to the department director, Wendy Kelley, and thanking her for the way she treated him."[18] During Jones's execution, the prison staff shut off the death chamber microphone before the lethal injection began, which was standard procedure in Arkansas.[19] Had the microphone been on, we might have a better understanding of Jack Jones's final moments.

Witnesses also could not see the problems that ensued an hour earlier when the state made several attempts to place an adequate IV. For 45 minutes, they could not find a suitable vein.[20] In a detailed timeline of the execution, Arkansas officials claimed that it only took eight minutes to place Jones's IV. Yet the autopsy report notes that medical examiners "found five needle marks on Jones's neck and clavicle... area" that were covered up with makeup.[21]

The same day it executed Jones, Arkansas also put Marcel Williams to death. Williams had been convicted and sentenced to death for the 1997 kidnapping, rape, and murder of a 22-year-old mother, Stacy Errickson.[22] The Williams execution lasted 17 minutes. Witnesses reported that he moved "up until three minutes before he was declared dead."[23] According to Jacob Rosenberg, one of the media witnesses at the execution, "His eyes began to droop and eventually close... His breaths became deep and heavy. His back arched off the gurney [countless times] as he sucked in air."[24] Throughout the execution, state officials conducted consciousness checks by feeling his pulse and touching his eyes. After one check, a member of the execution team could be seen whispering "I'm not sure."[25] In a statement to the press, Williams's lawyer said that he was "gravely concerned" about the execution and feared that Williams was conscious and in pain during the procedure.[26]

The executions of Jack Jones and Marcel Williams were followed by an even more troubling execution three days later—the fourth and final killing of the week. This time, it was Kenneth Williams whom Arkansas put to death. Williams grew up in an abusive household.[27] By the time he was 9 years old, "Williams joined a street

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18 DeMillo & Kissel, *supra* note 14.

19 Kelly P. Kissel, *New Issue in Executions: Should the Death Chamber be Silent?*, AP News (Apr. 26, 2017), https://apnews.com/article/us-news-arkansas-ar-state-wire-ap-top-news-executions-fdedd42653d94e42b7e78ca56dc22355.

20 Andrew DeMillo & Kelly P. Kissel, *Arkansas Executes 2 Inmates on the Same Gurney, Hours Apart*, AP News (Apr. 25, 2017), https://apnews.com/article/health-us-news-arkansas-ar-state-wire-ap-top-news-f5105c1f0d4e4accab1130e0fe4d7ef3.

21 John Moritz, *4 Arkansas Inmates Died of Injection, Recently Completed Reports Show*, Ark. Democrat Gazette (Jun. 8, 2017), https://www.arkansasonline.com/news/2017/jun/08/4-state-inmates-died-of-injection-20170.

22 Frank E. Keating, *Arkansas Jurors Were Never Told of Marcel Williams' Life; Grave Error, Judge Said*, Ark. Democrat Gazette (Apr. 24, 2017), https://www.arkansasonline.com/news/2017/apr/25/jurors-were-never-told-of-williams-life/.

23 Fiona Keating, *Judge Orders Blood and Tissue Samples from Botched Arkansas Execution Body for Autopsy*, Int'l Bus. Times (Apr. 30, 2017), https://www.ibtimes.co.uk/judge-orders-blood-tissue-samples-botched-arkansas-execution-body-autopsy-1619352.

24 Jacob Rosenberg, *Arkansas Executions: 'I was watching him breathe heavily and arch his back'*, The Guardian (Apr. 25, 2017), http://www.theguardian.com/us-news/2017/apr/25/arkansas-execution-eyewitness-marcel-williams.

25 Kissel, *supra* note 19.

26 Keating, *supra* note 23.

27 Erika Ferrando & Kaitlin Barger, *Kenneth Williams, Convicted Murderer of UAPB Cheerleader, to Be Executed Thursday*, THV 11 (Apr. 28, 2017), https://www.thv11.

gang called the Gangster Disciples. Two years later he was molested by another boy."[28] According to testimony at his clemency hearing, he decided to become "the predator, not the prey" at a young age.[29] In 1998, he kidnapped and killed a college cheerleader, Dominique Hurd. After spending less than a year in prison, Williams "escaped by hiding in a hog slop-filled tank of a garbage truck."[30] Once outside the prison, he shot a former prison warden, stole his truck, and led police on a high-speech chase during which he hit and killed another man. For his new slew of crimes, he was sentenced to death in August 2000.[31]

On April 27, 2017, Williams became the 200th person, and the 140th black man, executed in Arkansas since 1913.[32] It was the first time since 1999 that Arkansas executed two people in a single day.[33] About three minutes after receiving a dose of midazolam, Williams began to thrash about and convulse on the gurney. One reporter said that he "lurched forward 15 times, then another five times, more slowly" before gasping and taking labored breaths.[34] Witnesses could hear the inmate moaning and groaning.

Despite those widely-reported details, state officials insisted that everything went as planned, calling the execution "flawless." A Department of Corrections spokesperson insisted that "Williams [only] coughed without sound—in direct contradiction of media witness testimony."[35] Governor Asa Hutchinson refused to heed calls for an investigation and reportedly "remained confident in the state's protocol."[36]

Yet an independent autopsy confirmed that Williams's execution was anything but flawless. Joseph Cohen, the California-based pathologist who conducted it, concluded that Williams "experienced pain" and likely felt "a sensation of air hunger, fear, shortness of breath, respiratory distress, and dizziness."[37] The press and Williams's legal team described his execution as a "horrifying" botch.[38]

This single week in Arkansas provides a window into the fate of lethal injection and the consequences of the decomposition of the standard three-drug-protocol. For every lethal injection during the more than thirty years between 1977 and 2009, states used only a single lethal injection protocol. However, drug shortages beginning in 2009 forced death penalty states to make a lethal choice. They could

com/article/news/local/kenneth-williams-convicted-murderer-of-uapb-cheerleader-to-be-executed-thursday/91-434214516.

28 Olivia Messer, *Gangster by 9, Murderer by 19, Minister by 26, Executed by 39?* The Daily Beast (Apr. 17, 2017), https://www.thedailybeast.com/articles/2017/04/17/gangster-by-9-murderer-by-19-minister-by-26-executed-by-39.

29 *Id.*

30 Ferrando & Barger, *supra* note 27.

31 Liliana Segura, *Arkansas Justice: Racism, Torture, and a Botched Execution*, The Intercept (Nov. 12, 2017), https://theintercept.com/2017/11/12/arkansas-death-row-executions-kenneth-williams.

32 In 1913, Arkansas switched from hanging to electrocution. *Id.*

33 Pilkington, Lartey & Rosenberg, *supra* note 15.

34 Segura, *supra* note 31.

35 Phil McCausland, *Arkansas Execution of Kenneth Williams 'Horrifying': Lawyer*, NBC News (Apr. 27, 2017), https://www.nbcnews.com/storyline/lethal-injection/arkansas-executes-kenneth-williams-4th-lethal-injection-week-n752086.

36 *Id.*

37 Moritz, *supra* note 21.

38 McCausland, *supra* note 35.

halt capital punishment, revive defunct methods of execution, or try new ways of carrying out lethal injection. Most made the third choice, turning to untested drugs and drug combinations.

As a result, over the course of the last decade, the lethal injection paradigm decomposed. For many years, lethal injection involved the use of a single drug combination. Now it signifies an execution method that uses a wide variety of drugs and procedures.

Even as it encountered mishaps in its rapid-paced executions, Arkansas did not slow down. Instead, it hid behind various provisions in its execution procedure—such as inserting the IV behind a curtain and switching off the microphone after an inmate's final words—that obscured key parts of the execution process from view. The state insisted, against considerable evidence to the contrary, that all went according to plan. More than three years later, a federal court cleared Arkansas to continue using midazolam in its executions as long as it tweaked its procedures slightly.[39] This pattern of mishaps and responses is paradigmatic of the practice of lethal injection across the United States.

This article shows that as lethal injection protocols and drugs proliferated and as the paradigm decomposed, executions became more error-prone and unpredictable. At the same time, states revised their protocols in ways that made it harder to say when executions did not conform to those protocols' requirements. In Part 1, we recount the origins of the once-standard three-drug protocol. In Part 2, we discuss that protocol's collapse and the rise of new lethal injection techniques. In Part 3, we discuss what happened in the execution chamber during lethal injections carried out between 2010 and 2020 and show that as states switched to new drug protocols, lethal injection became more mishap-prone. In Part 4, we examine state responses to the threat mishaps pose to lethal injection. In the face of criticism, they adopted secrecy statutes and adjusted their procedural documents to both prevent and obscure mishaps. In our conclusion, we take up what lethal injection's decomposition means for the practice itself and for America's continuing use of capital punishment.

I. Lethal Injection's Early Years

A. Lethal Injection Is Born in Oklahoma

In July 1976, the Supreme Court ended a four-year de facto moratorium on the death penalty when it announced its decision in the landmark case *Gregg v. Georgia*.[40] After *Gregg*, every death penalty state reinstated capital punishment, and Oklahoma was no exception. The same month the *Gregg* decision was announced, Oklahoma Governor David Boren convened a special legislative session to swiftly restore capital punishment.[41] At the time, Oklahoma law designated the electric chair as

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39 Andrew DeMillo, *Federal Judge Upholds Use of Sedative in Arkansas Executions*, AP News (Jun. 2, 2020), https://apnews.com/article/c3bdd9dc861f99d24aaceba12569fbb2.

40 428 U.S. 153 (1976).

41 Von Russell Creel, *Capital Punishment*, The Encyclopedia of Okla. Hist. and Culture, https://www.okhistory.org/publications/enc/entry.php?entry=CA052, visited Nov. 1, 2021.

its method of execution. However, the state's only electric chair was no longer in working condition.[42]

Responding to this situation, State Senator Bill Dawson and State Representative Bill Wiseman proposed that the state adopt a new method of execution: lethal injection. Though New York State first considered adopting lethal injection in 1888, the method had never been used to execute an inmate in the United States or elsewhere.[43] Dawson and Wiseman argued that lethal injection had two clear advantages over other methods. First, it was much cheaper than other methods of execution, including electrocution, lethal gas, hanging, or shooting.[44] They also claimed, without any evidence, that it would be more humane. Death could be accomplished with "no struggle, no stench, no pain."[45]

For advice about which drugs might be used, they reached out to the Oklahoma Medical Association which refused to help for fear of possibly violating medical ethics. They had trouble enlisting help from other medical practitioners until they consulted A. Jay Chapman, Oklahoma's chief medical examiner. Later, Chapman described himself as "an expert in dead bodies but not an expert in getting them that way."[46]

Believing that lethal injection would be less violent and gruesome than the electric chair, Chapman offered a blueprint for Oklahoma's lethal injection law: "an intravenous saline drip shall be started in the prisoner's arm, into which shall be introduced a lethal injection consisting of an ultrashort-acting barbiturate in combination with a chemical paralytic."[47] This language would quickly become the model for many states' lethal injection laws.

The proposal to adopt lethal injection was very controversial among death penalty supporters. Some argued that making executions less gruesome and painful would weaken the death penalty's deterrent effect. Others said that it would prompt suicidal people to commit murders in hopes of dying painlessly via lethal injection.[48] Few disputed the premise that this new execution method was indeed more humane than other methods.

During Oklahoma's legislative debate, State Senator Gene Stipe offered an amendment to limit the duration of lethal injections.[49] He argued that if there was no such limit, the condemned might languish between life and death for hours or even days. Stipe proposed a five-minute limit, contending that the longest recorded hanging in American history lasted four minutes and fifty-eight seconds and no electrocution exceeded five minutes. The amendment failed, but not before the bill's sponsors remarked that they expected most executions to take less than five minutes.

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42 *3rd Reading*, S.B. 10, 36th Leg., 1st Sess. (Ok. 1977).

43 Elbridge Gerry, Alfred P. Southwick & Matthew Hale, Report of the Commission to Investigate and Report the Most Humane and Practical Method of Carrying into Effect the Sentence of Death in Capital Cases (1888).

44 *3rd Reading*, S.B. 10, 36th Leg., 1st Sess. (Ok. 1977).

45 Vince Bieser, *A Guilty Man*, Mother Jones (Sept. 1, 2005), https://www.motherjones.com/politics/2005/09/guilty-man.

46 Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 Fordham L. Rev. 49, 66 (2007).

47 *Id.* at 66–67.

48 *Motion to Reconsider Vote*, S.B. 10, 36th Leg.,1st Sess. (Ok. 1977).

49 *3rd Reading*, S.B. 10, 36th Leg., 1st Sess. (Ok. 1977).

After extensive debate, the Oklahoma State Senate passed the lethal injection bill by a 26-20 vote. The House soon followed suit, 74-18. On May 11, 1977, the governor signed legislation making Oklahoma the first state to adopt lethal injection as its method of execution.

Initially, the state's new execution protocol called for the use of only two drugs: sodium thiopental, the "ultrashort-acting barbiturate" that would anesthetize the inmate, and pancuronium bromide, the "chemical paralytic" that would asphyxiate the inmate. Potassium chloride, the final piece of the traditional three-drug protocol that stops the heart, was added to the protocol four years later, before anyone was put to death by lethal injection. Oklahoma's lethal injection statute made no mention of a third drug.[50]

B. The Diffusion of Lethal Injection

As Senator Dawson hoped, the new lethal injection law "put Oklahoma in one of those rare instances of being a pioneer."[51] However, at the same time that Oklahoma's bill was up for debate, Texas's legislature considered a bill that would change the state's method of execution from electrocution to lethal injection. In Texas, lethal injection's proponents stressed that it would be a less violent alternative to electrocution. Texas Representative George Robert Close described electrocution as "a very scary thing to see. Blood squirts out of the nose. The eyeballs pop out. The body almost virtually catches fire. I voted for a more humane treatment because death is pretty final. That's enough of a penalty."[52] W. J. Estelle, the director of Texas's Department of Corrections, argued that "the lethal injection method suits our state of civilization more than electrocution."[53]

In Texas, other death penalty supporters worried that lethal injection provided an easy way out for criminals. They claimed that its supposed lack of pain and violence defeated the primary purpose of the death penalty—to deter future crimes. Underlying their objection to lethal injection was a belief that vicious murderers do not deserve to die painlessly or more humanely than their victims.

Death penalty opponents also objected to Texas's lethal injection bill, arguing that the death penalty is inhumane and cruel, regardless of the method used.[54] Abolitionists were concerned that switching to lethal injection, which better masks signs of violence and pain, would "salve the public conscience" and open an execution floodgate.[55] Pointing to the fact that black inmates were much more likely to get the death penalty for similar crimes than their white counterparts, critics added that the apparent humanity of lethal injection would not benefit the condemned. Instead it would benefit "the affluent white majority which kills blacks, browns

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50 Denno, *supra* note 46, at 74.

51 *Motion to Reconsider Vote*, S.B. 10, 36th Leg., 1st Sess. (Ok. 1977).

52 Jonathan R. Sorensen & Rocky LeAnn Pilgrim, Lethal Injection: Capital Punishment in Texas during the Modern Era 9 (1st ed. 2006).

53 *Id.* at 10.

54 *Id.* at 9-11.

55 House Study Group Bill Analysis of HB 945 1977, https://lrl.texas.gov/legis/billsearch/text.cfm?legSession=65-0&billtypeDetail=HB&billNumberDetail=945&billSuffixDetail, accessed Nov. 1, 2021.

and poor 'white n-' in the name of Texas."[56] Abolitionist groups packed House committee hearings hoping to pressure lawmakers to halt all state executions.[57]

Despite these efforts, Texas became the second state to adopt lethal injection on May 12, 1977, one day after Oklahoma. Texas's statute was almost identical to Oklahoma's and did not name specific drugs.[58] After spending several months considering various drugs and drug combinations, the Texas Department of Corrections decided to use "sodium thiopental in lethal doses."[59] And, like Oklahoma, Texas added pancuronium bromide and potassium chloride before carrying out the nation's first lethal injection in 1982.

Death penalty states across the United States quickly followed Oklahoma and Texas in adopting lethal injection. Between 1977 and 1982, Idaho, New Mexico, Washington, and Massachusetts switched to lethal injection.[60] Unlike Oklahoma and Texas, which executed a combined total of 681 inmates between 1976 and 2020, these four states have executed only nine inmates among them over the same time period.[61] Three of these early-adopters—New Mexico, Washington, and Massachusetts—have since abolished the death penalty.

In December 1982, Texas used its three drug lethal injection protocol for the first time in the execution of Charles Brooks Jr.[62] This first lethal injection eerily mirrored America's first electrocution. In August 1890, New York prison guards strapped William Kemmler to an electric chair, covered his face, and shot 1,000 volts of electric current through his body for 17 seconds.[63] Kemmler's body writhed and caught fire, but he continued to breathe heavily, his chest expanding and contracting as drool fell down his chin.[64] The warden quickly ordered a second wave of currents. This time, 2,000 volts of electricity went through Kemmler for seventy-three seconds, causing his blood vessels to rupture. In stark contrast to the quick and humane death that the new technology promised, Kemmler's electrocution was tortuously long and filled the chamber with the odor of burning flesh.

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56 *Id.* at 11.

57 *Execution Opponents Seek Moratorium*, Lubbock Avalanche J. Newspaper Archives (Feb. 28, 1977), https://newspaperarchive.com/lubbock-avalanche-journal-feb-28-1977-p-3.

58 *An Act Relating to Criminal Procedure; Amending 22 O.S. 1971, Section 1014; Specifying the Manner of Inflicting Punishment of Death; and Making Provisions Severable* 1977; *An Act Relating to the Method of Execution of Convicts Sentenced to Death; Amending Articles 43.14 and 43.18 of the Code of Criminal Procedure, 1965, As Amended* 1977.

59 James Welsh, *The Medical Technology of Execution: Lethal Injection*, 12 Int'l Rev. of L., Computers & Tech. 75 (1998).

60 Idaho in 1978, New Mexico in 1979, Washington in 1981 and Massachusetts in 1982.

61 According to the Death Penalty Information Center ("Execution Database" 2021), Idaho executed three inmates with lethal injection, New Mexico executed one, Washington executed five, and Massachusetts executed none.

62 Dick Reavis, *Charlie Brooks' Last Words*, Tex. Monthly (Feb. 1, 1983), https://www.texasmonthly.com/articles/charlie-brooks-last-words.

63 John G. Leyden, *Death in the Hot Seat a Century of Electrocution*, The Wash. Post (Aug. 5, 1990), https://www.washingtonpost.com/archive/opinions/1990/08/05/death-in-the-hot-seat-a-century-of-electrocutions/42629f1c-b96c-4128-83e8-7b659b7c3473.

64 *Far Worse Than Hanging; Kemmler's Death Proves an Awful Spectacle. The Electric Current had to be Turned on Twice Before the Deed was Fully Accomplished*, N. Y. Times (Aug. 7, 1890), https://www.nytimes.com/1890/08/07/archives/far-worse-than-hanging-kemmlers-death-proves-an-awful-spectacle-the.html.

Brooks's execution also did not live up to lethal injection's promise of a quick and humane death.[65] Before the drugs began to flow, three technicians repeatedly failed in their efforts to insert an IV into a vein in Brooks's arm, spattering the sheet covering him with blood.[66] During the several minutes it took for the drugs to take effect, Brooks's eyes looked forward in terror. He wagged his head, his fingers trembled, he mouthed words, and he let out a harsh rasp.[67] It took seven minutes for Brooks to die.

Despite these problems, states continued to adopt lethal injection, as shown in Figure 1. By the end of 1983, seven additional states—Arkansas, Illinois, Montana, Nevada, New Jersey, North Carolina, and Utah—had switched their execution method to lethal injection.[68] By 1988, a total of 21 states had passed lethal injection statutes. Strikingly, every one of them chose the traditional three-drug protocol. This was still true when Nebraska became the 39th state to adopt the method in 2009. From 1982 until the end of 2009, every execution by lethal injection was done in one way: sodium thiopental to anesthetize the inmate, pancuronium bromide to paralyze them, and potassium chloride to stop their heart.

II. The Collapse of the Original Lethal Injection Paradigm

The post-2009 period has witnessed the unravelling of the original lethal injection paradigm with its three-drug protocol. By 2016, no states were employing it. Instead, they were executing people with a variety of novel drug combinations. The shift from one dominant drug protocol to many was made possible by the advent of a new legal doctrine that granted states wide latitude to experiment with their drugs. This doctrine had its beginnings in the Supreme Court's *Baze v. Rees*[69] decision, its first on the constitutionality of lethal injection.[70]

In 2004, Ralph Baze, who had been sentenced to death in Kentucky for the murder of a sheriff and deputy sheriff, and another inmate on death row, Thomas Bowling, filed lawsuits challenging the constitutionality of their upcoming executions. They contended that lethal injection violated the Eighth Amendment because an improper administration of the traditional three-drug protocol could cause "excruciating pain." They argued that because other execution methods posed a "lower risk of causing pain or suffering," the lethal injection protocol could inflict "unnecessary and wanton... pain." Baze and Bowling proposed two alternative protocols in their suit. The first used only sodium thiopental to cause an overdose, eschewing the second and third drugs. The second alternative omitted the paralytic agent while retaining the first and third drugs.

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65 Reavis, *supra* note 62.

66 Don Colburn, *Lethal Injection*, The Wash. Post (Dec. 11, 1990), https://www.washingtonpost.com/archive/lifestyle/wellness/1990/12/11/lethal-injection/5838a159-cd73-440e-a208-850d318be8fe.

67 Reavis, *supra* note 62.

68 Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 Geo. L.J. 1331, 1341 (2013).

69 553 U.S. 35 (2008).

70 Molly E. Grace, *Baze v. Rees: Merging Eighth Amendment Precedents into a New Standard for Method of Execution Challenges*, 68 Md. L. Rev. 430 (2008).

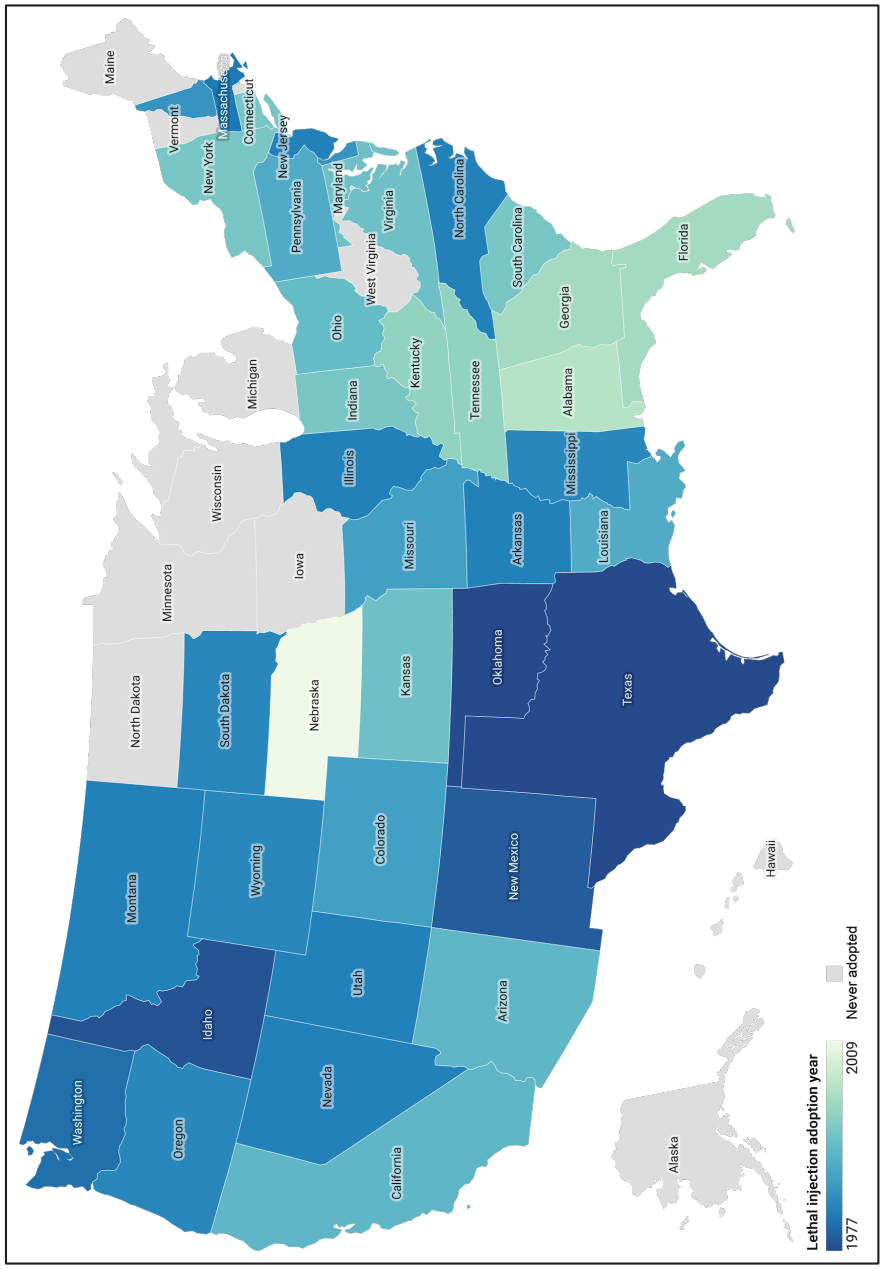

Figure 1: Lethal Injection Adoption by State.

After the Kentucky Supreme Court upheld the state's execution protocol, Baze and Bowling appealed to the Supreme Court. The Court ruled 7-2 against Baze and Bowling. The plurality opinion, written by Chief Justice Roberts and joined by Justices Samuel Alito and Anthony Kennedy, found lethal injection to be constitutional. Furthermore, it introduced the requirement that any plaintiff mounting an Eighth Amendment challenge to a method of execution had to present a "feasible, readily implemented" alternative that would "significantly reduce a substantial risk of severe pain."[71] The Court also held that pancuronium bromide, the paralytic in the three drug combination, served the valid purposes of "hastening death" and "preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."[72]

Baze indicated that the Court would defer to the choices states made concerning their execution protocols. It assigned to plaintiffs the burden of proving that protocols created an unconstitutional risk, rather than requiring states to prove that they did not do so.[73] As a result, states were left with considerable latitude to experiment with new protocols or to stick with the traditional three-drug protocol.

Just after *Baze*, an Ohio court decided that the state could no longer use a three-drug execution protocol because it contravened state law.[74] To continue executing people, Ohio abandoned the traditional three-drug protocol in 2009. In its place, it implemented a new protocol: a single large dose of sodium thiopental.[75]

Ohio's break from tradition was the first step in lethal injection's decomposition. Though its switch was the result of litigation in state court, other states quickly followed suit, adopting the one-drug protocol because of its relative simplicity.[76] By the end of 2013, 13 states had switched to such a protocol.

Just as Ohio's one-drug execution method began to spread, states started to encounter difficulties in obtaining execution drugs. Bowing to pressure from abolitionist groups, many American drug manufacturers decided to limit the distribution of drugs used for lethal injections. One producer, the American pharmaceutical company Hospira, stopped producing sodium thiopental entirely.[77] Following this decision, in December 2010, Oklahoma executed John Duty with pentobarbital, another short-acting barbiturate that had never before been used in an execution, rather than sodium thiopental.[78] For its second drug, Oklahoma used

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71 *Baze v. Rees*, 553 U.S. 35, 52 (2008).

72 *Id.* at 57.

73 This standard, promulgated by the plurality of the Court in *Baze*, became the basis for the majority opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). In *Glossip*, petitioners challenged Oklahoma's midazolam lethal injection protocol. The Court held that the protocol was permissible for the same reasons as Kentucky's use of the traditional three-drug protocol challenged in *Baze.* Nowadays, the requirement that inmates present a readily available alternative method that significantly reduces a substantial risk of severe pain is known as the *Glossip* doctrine.

74 Denno, *supra* note 68, at 1354.

75 The new protocol was the same as the one that Ralph Baze and Thomas Bowling had suggested in *Baze v. Rees*, 553 U.S. 35 (2008).

76 Denno, *supra* note 68, at 1358-60.

77 Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, The Atl. (Jun. 13, 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069.

78 Sean Murphy, *Inmate Executed with New Drug Mix*, The Oklahoman, Dec. 17, 2010, at 1A.

vecuronium bromide, a common substitute for the original pancuronium bromide.[79] For its third drug, Oklahoma continued to use potassium chloride.

With American supply chains cut off, some states turned to European drug companies.[80] In response, the British anti-death penalty group Reprieve launched its *Stop the Lethal Injection Project*. Manufacturers that had been selling drugs for executions found themselves on the receiving end of a shaming campaign.[81] Later, both the United Kingdom and the European Union banned the export of drugs for executions. As Gibson and Barrett Lain note, European governments, not the drug companies themselves, were the "true change agents."[82] Those governments insisted that pharmaceutical companies conform to the abolitionist norms of what Gibson and Barrett Lain label the international "moral marketplace."[83]

In response to these decisions, states soon followed Oklahoma's lead and started to use drugs like pentobarbital. Thirteen states held pentobarbital executions in 2011 alone.[84] Some used a three-drug pentobarbital protocol; others used a one-drug pentobarbital protocol. By 2013, the concurrent shifts from three drugs to one drug and from sodium thiopental to pentobarbital combined to produce four distinct lethal injection protocols.[85] (See Table 1).

Table 1: Drug protocols used between 2010 and 2013.

	One-drug	**Three-drug**
Sodium thiopental	Ohio, Washington	Texas, Louisiana, Oklahoma, Florida, Mississippi, Virginia, Alabama, Georgia, Arizona
Pentobarbital	Ohio, Arizona, Idaho, Texas, South Dakota, Georgia, Missouri	Oklahoma, Texas, South Carolina, Mississippi, Alabama, Arizona, Georgia, Delaware, Virginia, Florida, Idaho

Drug protocols used in executions from January 2010 through September 2013, by state. In September 2013, states began to adopt even newer drug protocols that eschewed barbiturates, the class of drugs that contains both sodium thiopental and pentobarbital. States that held executions with multiple protocols are listed twice.

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79 In general, we do not distinguish drug protocols that switch their second and third drugs for close analogues that have the same intended effect when injected. For example, states sometimes substitute vecuronium bromide or rocuronium bromide for pancuronium bromide, as is the case here. Besides a few exceptions, it is very difficult to determine exactly which second and third drugs a state used in a given execution since newspapers commonly report the first drug but not the others. Furthermore, execution procedures often allow many choices between second and third drugs.

80 Raymond Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, The N.Y. Times (Mar. 30, 2011), https://www.nytimes.com/2011/03/31/world/europe/31iht-letter31.html.

81 Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U.L. Rev. 427 (2015).

82 James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 100 Geo. L.J. 1215 (2015).

83 *Id.* at 1215.

84 The states were Oklahoma, Texas, South Carolina, Mississippi, Alabama, Arizona, Georgia, Delaware, Virginia, Florida, Idaho, and Ohio.

85 Administrative documents allowed for even more novel drug combinations, like midazolam and hydromorphone, as backups.

However, the switch to pentobarbital did not alleviate supply pressures.[86] Soon, the drug's only major producer began to restrict its sale to death penalty states.[87] As a result, states had to find other drugs to use in executions.

In 2013, Florida geared up to conduct the nation's first execution using midazolam hydrochloride as the first drug in its three-drug protocol.[88] Richard Dieter, executive director of the Death Penalty Information Center, called it, "an experiment on a living human being."[89] A lethal injection drug expert at the Death Penalty Clinic at the University of California, Berkeley told NPR in 2013, "If [midazolam] does not in fact deeply anesthetize the prisoner, then he or she could be conscious and aware of being both paralyzed and able to experience pain and the experience of cardiac arrest."[90] Nevertheless, Florida's execution proceeded as planned. In 2014, Oklahoma, Arizona, and Ohio also conducted executions with midazolam.

Two of those states, Ohio and Arizona, did not just replace the first drug in the traditional three-drug protocol with midazolam, they also dropped the second and third drugs for hydromorphone, an opiate made from morphine.[91] In both states, the first executions using the new drug combination were botched, and no executions with that protocol have happened since.

However, states have continued to experiment with other drugs and drug combinations. Their forays beyond the well-trodden ground of barbiturates, the class of drugs to which sodium thiopental and pentobarbital belong, did not end with midazolam. In 2017, when drug manufacturers refused to provide Florida with that drug, the state chose to use a different sedative, etomidate, in its place. Etomidate is an ultrashort-acting sedative and anesthetic that has no analgesic (pain-blocking) abilities, and it had never before been used in an execution.[92]

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86 *Ohio Turns to Untried Execution Drug Mix Due to Shortage of Pentobarbital*, The Guardian (Oct. 28, 2013), http://www.theguardian.com/world/2013/oct/28/ohio-untried-execution-drugs-pentobarbital-shortage.

87 David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, N.Y. Times (July 1, 2011), https://www.nytimes.com/2011/07/02/world/europe/02execute.html.

88 Just as we do not typically distinguish between protocols that use close analogues in the second or third drugs, we do not distinguish between protocols using midazolam and midazolam hydrochloride. Newspaper reports and administrative protocols are generally not specific enough to do so; Morgan Watkins, *Happ Executed Using New Drug*, The Gainesville (Oct. 15, 2013).

89 Bill Cotterell, *Florida Executes Man with New Lethal Injection Drug*, Reuters (Oct. 15, 2013), https://www.reuters.com/article/usa-florida-execution-idINL1N0I521020131015.

90 *Lacking Lethal Injection Drugs, States Find Untested Backups*, NPR (Oct. 26, 2013), https://www.npr.org/2013/10/26/241011316/lacking-lethal-injection-drugs-states-find-untested-backups.

91 Hydromorphone had never been used in a lethal injection. The federal court that approved the first execution with Ohio's new protocol wrote, "There is absolutely no question that Ohio's current protocol presents an experiment in lethal injection processes" (*In* re Ohio Execution Protocol Litig., 994 F. Supp. 2d 906 (S.D. Ohio 2014)).

92 Lesley M. Williams, Katharine L. Boyd & Brian M. Fitzgerald, *Etomidate*, StatPearls (July 25, 2021), http://www.ncbi.nlm.nih.gov/books/NBK535364; Jeffrey L. Giese & Theodore H. Stanley, *Etomidate: A New Intravenous Anesthetic Induction Agent*, 3 J. Hum. Pharmacology & Drug Therapy 251, 251-58 (1983).

Florida conducted seven executions with etomidate in combination with rocuronium bromide and potassium acetate between 2017 and 2019. In fact, that protocol's third drug was also a novel choice: Oklahoma inadvertently used potassium acetate instead of potassium chloride in a 2015 execution, but no state had used it intentionally until Florida adopted it in 2017.

Like Florida, Nebraska had trouble acquiring its lethal injection drugs in the latter part of the 2010-2020 decade. After it failed for years to find drugs, the state allowed its corrections director to choose a new protocol. In 2018, Nebraska held the only American execution conducted with a four-drug combination when it used diazepam, fentanyl, cisatracurium besylate, and potassium chloride.[93] The first three drugs, which tranquilized, knocked out, and paralyzed the inmate respectively, were all new to executions.

By the end of 2020, states had used at least ten distinct drug protocols in their executions.[94] Some protocols were used multiple times, and some were used just once. Even so, the traditional three-drug protocol was all but forgotten: its last use was in 2012. To better understand states' changing protocols over time, we sort them into three different categories: barbiturate combinations, barbiturate overdoses, and sedative combinations. (See Table 2). Figure 2 also displays states' dramatic shift in drug use. After years of experimentation, all that remains of the original paradigm is a needle in the inmate's arm and a declaration of death.[95]

Table 2: Classification of lethal injection drug protocols.

Classification	Characteristics	Examples
Barbiturate combination	Sodium thiopental or pentobarbital in combination with a paralytic and a heart-stopper	Sodium thiopental, pancuronium bromide, and potassium chloride ***(traditional three-drug protocol)*** Pentobarbital, rocuronium bromide, and potassium chloride
Barbiturate overdose	Sodium thiopental or pentobarbital on their own	Sodium thiopental alone Pentobarbital alone
Sedative combination	Midazolam, etomidate, or diazepam in combination with other drugs	Midazolam and hydromorphone Etomidate, vecuronium bromide, and potassium acetate

93 Mitch Smith, *Fentanyl Used to Execute Nebraska Inmate, in a First for U.S.*, N.Y. Times (Aug. 14, 2018) https://www.nytimes.com/2018/08/14/us/carey-dean-moore-nebraska-execution-fentanyl.html.

94 The true number is likely higher due to untraceable differences in analogous second and third drugs.

95 Sometimes, as in the case of Romell Broom, not even death is guaranteed; Broom v. Jenkins, No. 1:10CV2058, 2019 WL 1299846 (N.D. Ohio Mar. 21, 2019).

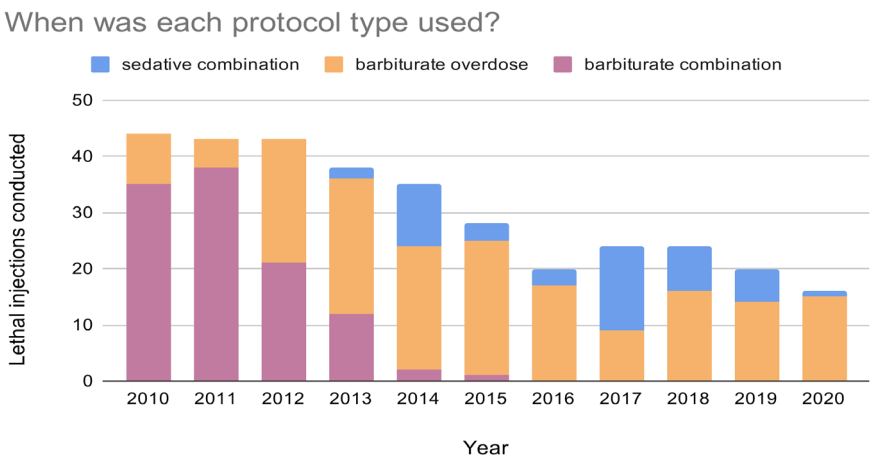

Figure 2: Protocol type by year of use.

IIII. Lethal Injection Mishaps, 2010-2020

From 2010 to the end of 2020, states and the federal government carried out 335 lethal injections, making up the overwhelming majority of executions in that decade.[96] As the executions of Jack Jones and Marcel Williams, among others, show us, some of those executions went wrong. In what follows, we describe the ways in which the decade's mishaps occurred, the reasons they did, and how states, inmates, and others reacted when mishaps occurred.

Problems in American executions are, of course, nothing new. For as long as America has used capital punishment, states have encountered such problems. Sarat reports that 3 percent of the executions carried out from 1890 to 2010 were botched in some way.[97] Hangings sometimes resulted in gruesome beheadings and slow asphyxiations. During electrocutions, inmates convulsed and occasionally burst into flames. Lethal gas, billed as yet another humane execution technology, caused its victims to cough, jerk, and writhe for several minutes before death. Lethal injection, as we have already noted, is no exception.

To analyze lethal injection's problems over the last decade, we examined every execution for evidence of mishaps: discrete, identifiable moments in an execution when lethal injection faltered. Mishaps include identifiable procedural errors committed by the execution team. For example, officials sometimes start the injection early, before the inmate can finish their last words. In other cases, executioners are unable to set intravenous lines or set them incorrectly. Mishaps also include unforeseen bodily reactions to lethal drugs, such as inmates crying out, claiming that the injections burn, coughing, gasping, or heaving their chests.

[96] In that time, Virginia electrocuted two people, Utah shot one, and Tennessee electrocuted five for a total of 343 executions.

[97] Austin Sarat, Gruesome Spectacles: Botched Executions and America's Death Penalty (2014).

These reactions signal that an inmate underwent unnecessary emotional or physical suffering, or otherwise responded to the execution in an unexpected way.

Such mishaps occurred in many lethal injections during the last decade.[98] For example, in 27 of the lethal injections carried out during that period, or 8.1 percent, executioners struggled to set adequate IVs, as in the 2014 execution of Clayton Lockett.[99]

In 1999, when he was 23, Lockett beat and raped a group of young women before shooting and killing one of them.[100] At his trial, Lockett's counsel offered no defense. After three hours of deliberation, the jury found him guilty of "conspiracy, first-degree burglary, three counts of assault with a dangerous weapon, three counts of forcible oral sodomy, four counts of first-degree rape, four counts of kidnapping and two counts of robbery by force and fear."[101] He "was sentenced to death for first-degree murder, and more than 2,285 years in prison for his other convictions."[102]

Fifteen years later, after attempting suicide on the morning of his execution, guards dragged Lockett into Oklahoma's death chamber.[103] Once there, and after having been strapped to a gurney, a paramedic tried to place an intravenous line in his arms and feet, but failed to find an adequate vein. After three placement attempts, the paramedic asked a doctor on hand—who was ostensibly there only to check for consciousness and pronounce the time of death—to assist her. Fifty-one minutes after starting to place the IV, the two successfully placed it in Lockett's groin using a painful and invasive procedure. They covered the IV with a sheet to hide Lockett's groin from the witnesses.

At 6:23 p.m., the executioners started the flow of midazolam. Lockett looked confused for several minutes as he waited for the drugs to take effect, then closed his

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98 To find mishaps, we conducted a thorough examination of every execution attempt from 2010 to 2020. First, we used the Death Penalty Information Center's (DPIC) execution database ("Execution Database" 2021) to build a list of every execution in the United States over those 11 years. Then, we compiled multiple first-hand news articles about each execution. Since court filings often contain more detailed information about specific executions, we used state and federal court documents to augment our database. We then developed a coding system to standardize how we would classify events in each execution. For example, to identify "sudden respiration", we looked for the keywords "gasping", "snorting", "coughing", "sputtering", "grunting", "blowing", and "choking" in the documents. Another researcher did a blind re-coding of every execution to ensure accuracy. We further augmented the DPIC's database with the drugs used in each execution.

99 Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, The Atlantic (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069; Sean Murphy, *Oklahoma Took 51 Minutes to Find Vein in Execution*, Taiwan News, (May 2, 2014), https://www.taiwannews.com.tw/en/news/2472880.

100 Ziva Branstetter, *Death Row Inmate Killed Teen Because She Wouldn't Back Down*, Tulsa World (Apr. 20, 2014), https://tulsaworld.com/news/local/crime-and-courts/death-row-inmate-killed-teen-because-she-wouldnt-back-down/article_e459564b-5c60-5145-a1ce-bbd17a14417b.html.

101 Jaime Fuller, *Why Were the Two Inmates in Oklahoma on Death Row in the First Place?*, The Washington Post (Apr, 30, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/04/30/why-were-the-two-inmates-in-oklahoma-on-death-row-in-the-first-place.

102 *Id.*

103 Guards had to use a Taser on Lockett to get him to leave his cell that morning.

eyes. During the first consciousness check, the doctor found that Lockett was still conscious, prompting a two-minute pause before a second check. The second time, the doctor determined that Lockett was unconscious. At this point, the executioners injected the paralytic, vecuronium bromide.

After the injection, Lockett moved his feet and head while mumbling, "Oh, man." He began to writhe and struggle against the restraints holding him down. On the electric heart monitor, his heart rate fell by two thirds. The doctor again entered the execution chamber and lifted the sheet, revealing a "protrusion the size of a tennis ball" where the IV had failed.[104] Instead of sending the drugs into his bloodstream, they had gone into the flesh of his groin. The warden closed the curtain between the witness room and the execution chamber as the doctor and paramedic scrambled to finish the execution. At 6:56 p.m., the director of the Oklahoma Department of Corrections, who had watched from the witness room, stopped the execution. Ten minutes later, and more than 40 minutes after the lethal injection drugs began to flow, Clayton Lockett died. Many reports say he died from a heart attack, but an independent autopsy attributed his death to the lethal injection drugs themselves.[105]

Lockett's botched lethal injection was one of the most infamous in the death penalty's recent history. However, even when the execution team sets effective lines, or realizes that they cannot set an effective IV and stops the execution, the process is often painful. As executioners poke and prod inmates with needles, they fall back on a variety of techniques that inflict substantially more pain than simply placing an IV into an arm.[106]

Even if the IV is set correctly, the rest of the lethal injection process is not pain free. In 4.8 percent of the last decade's lethal injections, inmates said they were in pain at some point during the execution. One such inmate was Anthony Shore who was executed for a series of murders that led him to be known as the "Tourniquet Killer."[107]

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104 Stern, *supra* note 99.

105 *Autopsy: Oklahoma Inmate Dies from Lethal Injection Drugs, Not Heart Attack After 'Botched' Execution*, KFOR-TV (Aug. 28, 2014), https://kfor.com/news/autopsy-oklahoma-inmate-dies-from-lethal-injection-drugs-not-heart-attack-after-botched-execution.

106 This kind of mishap occurred, for instance, in the attempted execution of 69-year-old Alva Campbell. Campbell had been sentenced to death for killing a teenager during a carjacking 20 years prior to his execution. In November 2017, an Ohio medical team used an ultraviolet light to probe both of Alva Campbell's arms for a suitable vein. The team poked Campbell twice with a needle in his right arm, then once in his left. But Campbell had lung cancer, chronic obstructive pulmonary disease, pneumonia, and relied on daily oxygen treatments; none of his veins could support the IV. When they tried his left leg, Campbell threw his head back and cried out in pain. The Columbus Dispatch reported that after the prison director called off the execution, "Campbell removed his glasses and appeared to rub tears from his withered face"; Marty Schladen, *After Four Unsuccessful Needle Pokes, Columbus Killer's Execution Called Off*, Columbus Dispatch (Nov. 15, 2017), https://www.dispatch.com/news/20171115/after-four-unsuccessful-needle-pokes-columbus-killers-execution-called-off.

107 Jolie McCullough, *Texas Executes Houston Serial Killer Anthony Shore*, Tex. Tribune (Jan. 18, 2018), https://www.texastribune.org/2018/01/18/texas-nations-first-execution-year-set-houston-serial-killer; Ed Pilkington, *Texas to Execute Third Prisoner This Year amid Reports of Botched Killings*, The Guardian (Feb. 1, 2018), http://www.

On January 18, 2018, with IVs already set, Shore apologized to his victims, saying that "no amount of words or apology could ever undo what I've done... I wish I could undo the past, but it is what it is."[108] Soon after the injection of compounded pentobarbital began, Shore cried, "Oh wee, I can feel that it does burn. Burning!" He then shook on the gurney and struggled to breathe before dying 13 minutes later, according to a witness's sworn affidavit.

The burning sensation that Shore reported occurs with surprising frequency in lethal injections.[109] In fact, this particular mishap may result from specific changes that states have made to their lethal injection protocols. Over time, they have generally increased the amount of each drug that they inject into inmates. For example, Virginia's 1995 drug protocol called for 120 mEq of potassium chloride as its final drug. By 2011, it had doubled the dose to 240 mEq. Similarly, Oklahoma's execution protocol used 100 mg of midazolam when it executed Clayton Lockett. Soon after, it increased the amount five-fold. These massive doses push lethal injection far outside of the realm of standard pharmaceutical practice.[110]

In 83 lethal injections, the inmate spoke or made noise after the injection began, utterances that ranged from screams, to sobs, to slurred sentences.[111] Commonly,

theguardian.com/us-news/2018/feb/01/texas-to-execute-third-prisoner-this-year-amid-reports-of-botched-killings.

108 Michael Graczyk, *'Tourniquet Killer' Executed in Texas for 1992 Strangling*, AP News (Jan. 19, 2018), https://apnews.com/article/bd1b3d2b064f48d5a4cf3c4c5df47357.

109 Lawyers have called upon medical experts to explain the phenomenon in the courtroom. In Ohio's long-running lethal injection consolidated case, a federal district court received hundreds of pages of testimony from doctors and pharmacists about the effects of midazolam. As one doctor in that case remarked, "midazolam itself is highly acidic, and while that is not problematic when the drug is used in therapeutic doses, at the dosage used in the protocol, it may cause severe burning pain upon injection." Another doctor, this time called by the state, disagreed and argued that midazolam could not cause a burning sensation, even in high doses. Ultimately, the court ruled that it was "certain or very likely that... midazolam cannot reduce consciousness to the level at which a condemned inmate will not experience severe pain" *Henness (In re Ohio Execution Protocol Litig.)* 2019 U.S. Dist. LEXIS 8200 (U.S. D. C. S.D. Ohio 2019). Though an appellate court later reversed the court's ruling, the mishap in Shore's execution—inmates reporting pain during their executions—is central to today's legal challenges to lethal injection.

110 Even before increases, lethal injection protocols already used dosages far beyond what doctors had ever used therapeutically. Dosage increases have made it harder to evaluate and understand the effects of these drugs, introducing more uncertainty into lethal injection. Outside of America's execution chambers, no one has studied what happens when you inject someone with 500 mg of midazolam.

111 Often, witnesses cannot tell if an inmate is making sounds because many states' execution chambers block any sounds from escaping. For example, in Arkansas's 2017 execution of Jack Jones, witnesses remarked that it looked as if Jones was making noise, but the state disputed that. States sometimes decide to turn off death chamber microphones soon after specific executions. For example, Oklahoma's September 2014 protocol required the execution team to turn off the microphone after the inmate's last words. In April 2014, before the execution of Clayton Lockett, Oklahoma's protocol did not mention the microphone at all. Microphone procedures are also the subject of death penalty litigation. The 9th Circuit recently ruled that Arizona had to keep its microphones on during executions to make sure that press witnesses could hear what happened, which would prevent the ambiguity seen in Jack Jones's execution (*First Amendment Coalition v. Ryan*, 938 F.3d 1069 (9th Cir. 2019)).

inmates exhibit unusual breathing patterns, body movement, and dramatic changes in skin color.[112] Seventy-three included coughing, snorting, and other sudden respirations. In 183 lethal injections, the inmate moved after the injection began. Many twitched or jerked, some heaved their chests, and others fluttered their eyes as the drugs took effect.[113]

Some of these reactions may be inevitable consequences of death by lethal injection. Lethal injection works on a microscopic level inside of the inmate, concealing its operation from view.[114] In fact, medical professionals disagree about how each of the drugs used in lethal injection actually kills.[115] Further complicating the effort to understand what happens during a lethal injection is the paralytic used in many protocols. If administered correctly, it prevents inmates from indicating any pain, even involuntarily, making it difficult for witnesses to determine if the condemned suffer.[116]

Though it is often impossible for inmates to display what is happening during a lethal injection, certain mishaps show that lethal injection is far removed from the original promise that it would allow the condemned to die by peacefully falling asleep. In September 2020, a NPR investigation found signs of pulmonary edema—fluid

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[112] For example, after Nebraska killed Carey Moore with a four-drug diazepam and fentanyl combination, his face was "darker purple" and "mottled." Paul Hammel, *Witnesses Say It Appears Nebraska's First Execution in 21 Years Went Smoothly*, Omaha World-Herald (Aug. 15, 2018), https://omaha.com/news/crime/witnesses-say-it-appears-nebraskas-first-execution-in-21-years-went-smoothly/article_b690da09-b716-5eaa-9eda-fa1effcad32c.html.

[113] One such botch occurred in 2018 when Tennessee put Billy Irick to death. More than 30 years earlier, Irick was found guilty of the rape of a seven-year-old girl. After officials injected midazolam into his veins, he began to "gulp[] for an extended period of time," choke, gasp, cough, and snore. A witness said that he moved his stomach, moved his head, and "briefly strain[ed] his forearms against the restraints" (Steven Hale, *The Execution of Billy Ray Irick,* Nashville Scene (Aug. 10, 2018)). Such movements suggest that Irick was conscious while the executioners injected the second and third drugs. According to *The Tennessean*, the execution deviated from the state's protocol almost as soon as it started. Adam Tamburin et al., *Billy Ray Irick Execution Brings No Resolution to Lethal Injection Debate*, The Tennessean (Aug. 10, 2018), https://eu.tennessean.com/story/news/crime/2018/08/10/billy-ray-irick-execution-lethal-injection-debate/954312002; The paper also remarked that Irick's execution took 20 minutes, which it called "longer than average." Later, news reports quoted a doctor who said that Irick almost certainly felt intense pain during his execution. Steven Hale, *Medical Expert: Billy Ray Irick Was Tortured during Execution*, Nashville Scene (Sep. 7, 2018), https://www.nashvillescene.com/news/pithinthewind/medical-expert-billy-ray-irick-was-tortured-during-execution/article_1c31a651-5ffc-5be2-a39e-6a35f41c5558.html; At Irick's request, the state conducted no autopsy after he died. Adam Tamburin, *Court Blocks Autopsy for Executed Inmate Billy Ray Irick, Citing His Religious Beliefs*, The Tennessean (Aug. 15, 2018), https://www.tennessean.com/story/news/crime/2018/08/15/billy-ray-irick-execution-court-blocks-autopsy/999087002.

[114] David R. Dow, *The Beginning of the End of America's Death-Penalty Experiment*, Politico (July 25, 2014) https://www.politico.com/magazine/story/2014/07/the-beginning-of-the-end-of-americas-death-penalty-experiment-109394.

[115] Many court cases that involve evaluating midazolam contain disagreement between medical experts. Examples include *Henness*, *supra* note 109; and Glossip v. Gross, 135 S. Ct. 2726 (2014).

[116] Sarat, *supra* note 97, at 120.

filling the lungs—in 84 percent of the 216 post-lethal injection autopsies it reviewed.[117] Some autopsies reveal that inmates' lungs filled while they continued to breathe, which would cause them to feel as if they were drowning and suffocating.[118]

As states switched drug protocols, the frequency of mishaps shifted dramatically. Most striking among these shifts is the increased frequency with which witnesses or newspapers said that executions were "botched." Between 2010 and 2020, newspapers and independent witnesses used this term to describe 28 of the lethal injections, or 8.4 percent.[119] This label was used to describe only 3.7 percent of barbiturate combination executions. However, newspapers or witnesses labelled 7.3 percent of barbiturate overdose executions as botched, about twice the rate as barbiturate combinations. In sedative combination executions, the rate skyrocketed to 22.4 percent.

Another striking difference between barbiturate combination protocols and the bevy of novel cocktails is how long they take to work. We found that, between 2010 and 2020, barbiturate overdose executions lasted 62 percent longer than barbiturate combination executions, including the traditional three-drug protocol.[120] Sedative combinations resulted in executions that lasted twice as long as their barbiturate combination counterparts.[121]

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117 Noah Caldwell, Ailsa Chang & Jolie Myers, *Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sep. 21, 2020), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection.

118 Fifty-one of the executions we examined contained mishaps that suggest those inmates suffered from pulmonary edema. Mishaps that we took to possibly indicate pulmonary edema were gurgling and gasping, two uncommon breathing changes that doctors identified as possible signs. Since the paralytics prevent some of these signs from showing themselves to outside observers, our count only includes inmates who suffered pulmonary edema while still able to breathe, which accounts for the discrepancy between our count and NPR's. Pulmonary edema, like the burning sensation connected to high-dosage injections, is central to recent legal challenges to lethal injection. In Ohio's consolidated case, experts for the plaintiffs drew upon autopsy reports from past executions as well as a detailed understanding of how midazolam works inside the body to argue that pulmonary edema satisfied what the court called "the first prong of *Glossip,*" that midazolam is very likely to cause severe pain associated with pulmonary edema. *Henness*, *supra* note 109. Though the litigation in this case only concerned midazolam, our evidence and NPR's investigation suggest that pulmonary edema is a likely side-effect of virtually all execution drug protocols. It remains to be seen if the Supreme Court will reconsider its prior approval of midazolam and drug experimentation in light of this new evidence about pulmonary edema. However, until they do, lower courts will continue to apply the *Glossip* doctrine that prevents any relief unless inmates can present a readily available alternative.

119 Newspapers and witnesses rarely have access to the administrative documents that govern executions, but they often pick out when something seems to have gone wrong. As such, we counted executions in this category when journalists mentioned something out of the ordinary in addition to when they used the word "botch" itself. This was a slight increase in the rate from 1980 through 2010 when Sarat et al. found that 7.1 percent of lethal injections were botched. Sarat, *supra* note 97, at 177.

120 This difference is made even more remarkable by the fact that some states require a short waiting period between the first and following drugs in barbiturate and sedative combination executions. Despite that brief break, one-drug barbiturate overdose protocols took longer.

121 We found that executions between 2010 and 2020 which used a barbiturate combination lasted 10.4 minutes on average; barbiturate overdoses lasted 16.8 minutes; sedative combinations lasted 20.7 minutes.

As shown in Figure 3 below, the average execution time in 2010 was just over nine minutes. In 2020, the average time was over 20 minutes. More than 74 of the executions we analyzed took longer than 20 minutes—four times longer than lethal injection's creators expected the method to take.[122] In fact, almost none of the lethal injections over the last 11 years lasted less than five minutes. In a few jarring cases, lethal injections took longer than an hour.

Figure 4 helps explain why. Sedative combination protocols, which were commonly used in the latter half of the last decade, take over twice as long to kill as barbiturate combination protocols, which were predominately used in the first half.

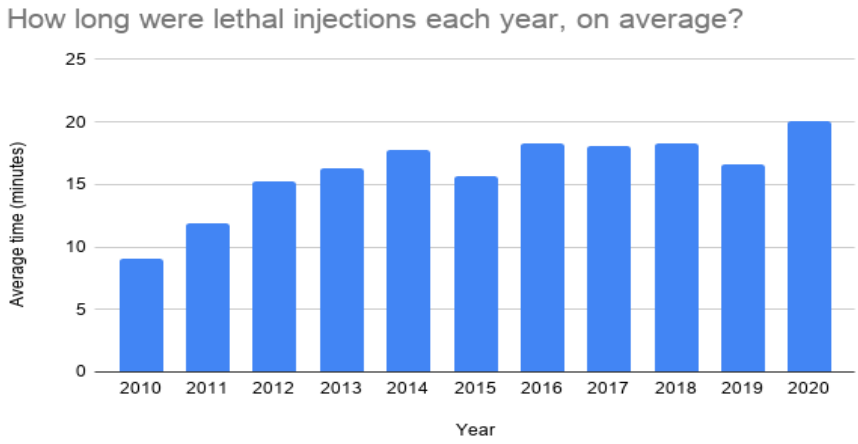

Figure 3: Average duration of lethal injections by year.

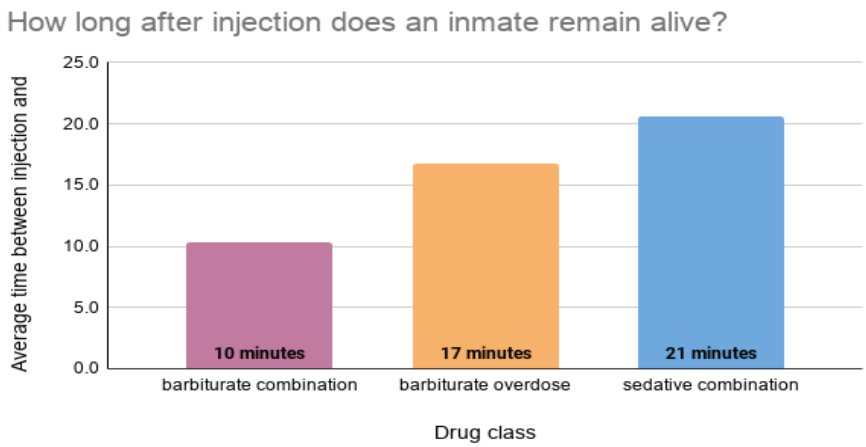

Figure 4: How long after injection does an inmate remain alive?

[122] As we remarked in Part 1, the sponsor of Oklahoma's trailblazing lethal injection bill expected each execution to take less than five minutes.

IV. The Choreography: States Change and Hide Procedures

States responded to the kind of mishaps we have described in two ways.[123] First, they modified their execution procedures to make mishaps less likely. Such changes included adding consciousness checks, mandating that the IV be clearly visible, and inserting backup lines in case the primary line fails. Other states chose to make it harder to identify or label any irregularity in the execution chamber as a departure from their protocols and procedures. They introduced greater ambiguity and discretion into their procedures. Doing so afforded executioners greater flexibility when something goes wrong. States also have attempted to keep their procedures and drug suppliers secret from inmates and the public. The two responses, specificity and obfuscation, are not mutually exclusive. In fact, as states added some steps to prevent mishaps, they often made other procedures less specific.[124]

A. Avoiding Mishaps: Procedural Specificity

As the lethal injection paradigm decomposed, some death penalty states attempted to avoid preventable errors with procedural adjustments. For example, they added steps to parts of the lethal injection process where preventable mishaps commonly occur, such as in the injection of the sedative or anesthetic. If the executioners inject the second or third drugs before the first drug anesthetizes the inmate, the condemned will suffer excruciating pain. Similarly, paralytics must have time to immobilize the inmate lest pain be apparent to witnesses as they jerk and squirm on the table. In the late 2000s and early 2010s, at least nine states[125] began to specify waiting periods between the injection of each drug in the lethal cocktail. One particularly instructive case is Virginia, which made no mention of waiting periods in its October 2010 protocol. However, the state's July 2012 protocol called for a 30

[123] As states switched to drug protocols associated with more mishaps, the media began to pay more attention to problems associated with lethal injection. In an article about the rhetoric of mistake in lethal injection, Jody Madeira reports, "[N]ews coverage of flawed lethal injections skyrocketed in 2014 from a yearly average of approximately 100 articles from 2010 to 2013 to approximately 1300 articles per year in 2014" (Jody Lyneé Madeira, *The Ghosts in the Machinery of Death: The Rhetoric of Mistake in Lethal Injection Reform* in Law's Mistakes 104 (Austin Sarat, Lawrence Douglas & Martha Umphrey eds., 2016)). The increased media coverage occurred in step with a steady decline in the percentage of Americans in favor of the death penalty. These factors may have applied additional pressure on states to avoid mishaps, or else face further disfavor.

[124] We investigated protocol changes throughout the decade by collecting as many of the documents as we could. To do this, we filed Freedom of Information Act requests with the department of corrections in all states that had the death penalty within the studied time period. Some states (including Delaware, Louisiana, South Carolina, and Wyoming) denied these requests, and most states provided information with information redacted. To supplement our protocol database, we contacted Assistant Federal Public Defender Jennifer Moreno, who provided us with many protocols. Moreno formerly worked at the Berkeley Law School Lethal Injection Project. The claims we make are limited in scope because secrecy measures restrict our ability to create an exhaustive database.

[125] These states are Arizona, Delaware, Idaho, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Virginia.

second waiting period after the first drug's injection. By February 2014, Virginia's procedure called for a two-minute waiting period at the same juncture.[126]

After 2010, at least seven[127] state procedures required that officials conduct "consciousness checks" on the condemned inmate. Executioners must evaluate an inmate's consciousness with auditory and physical stimuli between injecting the first and second drugs. For example, in its December 2010 protocol, Pennsylvania instructed officials to close the curtain and call the inmate's name in a loud voice before "assess[ing] consciousness of the inmate by tactical stimulation... touching the inmate's shoulder and brushing the inmate's eyelashes."[128]

A few states also added specificity when it comes to the placement of IVs, especially after the botched execution of Clayton Lockett. For example, Oklahoma added a number of mishap-preventing and mishap-detecting provisions to its lethal injection protocol. It required officials to record the number of IV insertion attempts, read the drug name out loud before its administration, leave the IV in the inmate after death for a medical examiner to see, and ensure the IV insertion remained visible.

Ohio's 2004 protocol only briefly mentions IV access. It records a preference for setting IVs into the inmate's arms, but does not require the execution team to ensure the IVs are working. In 2009, before Lockett's ill-fated execution, Ohio began to specify that executioners use a saline drip to test the IVs, perform vein assessments ahead of time, and ensure that the IV insertion points are visible throughout the execution.

Procedural specificity also occurs in protocols that identify decisional contingencies (if, then) in the lethal injection process. We call this "branching." From 2010 to 2020, many lethal injection protocols came to resemble decision trees with many branches, rather than a simple set of instructions. Figure 5 displays Ohio's protocol as a decision tree.

At least 14 states[129] adopted one or more elements of branching, providing additional instructions in case IV lines cannot be established, drugs do not cause unconsciousness or death, or an IV line fails. Three of these states—Arizona, Idaho, and Oklahoma—include a contingency procedure to revive the inmate in case they go into cardiac arrest. In this way, protocols provide executioners with specific methods to address various issues as they arise. Further, by acknowledging many possibilities, states ensure that fewer events fall outside the purview of lethal injection protocols. Problematic lethal injections are more difficult to critique.

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126 In 2010, Virginia's first drug was sodium thiopental. In 2012, its first drug was pentobarbital. In 2014, Virginia permitted the first drug to be sodium thiopental, pentobarbital, or midazolam; regardless of the drug, it prescribed a two-minute waiting period. Another example is Pennsylvania, which added a two-minute waiting period to its procedure in 2010.

127 These states are Alabama, California, Idaho, Oklahoma, Pennsylvania, South Dakota, and Virginia.

128 In August 2013, Missouri added a provision for medical personnel to "use standard clinical techniques to assess consciousness, such as checking for movement, opened eyes, eyelash reflex, [and] pupillary responses or diameters." Some states specify that officials should use an electroencephalogram, which monitors brain activity, or other medical technology to assess inmates' consciousness.

129 These states are Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Kentucky, Missouri, Nebraska, Ohio, Oklahoma, Tennessee, and Virginia.

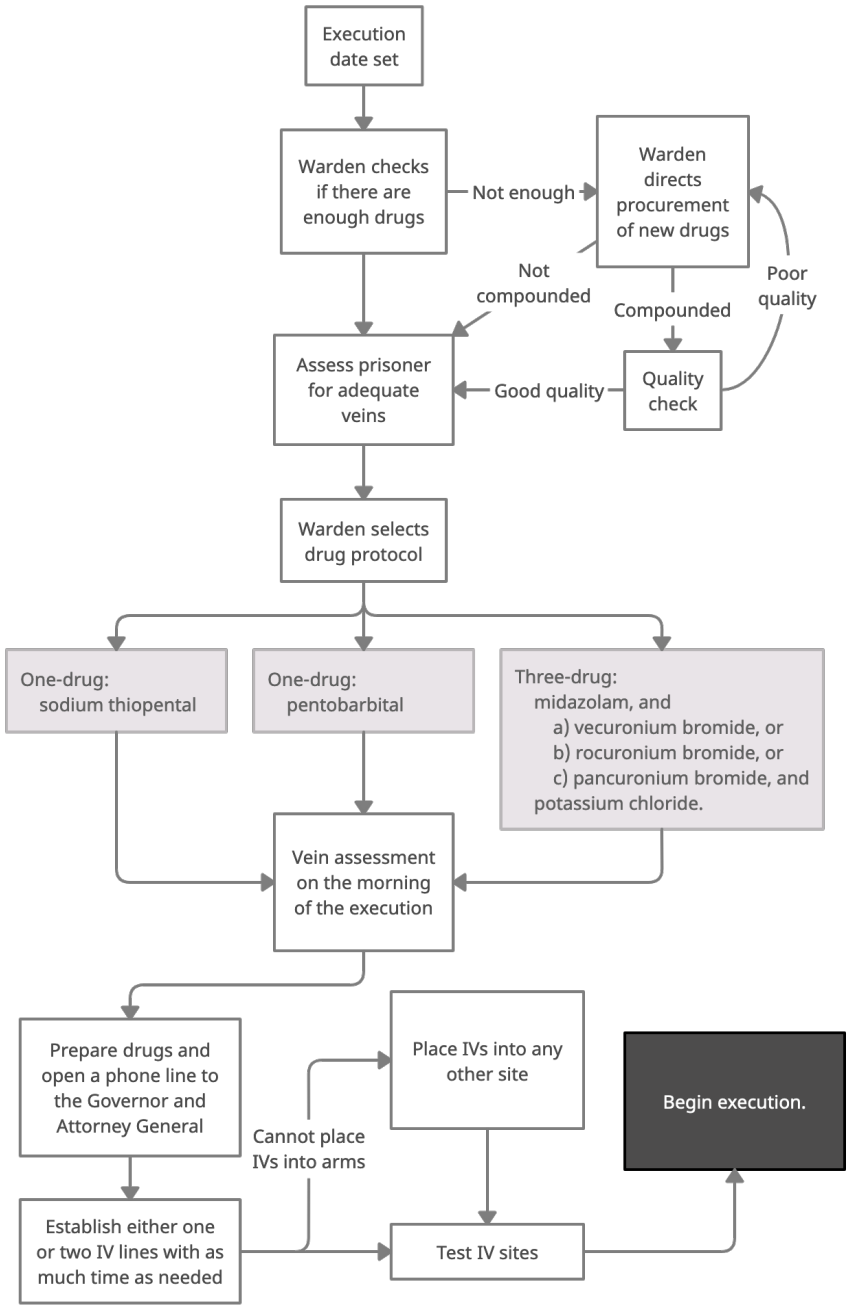

Figure 5: Branching in Ohio's lethal injection procedure.

Increases in specificity may help imbue lethal injection with legitimacy after problematic executions. In this way, states implicitly signal that lethal injection can be improved by better procedures and that they are committed to such improvement. Legal scholar Jody Madeira notes that mistakes have been normalized in the lethal injection paradigm: "Corrections has long explored execution methods through a 'learning-by-doing' process, and may interpret each botched execution as a unique event instead of a patterned consequence of haphazard lethal injection reform."[130] By amending their procedures, states treat lethal injection mishaps as anomalies—wrongs that can be righted with procedural tweaks.

B. Obscuring Mishaps in Lethal Injection: Secrecy, Ambiguity, Discretion

At the same time as they dealt with mishaps by adding specific checks to their procedures, death penalty states have attempted to obscure the perception of mishaps by hiding executions, and information related to executions, from public view. According to the Death Penalty Information Center, of the 17 states that carried out executions between 2011 and 2018, 14 prevented witnesses from seeing at least one part of the execution, 15 prevented witnesses from hearing the sounds of the execution, and 16 concealed the source of the drugs used.[131] All 17 prevented witnesses from finding out when lethal drugs were administered.[132] As states hide more of their procedures and executions, it becomes increasingly difficult to say that, or when, an execution went wrong.[133]

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130 Madeira, *supra* note 123, at 98.

131 In addition to using new drugs over the last decade, states also searched for new sources of drugs. With major manufacturers unwilling to provide lethal injection drugs, states turned to compounding pharmacies. Compounding pharmacies make drugs in small batches and are not subject to strict regulation. In 2018, at least ten states sourced their drugs from compounding pharmacies. On occasion, states have stopped all executions because pharmacies provided contaminated drugs, and state inspectors have found that compounding pharmacies often adopt unsafe and unsanitary practices. In order to shield compounding pharmacies from public pressure to stop supplying lethal injection drugs, many states have enacted secrecy statutes to conceal their identity. Barri Dean, *What Are Those Ingredients You Are Mixing up Behind Your Veil*, 62 Howard L. J. 1 (2018).

132 Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, Death Penalty Info. Ctr. (Nov. 20, 2018), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/behind-the-curtain-secrecy-and-the-death-penalty-in-the-united-states.

133 However, scholars, lawyers, journalists and advocates are beginning to push back on secrecy statutes. According to Deborah Denno, secrecy statutes "[make] it difficult—if not impossible—to evaluate the constitutionality of lethal injection." Denno, *supra* note 46, at 95. As a result, the American Bar Association "urg[es] all jurisdictions that impose capital punishment to publish their execution drug protocols 'in an open and transparent manner,' require public review and comment on proposed protocols, and require disclosure of 'all relevant information regarding execution procedures'" Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. Crim. L. & Criminology 443, 461 (2017). Similarly, the Death Penalty Information Center argues that secrecy statutes are fundamentally at odds with American democracy. The organization asserts that "the growing secrecy that shields current state efforts to carry out executions

Another way states have adapted to mishaps is to make their protocols less specific at certain points during their executions. They have introduced greater ambiguity in the language governing crucial parts of their protocols. For example, even as states have added more checks to ensure that IVs are working, they have allowed executioners to attempt to set lines for longer periods of time and in more places.

States also have added ambiguity in execution length. No state procedures now specify a maximum time that should pass between injection and death. As a result, lethal injection's critics cannot point to a specific regulation in order to hold states accountable for long and painful executions.

In fact, the refusal of courts or legislatures to impose time constraints on executions has been integral to lethal injection's survival.[134] One exemplary case is the Tennessee Supreme Court's 2017 case *West v. Schofield*.[135] Several inmates challenged the constitutionality of the state's one-drug pentobarbital protocol, partially on the grounds that it creates a substantial risk of a lingering death. One of the their expert witnesses reviewed thirty pentobarbital executions conducted in Georgia, Ohio, and Texas and found that all of these executions resulted in death within 30 minutes of the first pentobarbital injection. Because no procedural, legal, or judicial standard of "lingering death" had ever been established, the Tennessee court had to decide whether a half-hour death constituted cruel and unusual punishment. Without explicitly affirming a 30-minute standard for lethal injections, it ruled in favor of the protocol's constitutionality.

States have made it hard to say when mishaps occur by explicitly or implicitly authorizing officials to exercise discretion. Thus states have set extremely broad expectations about how long the IV insertion is supposed to take. In 2017, Kentucky provided a one-hour window for the process before an execution must be stopped.[136] It revised its protocol in 2018 and expanded that window to three hours. Similarly, in 2016 Ohio made its lack of a standard explicit, writing in its protocol that the IV insertion team should take "as much time as necessary."[137]

While protocols previously limited IV insertion site options to minimize pain, they have come to allow for a wider array of sites. After 2010 eight states[138]

poses significant challenges to the rule of law and to the legitimacy of the democratic institutions administering capital punishment." Konrad, *supra* note 132, at 7.

134 In January 2014, a quarter-century after Dennis McGuire brutally raped and killed 8-month pregnant Joy Stewart, it took roughly 25 minutes for Ohio to kill him. It was the longest of the 53 executions Ohio had conducted since it resumed lethal injection in 1999. For 10 minutes, McGuire intermittently gasped and snorted for air. Southern Ohio Correctional Facility warden Donald Morgan wrote, immediately after overseeing the execution, "The process worked very well." Later in the month, upon reviewing the lethal injection as per standard procedure, special assistant Joseph Andrews found that everything in the execution went according to plan. Advocates called for a moratorium on the death penalty, in vain. Josh Sweigart, *Warden Says Execution Went as Planned*, Dayton Daily News (Feb. 5, 2014), https://www.daytondailynews.com/news/crime--law/warden-says-execution-went-planned/xls2RdWISRUjUzIusz9FKN.

135 519 S.W.3d 550 (Tenn. 2017).

136 In 2011, Delaware also allowed one hour. In 2014, Louisiana allowed one hour.

137 *Supra* note 134.

138 These states are Arkansas, Delaware, Florida, Idaho, Kentucky, Louisiana, Oklahoma, and South Dakota.

provided lists of ordered preferences for a large number of insertion sites. Protocols from least 13 states[139] indicated no preference for an IV site at some point in the last decade, leaving that decision for the IV team to make. Additionally, four states[140] have, sometime after 2010, explicitly called for a "cut down" procedure[141] in order to place a central venous line (in the chest) when necessary. Three states currently allow cut downs. Protocols in four additional states[142] allow a central venous line placement without proscribing a cut down.

Discretion is also frequently granted when the dosage prescribed by a protocol is insufficient to kill. At least 19 states' protocols[143] have allowed officials overseeing the execution to inject additional doses as they see fit. Thirteen of those states[144] have left the length of the waiting period between rounds of injection completely up to prison officials' discretion. Among states that do specify a waiting period length, the periods are inconsistent.[145] Occasionally, permission for a second injection is accompanied by permission for a range of other actions; Oklahoma's 2015 protocol allows the execution team to close the curtain, remove all of the witnesses, inject additional doses, and "determine how to proceed," a generous grant of discretion that gives officials room to change the procedure on the fly.

Moreover, states have increasingly left the choice of drugs for any particular execution to the warden overseeing an execution. At least 14 death penalty states[146] no longer specify a particular drug protocol, as they had before 2009. Instead, they allow officials to choose from a menu of drugs and drug combinations if needed.[147] Idaho's 2012 protocol reads, "which option is used is dependent on the availability of chemicals," making it explicit that these menus serve to enable executions to proceed in the face of drug shortages.

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139 Alabama, Arizona, Georgia, Indiana, Missouri, Nebraska, Nevada, North Carolina, Pennsylvania, Texas, Utah, Virginia, and Washington.

140 Alabama, Florida, Indiana, and Oklahoma.

141 The invasive surgery, in which officials place a central venous line by cutting away the inmate's flesh, has fallen out of favor in the medical community. Most central lines are placed today via the Seldinger technique (a safety enhancement over the previous 'cut-down' technique: Ari D. Leib, Bryan S. England & John Kiel, *Central Line*, StatPearls (July 31, 2021), http://www.ncbi.nlm.nih.gov/books/NBK519511. The cut down procedure is so gruesome that Texas (as of 2005), Delaware (as of 2011), Ohio and Oklahoma (both as of 2014) have explicitly forbidden it in their executions.

142 Idaho, Kentucky, Louisiana and Mississippi.

143 The 19 states are Alabama, Arkansas, California, Delaware, Florida, Georgia, Idaho, Kentucky, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington.

144 The 13 states are Alabama, Arkansas, Florida, Georgia, Idaho, Missouri, Nebraska, North Carolina, Ohio, Tennessee, Texas, Virginia, and Washington.

145 Oklahoma has prescribed 5 minutes; California, Delaware, South Dakota, and Utah have prescribed 10 minutes; Kentucky has prescribed 20.

146 These states are Arizona, California, Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, and Washington.

147 In January 2014, Ohio was unable to obtain pentobarbital for its preferred protocol and instead drew on its menu of options, selecting a novel combination of midazolam and another sedative, hydromorphone, to kill Dennis McGuire. In July, Arizona encountered a pentobarbital shortage and for the execution of Joseph Wood turned to midazolam and hydromorphone as well. McGuire and Wood's executions lasted 24 and 117 minutes respectively, and were widely recognized as botches.

Ambiguity and discretion provide executioners with a kind of blank check that brings lingering, fraught deaths into the fold of acceptable executions. Ambiguous language allows officials to elide details and avoid the specific provisions that once protected inmates from painful procedures or long executions. The discretion that protocols now allow means that executioners have wide latitude to modify execution procedures. Executioners can do what they deem necessary to kill an inmate--while acting within the authority grated by the state.

V. Conclusion: Failure, Reform, Failure in America's Death Penalty System

The recent history of lethal injection echoes the longer history of the death penalty. When states encountered problems with their previous methods of execution, they first attempted to address these problems by tinkering with their existing methods. When tinkering failed, they adopted allegedly more humane execution methods. When they ran into difficulty with the new methods, state actors scrambled to hide the death penalty from public view.[148] They have followed this same playbook during the era of lethal injection.

Our glimpse into the death chamber—aided by newspaper articles, independent investigations, and court documents—reveals that procedural changes have done little to make lethal injection more humane.[149] According to Deborah Denno, "it is questionable whether any of the [changes to lethal injection procedures]... can fix [them] with a sufficient degree of reliability."[150] In fact, lethal injection became more error-prone as states switched from barbiturate combinations to other types of drug protocols.[151] As the original lethal injection paradigm has decomposed, its problems have grown.

Some states have responded to lethal injection's problems by resurrecting older methods of execution as backups in case lethal injection becomes "unavailable" in the future. Between 2014 and 2015, six states made the firing squad, electrocution, or lethal gas backup methods of execution, and the federal government joined them in 2020.[152] If lethal injection becomes "unavailable," Missouri, Utah, and Wyoming

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148 In the 18th-century, this secrecy took the form of hoods placed over the inmate's head to hide their contortions. With the advent of the electric chair in 1890, it took the form of midnight executions conducted deep behind the walls of state prisons. Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States Symposium: The Lethal Injection Debate: Law and Science.* 35 Fordham Urb. L.J. 789, 791 (2008).

149 According to S. E. Smith, states tend to implement "minor reforms" after botches (2009).

150 Denno, *supra* note 46, at 117.

151 This assertion is backed by scholars like Madeira. Madeira states that "rapid innovation also intensifies organizational stress, increasing the likelihood of the very mistakes that reforms purportedly reduce" and as a result, "capital punishment by lethal injection is characterized by frequent reform and, as a result, has become engulfed in a "culture of mistake" (Madeira, *supra* note 123, at 83–84).

152 James C. Feldman, *Nothing Less than the Dignity of Man: The Eighth Amendment and State Efforts to Reinstitute Traditional Methods of Execution*, 90 Wash. L. Rev. 1313 (2015); Maurice Chammah, Andrew Cohen & Eli Hagar, *After Lethal Injection*, The Marshall Project, (June 1, 2015), https://www.themarshallproject.org/2015/06/01/after-lethal-injection.

allow execution by firing squad; Tennessee and Virginia will execute by electric chair; and Oklahoma will execute with nitrogen gas.[153]

Yet, perhaps the recent actions of Ohio Governor Mike Dewine shed particular light on the fate of lethal injection. On December 8, 2020 Dewine announced an "unofficial moratorium" on his state's death penalty.[154] The moratorium came almost three years after a federal judge compared Ohio's lethal injection procedure to "waterboarding, suffocation, and exposure to chemical fire." The judge found that lethal injection "will almost certainly subject prisoners to severe pain and needless suffering."[155] Dewine responded that "Ohio is not going to execute someone under my watch when a federal judge has found it to be cruel and unusual punishment." Ohio's efforts to keep lethal injection alive—such as switching drug cocktails, adding checks to its procedure, and obscuring mishaps in its death chamber—have not solved its problems.

Some scholars argue that the evolution of America's methods of execution is a story of progress.[156] To them, the adoption of each new execution method marked the abandonment of more barbaric and gruesome methods.[157] In contrast, the period from 2010 to 2020 was less a period of progress than of deterioration and decline. New drugs and drug combinations may have allowed the machinery of death to keep running. New procedures may have given the increasingly jerry-rigged lethal injection process a veneer of legitimacy. But none of these recent changes have resolved its fate or repaired its vexing problems. As Arkansas found out in its 2017 execution spree, there is little that can be done to save lethal injection from its status as America's least reliable and most problematic death penalty method.

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153 *Id.* at 1331-36.

154 Joseph Choi, *DeWine Says Lethal Injection 'impossible' Option for Ohio Executions*, The Hill, (Dec. 8, 2020), https://thehill.com/homenews/state-watch/529306-dewine-says-lethal-injection-impossible-option-for-ohio-executions.

155 *Ohio Governor Mike DeWine Calls Lethal Injection a Practical Impossibility, Says State Will Not Execute Anyone in 2021*, Death Penalty Information Center (Dec. 15, 2020), https://deathpenaltyinfo.org/news/ohio-governor-mike-dewine-calls-lethal-injection-a-practical-impossibility-says-state-will-not-execute-anyone-in-2021.

156 Sarat, *supra* note 97; David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition 183 (2010).

157 Dieter, *supra* note 148, at 798.

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The Dynamics of Democratic Breakdown: A Case Study of the American Civil War

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ABSTRACT

The 2020 election raised fundamental questions about the future of American democracy. Although the Democratic presidential nominee Joseph Biden won a decisive victory in the Electoral College and the popular vote, President Donald Trump refused to accept defeat. For weeks after the election, Trump falsely claimed that Democrats had stolen the election. In an unprecedented step for a defeated incumbent president, he pressured Republican election officials and legislators to help him overturn the election results. Trump's attacks on American democracy culminated on January 6, 2021, when a pro-Trump mob invaded the United States Capitol Building to disrupt the Electoral Vote Count.

In the aftermath of the 2020 election controversy, national polls found that over 90% of Americans believe that American democracy is in danger. Since the election, experts on both ends of the political spectrum have warned of the possibility of a full-fledged democratic breakdown in the United States.

This article places America's political crisis in historical context by examining the only democratic breakdown in the nation's history: the Civil War. Following Abraham Lincoln's victory in the 1860 election, eleven southern states seceded from the Union. The conflict that ensued cost over half a million lives and left one-half of the United States in physical and economic ruin.

This article makes three main points. First, a dispute over election rules did not cause the Civil War. Instead, the war resulted when the dominant political class in the South—slaveholders—rejected the principle of majority rule. American history thus demonstrates that even in the case of an election of unquestionable integrity, a disgruntled extremist minority might still break the country apart.

Second, the slaveholders feared that if they put the issue of secession to a popular referendum, the non-slaveholding majorities in southern states might vote against it. To achieve their goal of destroying the Union, therefore, slaveholders dictated special rules for the secession votes in their states. After Lincoln's election, southern state legislatures delegated the issue of secession to state conventions. Across the

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South, slaveholders manipulated the convention election rules to ensure the result they wanted: break-up of the federal union.

Third, and finally, northerners viewed the war as a battle for the survival of democracy itself. They recognized that no democratically held election would ever be binding if losers could simply break free and form their own government. Northerners thus rallied around the Lincoln administration and supported the Union war effort through four bloody years of battle. The Union's victory vindicated democracy as a form of government. The Confederacy's crushing defeat in 1865 demonstrated that democracies could successfully navigate even the most extreme forms of civil disorder. Most important of all, the Civil War era gave rise to a dramatic expansion in the inclusiveness of American democracy. Ironically, therefore, the United States government emerged stronger in 1865 than it had been when the war began in 1861.

KEYWORDS

secession, democracy, extremism, polarization, political breakdown

CONTENTS

I. Introduction

The United States emerged from the 2020 presidential campaign more profoundly divided than at any time since the Civil War. Donald Trump's false claims of election fraud further inflamed those divisions. When Trump supporters stormed the United States Capitol Building to try to overturn the election results, it became undeniably clear that the nation had entered a dangerous new era of political violence. Since the election, experts on both ends of the political spectrum have warned of the possibility of a full-fledged democratic breakdown in the United States.[1]

This article places America's polarization in historical context by examining the only democratic breakdown in the nation's history: the Civil War.[2] Democratic breakdowns typically occur in one of two forms.[3] The first is when a country's military or internal security forces topple an elected government.[4] The Spanish military's revolt against the democratically-elected government in Madrid in 1936—an event that set off the Spanish Civil War—is a preeminent example.[5] A second form of democratic breakdown occurs when the incumbent party uses the power of the state to suspend elections and dismantle democratic government.[6] The most notorious example is the Nazi Party's destruction of the Weimar Republic in 1933.[7]

But the United States experienced a third form of democratic breakdown: a secession movement by disgruntled election losers. When Abraham Lincoln and the Republican Party won the 1860 presidential election, the slaveholding South refused to be bound by the election results. Instead of looking ahead to the next presidential election campaign, eleven southern states chose to secede. The conflict that ensued remains the bloodiest war in American history. The Civil War cost over half a million lives and left one-half of the United States in physical and economic ruin.[8]

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1 *See* Part II.

2 The Civil War continues to generate an extraordinary amount of outstanding legal scholarship. For recent examples, *see* Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 Mil. L. Rev. 481 (2016); Stephanie McCurry, *Enemy Women and the Laws of War in the American Civil War*, 35 Law & Hist. Rev.667 (2017); Laura F. Edwards, A Legal History of the Civil War and Reconstruction: A Nation of New Rights (2015); Cynthia Nicoletta, Secession on Trial: The Treason Prosecution of Jefferson Davis (2017).

3 Ko Maeda, *Two Modes of Democratic Breakdown: A Competing Risks Analysis of Democratic Durability* 72 J. Pol. 1129, 1129 (2010) ("There are two distinctive modes by which democracies become nondemocracies, which have not yet been differentiated in the literature. One is when a democratic government is toppled by a force outside of the government, such as a military coup, and the other is when a democratically elected leader suspends the democratic process.").

4 *Id.* at 1129-30.

5 Stanley G. Payne, The Collapse of the Spanish Republic, 1933-1936, 308 (2006) ("The Spanish Military Conspiracy and revolt of 1936 may be the most widely written about, if not the most thoroughly investigated, in world history.").

6 Maeda, *supra* note 3, at 1130.

7 Eric D. Weitz, Weimar Germany: Promise and Tragedy 358 (2018) ("The Nazi assumption of power was a counterrevolution in the sense that it overthrew the great achievements of the revolution of 1918–19. Universal and equal suffrage, political liberties, elections, popular participation in all sorts of institutions—all that was quickly destroyed by the Nazis, obliterating the republic and the constitution.").

8 *See* Parts II and III.

More than 150 years later, the United States faces new threats of political violence from disgruntled election losers. Equally troubling, recent polling data finds a rising degree of support for secession among ordinary Americans, especially after their party loses a presidential election.[9] Accordingly, the intense polarization of the 2020s has made the lessons of the Civil War more relevant than ever.

In placing the current democratic crisis in historical context, this article focuses on three questions: First, why did the South reject the results of the 1860 election? Second, what legal and quasi-democratic processes did Confederate states use to assert that most white southerners supported secession? Third, and most important of all, how did American democracy survive the Civil War, the greatest crisis in the nation's history?

II. Divided We Stand

The 2020 election raised fundamental questions about the future of American democracy. Although the Democratic presidential nominee Joseph Biden won a decisive victory in the Electoral College and the popular vote,[10] President Donald Trump refused to accept defeat. For weeks after the election, he falsely claimed that Democrats had stolen the election.[11] During a press conference two days after the election, he declared, "If you count the legal votes, I easily win."[12] With no evidence,[13] he claimed that the Democrats "were trying to steal an election."[14] In the two weeks after Biden's victory, Trump tweeted false claims of election fraud over 300 times.[15] Trump's irresponsible rhetoric was not the first time he had made spurious claims of election fraud.[16] In 2016, three weeks before election day, he claimed the election was rigged against him.[17] Even after Trump secured

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9 *See* Part II.

10 *Presidential Election Results: Biden Wins*, N.Y. Times (Dec. 14, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html.

11 Peter Baker & Maggie Haberman, *In Torrent of Falsehoods, Trump Claims Election Is Being Stolen,* N.Y. Times (Nov. 5, 2020), https://www.nytimes.com/2020/11/05/us/politics/trump-presidency.html; Michael D. Shear, *Trump, In Video From White House, Delivers A 46-Minute Diatribe On The 'Rigged' Election,* N.Y. Times (Dec.2 2020), https://www.nytimes.com/2020/12/02/us/politics/trump-election-video.html.

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17 *US election 2016: Trump says election 'rigged at polling places,'* BBC (Oct. 17, 2016), https://www.bbc.com/news/election-us-2016-37673797.

a majority in the Electoral College, he continued his baseless allegations, alleging that Democrats had manufactured three million illegal votes for Hillary Clinton.[18] Trump's false and cynical claims of fraud thus served as a central theme of both the 2016 and 2020 elections.[19]

But in 2020 Trump went to dangerous new lengths.[20] In an unprecedented step for a defeated incumbent president, he pressured Republican election officials and legislators to help him overturn the election results.[21] When that effort failed, Trump asked the Supreme Court to overturn Biden's victory.[22] At least 126 Republican members of Congress and 17 Republican state attorneys general joined in the effort.[23] When the Supreme Court rejected Trump's bid to overturn the 2020 election results, the president condemned the ruling, declaring: "This is a great and disgraceful miscarriage of justice. The people of the United States were cheated, and our Country disgraced. Never given our day in Court."[24] Although Trump failed to overturn the 2020 election results, his attacks undermined Republican confidence in the integrity of America's democratic institutions.[25] A post-election Reuters poll

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found that 52% of Republicans believed Trump's false claim that the election was rigged for Biden.[26] By early January 2021, over 60% of Republicans rejected the legitimacy of Biden's victory.[27] Congressional Republicans joined Trump in fanning partisan fury among Republican voters by continuing to spread the lie that the election was stolen.[28]

Trump's attacks on American democracy culminated on January 6, 2021, when a pro-Trump mob invaded the United States Capitol Building to disrupt the Electoral Vote Count.[29] Before the riot, President Trump had pressured Vice President Pence to unconstitutionally reject Biden's victory and declare Trump the winner.[30] Pence refused, explaining:

> "As a student of history who loves the Constitution and reveres its Framers, I do not believe that the Founders of our country intended to invest the vice president with unilateral authority to decide which electoral votes should be counted during the Joint Session of Congress, and no vice president in American history has ever asserted such authority."[31]

Outraged by Pence's refusal to overturn the 2020 presidential election, hundreds of rioters swarmed the Senate and House floors and occupied congressional offices, rifling drawers, destroying property, and claiming souvenirs.[32] The rioters' violence and lawlessness forced members of Congress to shelter in locked rooms, some even fearing for their lives.[33] Blaming Pence for Trump's defeat, the rioters

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chanted, "Hang Mike Pence."[34] Rioters attacked police officers, in one case beating a defenseless police officer on the ground with an American flag.[35] Prosecutors later revealed that some of the pro-Trump rioters intended to assassinate lawmakers and take others hostage.[36] At one point during the attack on the Capitol Building, rioters came within 100 feet of Pence.[37] As the Secret Service rushed Pence to safety, Trump condemned his vice president in a Tweet, declaring:

> "Mike Pence didn't have the courage to do what should have been done to protect our Country and our Constitution, giving States a chance to certify a corrected set of facts, not the fraudulent or inaccurate ones which they were asked to previously certify. USA demands the truth!"[38]

The riot led to 5 deaths[39] and only ended hours later when the Washington National Guard cleared the building.[40] The pro-Trump riot was one of the most

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serious threats to the Capitol's safety since the British invaded Washington in 1814.[41]

President Trump played a key role in the violence.[42] During a speech he made shortly before the rioters attacked the Capitol, Trump egged on the crowd, calling on his supporters to "fight much harder" and "show strength" to prevent Congress from certifying Biden's victory.[43] The purpose of the march, he emphasized, was to "stop the steal."[44] Falsely promising to march on the Capitol himself, Trump asserted that "all of us here today do not want to see our election victory stolen by bold and radical left Democrats."[45] After warning the crowd that "you'll never take back our country with weakness," he urged them to "fight like hell, and if you don't fight like hell you're not going to have a country anymore."[46] In the weeks after the riot, Trump never expressed regret for his role in inciting the mob.[47] In fact, according to Republican Congresswoman Jaime Herrera Beutler, Trump sided with the rioters during a phone call with House Minority Leader Kevin McCarthy as the mob stormed the Capitol.[48]

Many of the rioters interpreted Trump's words as a call for violence.[49] Leading Republicans did so as well. As Republican Congresswoman Liz Cheney emphasized, Trump "lit the flame" and "incited the mob."[50] Republican Senator Mitt Romney declared that "[w]hat happened here today was an insurrection,

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50 Justine Coleman, *Liz Cheney blames Trump for riots: 'He lit the flame'*, THE HILL (Jan. 6, 2021), https://thehill.com/homenews/house/533024-liz-cheney-blames-trump-for-riots-he-lit-the-flame.

incited by the President of the United States."[51] Similarly, Republican Senate Majority Leader Mitch McConnell asserted that the "mob was fed lies" and that "[t]hey were provoked by the President and other powerful people."[52] Indeed, as McConnell pointed out, Trump was not the only senior Republican who incited the mob to violence. Speaking at the same event as the president, Trump's attorney, Rudolph Giuliani, told the crowd, "Let's have trial by combat."[53] Nevertheless, the violence at the Capitol did not diminish baseless attacks on the integrity of the 2020 election. Even after the riot, 139 House Republicans and 8 Senate Republicans voted to reject Biden's victory despite the complete absence of evidence of fraud.[54]

Trump's unprecedented attack on the legitimacy of America's democratic institutions[55] reflected more than the reckless irresponsibility of a sore loser. His embrace of inflammatory tactics and demagogic rhetoric served as the culmination of years of deepening polarization in the United States. Even before Trump's presidency, rates of partisan polarization had soared to historic levels, extending even to marriage choices and neighborhood preferences.[56] The 2016 election intensified the trend toward hyper-partisanship. A 2017 poll, for example, found that a majority of Democrats and Republicans viewed the opposing party as a threat to the country.[57] Not coincidentally, a 2020 survey found public confidence in American democracy at an all-time low.[58]

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55 David E. Sanger, *Trump's Attempts to Overturn the Election Are Unparalleled in U.S. History*, N.Y. Times, (Nov. 20, 2020), https://www.nytimes.com/2020/11/19/us/politics/trump-election.html.

56 Nate Cohn, *Polarization Is Dividing American Society, Not Just Politics*, N.Y. Times (Jun. 12, 2014), https://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html.

57 Philip Bump, *More than half of partisans see the other party's policies as a threat to the country*, Wash. Post (Dec. 5, 2017), https://www.washingtonpost.com/news/politics/wp/2017/12/05/more-than-half-of-partisans-see-the-other-partys-policies-as-a-threat-to-the-country/; Aaron Blake, *How many Americans truly hate the other political party? About 1 in 4.*, Wash. Post (June 19, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/19/how-many-americans-truly-hate-the-other-political-party-only-about-78-million/; David Lauter, *Americans increasingly see opposing party as 'threat' to nation*, L.A. Times (June 12, 2014), https://www.latimes.com/nation/politics/politicsnow/la-pn-partisan-polarization-20140611-story.html.

58 Yascha Mounk & Roberto Stefan Foa, *This Is How Democracy Dies*, The Atlantic (Jan. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/01/confidence-democracy-lowest-point-record/605686/ ("Public confidence in democracy is at the lowest point on record in the United States. . . . [T]he drop in satisfaction with democracy is both especially rapid and especially consequential in the United States. For much of its

The refusal of many Republicans to accept Trump's defeat has led three of the nation's top election law experts to warn of the dangers facing American democracy. In the weeks before the election, Richard Hasen revealed that he had "never been more worried about American democracy than I am right now."[59] Similarly, Edward Foley stressed that "[i]f the losing party can't accept defeat, the whole enterprise of electoral democracy is finished."[60] Likewise, Richard Pildes observed that Trump's effort to persuade Republican officials to overturn the election outcome "is toxic for the country's politics."[61] Baseless allegations of election fraud, he warned, raised the danger "that the country will become increasingly ungovernable."[62] A retiring Republican member of Congress shared the scholars' concerns. Congressman Paul Mitchell changed his party affiliation to independent in protest of Congressional Republicans' support of Trump's efforts to overturn the election.[63] Mitchell urged his former Republican colleagues "to stand up for democracy first, for our Constitution first, and not political considerations."[64] The president's conspiracy theories and spurious attacks on the election, he warned, threatened "long-term harm to our democracy."[65]

Signs of strain on the American Union can be found in increasingly disturbing polling data and secessionist threats. A 2014 Reuters poll, for example, found that 24% of Americans were open to their state seceding from the United States.[66] After Trump's election in 2016, a Reuters poll found that 32% of Californians supported seceding from the Union.[67] In turn, Biden's victory in 2020 gave rise

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modern history, America has viewed itself as a model democracy that could serve as an example to countries that wished to emulate its success. Survey data show that there was a little substance to this hubris: as recently as 10 years ago, three out of every four Americans said that they were satisfied with the state of their democratic system. . . . For the first time on record, polls show that a majority of Americans (55 percent) are dissatisfied with their system of government.").

59 Richard L. Hasen, *I've Never Been More Worried About American Democracy Than I Am Right Now*, Slate (Sept. 23, 2020), https://slate.com/news-and-politics/2020/09/trump-plan-supreme-court-stop-election-vote-count.html. *See also* Pippa Norris, *Can our democracy survive if most Republicans think the government is illegitimate?*, Wash. Post (Dec. 11, 2020), https://www.washingtonpost.com/outlook/trump-democratic-legitimacy-election/2020/12/11/1adfe688-3b14-11eb-9276-ae0ca72729be_story.html ("[L]ong-term evidence indicates three reasons why this crisis may be different — and why it may worsen. If it does, it will threaten democratic governance in America. . . . the foundations of American civic culture have been gradually weakening for decades.").

60 Edward B. Foley, Opinion, *If the losing party won't accept defeat, democracy is dead*, Wash. Post. (Nov. 19, 2020), https://www.washingtonpost.com/opinions/2020/11/19/if-losing-party-wont-accept-defeat-democracy-is-dead/.

61 Richard H. Pildes, Opinion, *Why Trump Will Fail in Michigan*, N.Y. Times (Nov. 20, 2020), https://www.nytimes.com/2020/11/20/opinion/trump-michigan-election.html.

62 *Id.*

63 Jake Tapper, *Congressman cites Trump's efforts to overturn election in announcing decision to quit GOP*, CNN (Dec. 14, 2020), https://www.cnn.com/2020/12/14/politics/paul-mitchell-quits-gop/index.html.

64 *Id.*

65 *Id.*

66 Scott Malone, *Angry with Washington, 1 in 4 Americans open to secession*, Reuters (Sep. 19, 2014), https://www.reuters.com/article/us-usa-secession-exclusive/exclusive-angry-with-washington-1-in-4-americans-open-to-secession-idUSKBN0HE19U20140919.

67 Sharon Bernstein, *More Californians dreaming of a country without Trump: poll*, Reuters

to secessionist talk among Republicans. The chair of the Texas Republican Party called on his fellow conservatives to consider forming a new, smaller union of states.[68] He asserted that "perhaps law-abiding states should bond together and form a union of states that will abide by the Constitution."[69] Most provocative of all, the prominent conservative radio talk show host Rush Limbaugh declared in December 2020 that "there cannot be peaceful coexistence" between liberals and conservatives.[70] Limbaugh announced that conservatives were "trending toward secession."[71]

Could a democratic breakdown occur in the United States in the 2020s? History suggests the answer is yes. The United States has experienced a democratic breakdown in its past. The 1860 election divided the nation so profoundly that it resulted in the Civil War.[72] The four-year-long war cost at least 620,000 Americans their lives, and recent research indicates that perhaps as many as 750,000 Americans died in the war.[73] In addition to the massive loss of life, the war cost the federal government and northern state governments over $5.2 billion[74] and saw many southern cities and towns devastated.[75] The conflict's destruction left a legacy still felt in the twenty-first century. The shattered economy of the ex-Confederate states lagged behind the rest of the country for generations after the war.[76] As late as the 1940s, per capita income in most southern states was still one-third lower than the national average.[77] Even in the early 21st century, the

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(Jan. 23, 2017), https://www.reuters.com/article/us-usa-trump-california-secession/more-californians-dreaming-of-a-country-without-trump-poll-idUSKBN1572KB.

68 Shane Goldmacher, *Democrats, and Even Some Republicans, Cheer as Justices Spurn Trump*, N.Y.Times (Dec. 11, 2020), https://www.nytimes.com/2020/12/11/us/politics/trump-supreme-court-texas.html.

69 *Id.*

70 Media Matters Staff, *Rush Limbaugh: "There cannot be a peaceful coexistence" between liberals and conservatives*, Media Matters (Dec. 9, 2020, 5:36 PM), https://www.mediamatters.org/rush-limbaugh/rush-limbaugh-there-cannot-be-peaceful-coexistence-between-liberals-and-conservatives.

71 *Id.*

72 *See* Part III.

73 Drew Gilpin Faust, This Republic of Suffering: Death and the American Civil War xi (2008). Recent demographic studies estimate that the actual Civil War death toll was 750,000, and perhaps even as high as one million. *See* J. David Hacker, *A Census Based Count the Civil War Dead*, 57 Civ. War Hist. 307 (2011); Guy Gugliotta, *New Estimate Raises Civil War Death Toll*, N.Y. Times (Apr. 2, 2012), https://www.nytimes.com/2012/04/03/science/civil-war-toll-up-by-20-percent-in-new-estimate.html. By way of comparison, the Second World War cost 405,000 American lives and Vietnam cost 58,000. Office of Public Affairs, *America's Wars*, department of veterans affairs (2021), https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf.

74 Claudia D. Goldin & Frank D. Lewis, *The Economic Cost of the American Civil War: Estimates and Implications*, 35 J. Econ. Hist.299, 321 (1975).

75 William J. Cooper, jr. & Thomas E. Terrill, The American South: A History 385 (1990).

76 *See* Richard F. Bensel, Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877, 416-9 (1990); Roger L. Ransom, Conflict and Compromise: The Political Economy of Slavery, Emancipation, and the American Civil War (1989); William Cooper, jr. & Thomas E. Terrill, American south 383, 385 (2009).

77 Sharon Nunn, *The South's Economy Is Falling Behind: 'All of a Sudden the Money Stops Flowing'*, Wall St. J. (Jun. 9, 2019), https://www.wsj.com/articles/the-souths-

southern regional average remained 10 to 15% lower than the national average for per capita income.[78]

But the war also had many beneficial legacies. It created conditions that led to the adoption of the 13th, 14th, and 15th amendments, which abolished slavery, enshrined the principle of equality in American law, and dramatically expanded the definition of American democracy. The war thus transformed the United States into a modern nation, one that would become increasingly diverse, cosmopolitan, and powerful in the decades after 1865.

Although Americans usually think of the Civil War as a military conflict, elections played a critical role in every phase of the war. The conflict's triggering event was Abraham Lincoln's victory in the 1860 presidential election.[79] Seven southern states seceded in the months between Lincoln's election in November 1860 and his inauguration in March 1861.[80] Four more southern states seceded after the Confederate attack on the federal garrison at Fort Sumter, South Carolina.[81] From the conflict's earliest days, Lincoln defined the war as a test of whether democracy was a viable form of government.[82] Under his leadership, the North's central war aim was to uphold the principle of majority rule.[83] As Lincoln put it in the Gettysburg Address, the Union fought to ensure "that government of the people, by the people, for the people shall not perish from the earth."[84] Ultimately, Lincoln's reelection in 1864 sealed the Confederacy's fate and ensured the American republic's survival.[85]

The Civil War thus constituted the most severe test of American democracy. For Americans in the 2020s looking for lessons from the Civil War era, the first question is simple. Why did the 1860 election set off civil war in the first place?

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economy-is-falling-behind-all-of-a-sudden-the-money-stops-flowing-11560101610 ("In the 1940s, per capita income in the states historians and economists generally refer to as the South—Louisiana, Mississippi, Alabama, Georgia, the Carolinas, Virginia, West Virginia, Oklahoma, Arkansas, Tennessee and Kentucky—equaled 66.3% of the national average, according to historical data reconstructed by University of Kent economist Alex Klein and The Wall Street Journal. By 2009, that had climbed to 88.9%. That was the high-water mark. By 2017 it fell back to 85.9%.").

78 *Id.*

79 James M. McPherson, The Battle Cry Of Freedom: The Civil War Era 229 (1988); Richard H. Sewell, A House Divided: Sectionalism and Civil War, 1848-1865, 76-8 (1988).

80 McPherson, *supra* note 78, at 235; Sewell, *supra* note 78, at 80.

81 Sewell, *supra* note 78, at 83.

82 *See* Gettysburg Address, Yale Law School Avalon Project, https://avalon.law.yale.edu/19th_century/gettyb.asp.

83 James M. McPherson, Drawn With the Sword: Reflections on the American Civil War 209-10 (1996).

84 Gettysburg Address, *supra* note 45.

85 John Waugh, Reelecting Lincoln: The Battle For the 1864 Presidency 356 (1997); Alan T. Nolan, Lee Considered: General Robert E. Lee and Civil War History 117-18 (1991); Philip S. Paludan, The Presidency of Abraham Lincoln 290-91 (1994); William J. Cooper, Jr., & Thomas E. Terrill, The American South, 381-2 (1990).

III. Why the South Rejected the 1860 Election Results

Many leading experts have warned that gaps and contradictions in American election laws could provoke a democratic breakdown in the event of a controversial election.[86] Edward Foley, for example, has pointed out that ambiguities in the Electoral Count Act could create a constitutional crisis if a decisive state in a presidential election sent competing slates of electors to Congress.[87] The Constitution's Twelfth Amendment also includes dangerous shortcomings.[88] In light of the deficiencies in existing election law, Richard Hasen has urged the federal and state governments to avoid a future election meltdown by making "fundamental changes in the way we conduct our elections to bring our procedures more in line with international standards."[89] Modernizing and clarifying America's election laws is thus long overdue. Amid an intensely polarized electorate, a disputed election governed by ambiguous rules would be a disaster of historic proportions.

But the experience of the American Civil War shows that clarifying election rules may not be enough to prevent a democratic breakdown. A dispute over election rules did not cause the Civil War. Instead, the war resulted when the dominant political class in the South—slaveholders—rejected the principle of majority rule. American history thus demonstrates that even in the case of an election of unquestionable integrity, a polarized and extremist minority might still break the country apart.

In 1860, there was no reasonable doubt that Abraham Lincoln had won the presidential election.[90] As the Republican nominee, Lincoln carried 180 electoral votes, easily surpassing the 152 required to win an Electoral College majority.[91]

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86 Larry Diamond and Edward B. Foley, *The Terrifying Inadequacy of American Election Law*, The Atlantic (Sept. 8, 2020), https://www.theatlantic.com/ideas/archive/2020/09/terrifying-inadequacy-american-election-law/616072/; Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Was. & Lee L. Rev. 937 (2005); Edward B. Foley, Ballot Battles: The History of Disputed Elections in the United States 349 (2016), ("The main cause of serious vote-counting litigation is ambiguity, imprecision, or other forms of uncertainty in the content of the relevant rules and how they apply to particular situations"); Richard L. Hasen, The Voting Wars 4 (2012), ("We are just one more razor-thin presidential election away from chaos and an undermining of the rule of law").

87 Edward B. Foley, *Congress must fix this election law — before it's too late*, wash. post (Dec. 1, 2020), https://www.washingtonpost.com/opinions/2020/12/01/congress-must-fix-this-election-law-before-its-too-late/; Edward B. Foley, Ballot Battles: The History Of Disputed Elections in the United States, 279, 355 (2016) (calling on Congress to replace "the convoluted, essentially incomprehensible, and utterly inadequate procedures of the Electoral Count Act of 1887"). One of the act's key sentences is 275 words long, a length virtually guaranteed to create controversy if tested. *See* Stephen A. Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 Fla. L. Rev. 541, 543 (2004).

88 *See* Nathan L. Colvin and Edward B. Foley, *The Twelfth Amendment: A Constitutional Ticking Time Bomb*, 64 U. Miami L. Rev. 475 (2010).

89 Richard L. Hasen, Election Meltdown: Dirty Tricks, Distrust, And The Threat To American Democracy 136 (2020).

90 Phillip S. Paludan, The Presidency of Abraham Lincoln 5 (1994), ("Lincoln was indisputably the constitutionally elected chief executive").

91 James M. McPherson, The Battle Cry of Freedom 232 (1988).

Lincoln also received over 1.86 million votes, giving him 54 percent of the popular vote in the North and 40 percent nationally.[92] No other candidate was even close.[93] The northern Democratic Party nominee Stephen Douglas won over 1.37 million votes but only 12 electoral votes.[94] The southern Democratic Party nominee John Breckinridge won over 849,000 votes and 72 electoral votes and the Constitutional Union Party nominee John Bell won nearly 590,000 votes and 39 electoral votes.[95] Lincoln's decisive majority in the Electoral College thus made his victory incontrovertible.[96] As the historian Philip Paludan observed, "Lincoln was indisputably the constitutionally elected chief executive, chosen by one of the largest voter turnouts in American history."[97] Ironically, the only candidate with grounds for complaint was Lincoln himself. Slaveholders' threats of violence and intimidation prevented the Republican Party from fielding a ticket in 10 southern states.[98]

Before Lincoln was even inaugurated in March 1861, seven southern states seceded from the Union.[99] By May 1861, a total of 11 states had left the Union and formed the Confederate States of America.[100] None of the southern states seriously questioned the integrity of the 1860 election results. So why did they secede?

The answer is slavery. The South seceded because slaveowners—the most influential political force in the region—concluded that democracy no longer served their interests. As Confederate Vice President Alexander Stephens explained in a March 1861 speech, slavery and racial inequality served as the "foundations" and "cornerstone" of the new Confederate nation.[101] The 1860 election starkly demonstrated that the North's rapidly growing population gave northern politicians a decisive majoritarian advantage over their southern counterparts.[102] A magnet for immigrants,[103] the North received the lion's share of population growth in the 1850s.[104] The population of the United States grew from 23.3 million in 1850 to 31.5 million in 1860, a 33 percent increase in just ten years.[105] Accordingly, political

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92 David Herbert Donald, Lincoln 256 (1995); McPherson, *supra* note 91, at 232; Timothy S. Huebner, Liberty & Union: The Civil War Era and American Constitutionalism 114 (2016) (Lincoln's "margin of victory in fifteen of the seventeen states he won was large enough that even the combined votes of his opponents would not have defeated him.").

93 Paludan, *supra* note 89.

94 Donald, *supra* note 91.

95 *Id.*

96 Michael f. holt, The Election of 1860: A Campaign Fraught with Consequences 172 (2017)("The final results showed that Lincoln had swept all but three of the free states' electoral votes for a winning total of 180, which was 28 more than the majority he needed.").

97 Paludan, *supra* note 89.

98 James M. Mcpherson, The Battle Cry of Freedom 223 (1988)("Republicans did not even have a ticket in ten southern states, where their speakers would have been greeted with a coat of tar and feathers—or worse—if they had dared to appear.").

99 Huebner, *supra* note 91, at 117-8.

100 Sewell, *supra* note 78, at 86; Donald, supra note 91, at 297.

101 Emory M. Thomas, The Confederate Nation: 1861-1865, 10 (1979).

102 Paludan, *supra* note 89, at 6.

103 *Id.* at 7.

104 *Id.* at 6.

105 *Id.*

representation shifted northward. In the 1861 Congress, the 15 slave states' share of the House membership fell to 83 out of 233 House seats.[106] That in turn meant that the central institution of antebellum southern society—human slavery—faced unprecedented resistance at the national level.[107] Slaveholders thus came to the sober realization that the principle of majority rule posed a growing threat to the South's white supremacist political order.[108] To separate themselves from a national government they no longer controlled, slaveowners plunged the country into the most devastating war in American history.

The secession movement of 1860-61 resulted from decades of pent-up slaveholder fear and paranoia.[109] By the mid-nineteenth century, global trends in favor of abolition had left southern slaveholders isolated.[110] In 1833, for example, the United Kingdom banned slavery within the British Empire.[111] By 1860, it was abundantly clear that slavery was a dying institution outside the United States.[112] With slavery on the retreat internationally, southern slaveowners feared that growing hostility to slavery in the North would result in abolitionist efforts to incite slave revolts in the South.[113] Such fears seemed to materialize in October 1859 when the northern abolitionist John Brown led an attack on the federal armory at Harper's Ferry, Virginia.[114] Although Brown's effort to spark a slave revolt in the South failed, southern politics after Harper's Ferry became a tinderbox.[115] As the historian Roy Nichols observed, "It was a national calamity that in this frightening time there had to be fought a great electoral contest in which the stakes of power, never before so huge, were to be placed at hazard."[116] Lincoln's victory 13 months after Brown's raid ignited slaveholders' worst fears.[117] The specter that the federal government itself would take up Brown's cause inspired nightmarish visions in the South's slaveholding class.[118] South Carolina Congressman James Orr spoke for slaveholders across the South when he alleged that the Republican Party would wage "open undisguised war upon our social institutions."[119] With the South's white

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106 *Id.*

107 *Id.* at 7.

108 *Id.* ("Threats of vetoes and legislative maneuvering by Southern legislators had held back these expansions of national power, but demographics, economic development needs, and antislavery hostility were building pressure to break the dam. Population figures were driving national politics.").

109 McPherson, *supra* note 98, at 212-3, 229; Steven A. Channing, Crisis of Fear: Secession in South Carolina 236-7 (1970); William L. Barney, The Road to Secession: A New Perspective on the Old South 168 (1972). The southern defense of secession's constitutionality dated as far back as South Carolina Senator Robert Hayne's famous 1830 debate with Massachusetts Senator Daniel Webster. *See* Timothy S. Huebner, Liberty & Union: The Civil War Era and American Constitutionalism 17 (2016).

110 Barney, *supra* note 109, at 150.

111 *Id.*

112 *Id.*

113 Channing, *supra* note 109, at 21-4.

114 McPherson, *supra* note 98, at 205-6.

115 *Id.* at 212-3.

116 Roy F. Nichols, The Stakes of Power, 1845-1877, 78 (1961).

117 Channing, *supra* note 109, at 236-7; McPherson, *supra* note 98, at 229; Barney, *supra* note 109, at 168.

118 Channing, *supra* note 109, at 23; Barney, *supra* note 109, at 168-9, 238-9.

119 Channing, *supra* note 109, at 238-9.

supremacist social order seemingly under attack, Orr insisted that "secession is the only recourse."[120]

Ironically, slaveholders grossly exaggerated the threat. Although Lincoln opposed slavery's expansion into the western territories and had repeatedly expressed the hope that slavery would eventually die of its own accord, the president-elect was by no means an abolitionist.[121] In fact, in the weeks after his election, he even expressed a willingness to strengthen slavery. In an effort to appease southern and border state slaveholders, Lincoln promised to increase enforcement of the Fugitive Slave Act, which required northern states to cooperate in the capture and return of runaway slaves.[122] Most important of all, the new president emphasized that he would take no action against slavery in the southern and border states.[123] As he explained in his inaugural address on March 4, 1861, "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so."[124]

But Lincoln's assurances could not overcome southern conspiracy theories of Republican plots against the South.[125] The rumors began in Texas in August 1860 with false accusations that northern abolitionists had encouraged slaves to commit arson, rape, and murder.[126] The stories spread like wildfire throughout the Deep South in the fall of 1860.[127] Slaveholders fanned the flames of fear by claiming that the "Black Republican" party would set off a race war in the South.[128] Georgia Governor Joseph Brown asserted that Lincoln's "Black Republican" party would "do all in their power to create in the South a state of things which must ultimately terminate in a war of extermination between the white and black races."[129] After Lincoln's victory, the *Richmond Examiner* warned that "a party founded on the single sentiment of hatred of African slavery, is now the controlling power" in the country.[130] The region's unhinged reaction to Lincoln's election victory created a toxic political atmosphere in the South. In the view of the powerful slaveholder class, partisan divisions no longer represented good faith differences of opinion.[131] Instead, slaveholders insisted, the 1.8 million northerners who voted for Republican candidates constituted a mortal and intolerable threat to southern society.[132] As one New Orleans editor put it, each vote Lincoln received was "a deliberate, cold-blooded insult and outrage" on the South.[133]

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120 *Id.* at 239.
121 Donald, *supra* note 92, at 180-81, 187-9, 270; McPherson, *supra* note 98, at 127-9.
122 Donald, *supra* note 92, at 270.
123 *Id.*
124 *First Inaugural Address of Abraham Lincoln,* Yale Law School Avalon Project, (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp.
125 McPherson, *supra* note 98, at 228-9; Barney, *supra* note 109, at 146 ("No issue so galvanized white fears or engendered such blind hatred of the North as did the rumors of slave uprisings that swept over the South in 1860.").
126 Barney, *supra* note 109, at 146-8; McPherson, *supra* note 98, at 228-9.
127 *Id.*
128 George Rable, The Confederate Republic: A Revolution Against Politics 27 (1994); Barney, *supra* note 109, at 146-7.
129 Rable, *supra* note 128, at 29.
130 McPherson, *supra* note 98, at 232.
131 Rable, *supra* note 128, at 30.
132 *Id.*
133 McPherson, *supra* note 98, at 231.

Above all, southern slaveholders understood that Lincoln's election ushered in a new era in which slaveholders and their northern allies no longer possessed a national majority.[134] Slaveholders had served as president for 50 of the nation's first 72 years and no party hostile to slavery had ever secured a congressional majority.[135] But the 1860 election made it unmistakably clear that demographic changes had transformed the national balance of power.[136] In 1800 the populations of North and South stood roughly equal, but by 1860 the population of the North had surged past the South.[137] Accordingly, Lincoln was able to win the presidency without receiving a single electoral vote in the South.[138] As Republican Congressman Charles Francis Adams of Massachusetts put it, Lincoln's election meant that "[t]he country has once and for all thrown off the domination of the Slaveholders."[139]

The crucial point is that pro-secession southerners did not live under an illusion that their side had actually won the 1860 election. Quite the reverse. The secessionists viewed the election as conclusive proof that northern popular sentiment had irrevocably turned against southern slaveholders.[140] As the historian David Potter explained, Lincoln's victory and the rise of the Republican Party made white southern slaveholders "acutely conscious of their minority status."[141] Most crucial of all, the 1860 election thus brought home to southern slaveholders that they were a "permanent and dwindling minority" in the rapidly growing United States.[142] The population of the North had so surpassed that of the South that a candidate could win the presidency with no support in the South.[143] Thus, as the historian Michael Holt explains, southern slaveholders concluded that "a proslavery Democratic Party could never again win control of the national government."[144] In light of inescapable demographic realities, "the psychology of a garrison under siege" took hold among the slaveholding white South.[145]

Accordingly, Confederates did not leave the Union because they objected to the manner in which the 1860 election was conducted. Instead, southern secession constituted a direct attack on the principle of majority rule itself. White southerners

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134 David M. Potter, The Impending Crisis, 1848-1861, 439 (1976) (Lincoln's election "came to the South as a much greater shock").

135 *Id.* at 445.

136 *Id.* at 445, 475.

137 *Id.* at 475 ("But by 1860, northerners outnumbered southerners in a ratio of 6:4 in total population and 7:3 in white population").

138 *Id.* at 442.

139 McPherson, *supra* note 98, at 233.

140 Michael Holt, The Election of 1860: "a Campaign Fraught with Consequences" 184 (2017) ("Republicans had minuscule support within the South itself and less than two-fifths of the nationwide vote. But they had won a majority of the North's vote, and that majority, as secessionists saw it, was permanent. They agreed with those Republicans who boasted that a proslavery Democratic Party could never again win control of the national government").

141 Potter, *supra* note 134, at 478.

142 *Id.* at 476.

143 Holt, *supra* note 140, at 184-5 ("For secession's proponents, control of the executive branch by an almost exclusively northern and overtly anti-southern party alone assured a humiliating southern enslavement to northern tyranny that no honorable southern white man could possibly abide."); Potter, *supra* note 134, at 475-8.

144 Holt, *supra* note 140, at 184.

145 Potter, *supra* note 134, at 475.

knew they had been outvoted by white northerners in 1860. But rather than accept defeat, the key institution of power in the southern states—the slaveholder class—concluded that their interests would be better served by democratic breakdown and a catastrophic civil war. One of the grim lessons of the Civil War, therefore, is that reforming election rules will not necessarily protect the United States from democratic breakdown. After an election defeat, a disgruntled minority may choose war and chaos even if there is no doubt that the minority lost fairly and squarely at the ballot box.

IV. The Legal and Quasi-Democratic Mechanisms of Southern Secession

Election rules nevertheless remain critically important. As the Civil War demonstrated, a disgruntled losing party may craft favorable election laws to provoke a democratic breakdown. In the weeks after the 1860 presidential election, southern state legislatures held secession conventions to determine whether to leave the Union. Although the convention delegates were selected by popular vote, the election rules adopted by southern states gave secessionists a decisive advantage.

Southern secession was not inevitable. Slaveholders constituted a shrinking minority not only in the United States but also in the South.[146] In 1830, for example, 36 percent of white southerners owned slaves.[147] By 1860 only 26 percent of white southerners owned slaves.[148] As the slaveholding population of the South declined, the region's growing inequalities of wealth became starkly apparent.[149] On average, slaveholding families had 14 times the net wealth of non-slaveholding white families in the South.[150] Non-slaveholding small farmers and impoverished whites constituted a majority in every southern state.[151] If secession was fundamentally about protecting slavery—as the leading Confederates themselves acknowledged—only a minority of white southerners stood to benefit financially from the creation of a Confederate republic.

With a growing sense of alarm, slaveholders recognized that their political influence in the South would diminish the longer their states remained in the Union. The growing class divide between slaveholders and the rest of southern society made slaveholders increasingly anxious about their future. While publicly hailing white solidarity, secessionists privately distrusted non-slaveholding white southerners.[152] Many slaveholder politicians disdained the necessity of "seeking popular favor" with the common people.[153] In South Carolina, the slaveholding class even opposed

146 Bruce Levine, Half Slave and Half Free: The Roots of Civil War 37 (2005); Emory M. Thomas, The Confederate Nation 6 (1979) ("In 1860 only about 2,300 people owned as many as one hundred slaves and extensive acreage.").

147 Bruce C. Levine, Half Slave and Half Free 37 (2005).

148 *Id.* at 37.

149 *Id.* at 37.

150 *Id.* at 37.

151 Stephanie McCurry, Confederate Reckoning: Power and Politics in the Civil War South 41 (2010) ("Even in South Carolina it had to be sold to yeoman and poor white voters who were, after all, the majority of the electorate.").

152 Barney, *supra* note 109, at 195.

153 McCurry, *supra* note 151, at 41.

universal white male suffrage, viewing it as a form of mobocracy.[154] Secession brought into acute focus the increasingly divergent interests of slaveholders and non-slaveholders. As South Carolina legislator A.P. Aldrich admitted, the "common people" did not understand secession and would not embrace it on their own without intense prodding by slaveholders.[155]

Even before the 1860 election, a pervasive fear took hold among slaveholders that Republicans could exploit the South's social and class divisions to undermine slavery. Georgia Governor Joseph Brown, for example, warned his fellow secessionists that Lincoln's "Black Republican" government would eventually garner support from the South's non-slaveholding majority.[156] Brown was not alone in predicting the rise of a southern branch of the Republican Party. Although slaveholder violence and intimidation prevented Republicans from campaigning in ten of the eleven southern states in 1860,[157] many slaveholders feared that over time non-slaveholders, immigrants, and the landless poor in the South would gravitate to the Republican Party.[158] Accordingly, slaveholders employed violence as a political tool to intimidate fellow whites who questioned slavery. White mobs in North Carolina and Virginia, for example, attacked Irish canal workers suspected of encouraging slaves to rebel.[159]

Secessionists knew they must act quickly if they had any chance of persuading non-slaveholding whites to join them in setting off civil war.[160] The South Carolina secessionist leader Robert Barnwell Rhett urged his fellow secessionists to leave no "time for re-action on the part of the people."[161] Waiting, he warned, would create "increasing risks of internal domestic discontent" in South Carolina.[162] Likewise, Georgia secessionist leader Thomas Cobb stressed that if the legislature did not act quickly to leave the Union the "discordant voice" of the state's "divided people" would stop in its tracks the momentum for secession.[163] Time was thus of the essence. As A.P. Aldrich explained, slaveholders would "make the move [for secession] and force them [the common people] to follow."[164] Georgia secessionists, fearful that a popular majority of white men in the state opposed secession, urged the legislature to vote immediately to secede without waiting for popular consent.[165]

Above all, the slaveholders feared that if they put the issue of immediate secession to a popular referendum, the non-slaveholding majorities in their states might vote against it.[166] To achieve their goal of destroying the Union, therefore,

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154 *Id.* at 42.
155 Barney, *supra* note 109, at 195.
156 Rable, *supra* note 128, at 29.
157 McPherson, *supra* note 98, at 223.
158 Barney, *supra* note 109, at 169; Rable, *supra* note 128, at 26-9.
159 Barney, *supra* note 109, at 149.
160 Rable, *supra* note 128, at 26-9; Barney, *supra* note 109, at 169.
161 Channing, *supra* note 109, at 248.
162 *Id.* at 249.
163 McCurry, *supra* note 151, at 56; William B. McCash, *Thomas Cobb and the Codification of Georgia Law*, 62 Ga. Hist. Q. 9 (1978). Likewise, Georgia secessionist leader Howell Cobb—the outgoing Treasury Secretary—observed that the secessionists "were afraid that the blood of the people will cool down." Channing, *supra* note 109, at 248.
164 Barney, *supra* note 109, at 195.
165 McCurry, *supra* note 151, at 56.
166 *Id.* at 2, 41 ("Like their counterparts everywhere, fireeaters worried about what might

slaveholders and their allies dictated special rules for the secession votes in their states.[167] After Lincoln's election, state legislatures across the Deep South delegated the issue of secession to state conventions, the delegates of which would be elected by popular vote.[168] In only one state—Texas—was the decision to secede put before a popular referendum.[169] And even then, the Texas referendum occurred only after the state's convention had already voted in favor of secession.[170]

The use of conventions played a key role in enabling slaveholders in the Deep South to rush their states into secession.[171] To that end, southern state legislatures placed their secession conventions on an extraordinarily accelerated schedule. Lincoln was elected president on November 6, 1860.[172] Four days later South Carolina's legislature voted to hold an election of convention delegates in the first week of December.[173] Georgia, Florida, Mississippi, Texas, and Louisiana followed in rapid succession.[174] By mid-December, seven southern states had committed themselves to secession conventions.[175] The speed with which the legislatures acted reflected the fact that leading slaveholders had begun plotting secession months before Lincoln's victory. For example, in the weeks prior to the 1860 presidential election, the governors of South Carolina, Mississippi, Florida, Alabama, and Georgia secretly agreed to lead secession movements in their states.[176] The governors had thus predetermined the outcome of their secession conventions before the voters in their states had a chance to express their views on the subject.[177] Louisiana's governor even went so far as to order state troops to seize federal military garrisons in the state weeks before Louisiana's secession convention.[178]

The Deep South legislatures left voters with little time to hear arguments for and against secession. South Carolina elected convention delegates on December

happen when the people and especially the nonslaveholders were allowed to vote."), 42 ("Worry about nonslaveholders' loyalty to the planters' regime was a steady theme in South Carolina politics since at least the 1830s"); David M. Potter, Lincoln and his Party in the Secession Crisis 208 (1942).

167 McCurry, *supra* note 151, at 39, 41 (explaining that slaveholders "schemed" to "delimit the popular vote"); Potter, *supra* note 166, at 209.

168 William J. Cooper, Jr., & Tom Terrill, The American South 340 (1990); McCurry, *supra* note 151, at 39, 41; Potter, *supra* note 166, at 209.

169 Cooper, Jr. & Terrill, *supra* note 168, at 340; Potter, *supra* note 166, at 209.

170 McCurry, *supra* note 151, at 39.

171 Mario L. Chacon and Jeffrey L. Jensen, *The Political and Economic Geography of Southern Secession*, 80 J. Econ. hist. 386, 389 (2020) ("The decision to use conventions—and avoid statewide referendums—allowed secessionists to bypass this perceived opposition."); Cooper, Jr. & Terrill, *supra* note 168, at 340 ("Ultimately the decision for secession was massively influenced by the tactics of the fire-eaters").

172 Andrew Glass, *Lincoln elected president, Nov. 6, 1860*, Politico (Nov. 6, 2017), https://www.politico.com/story/2017/11/06/lincoln-elected-president-nov-6-1860-244576.

173 Potter, *supra* note 166, at 46.

174 Potter, *supra* note 166, at 46. Alabama's legislature had preemptively authorized its governor to call a secession convention before the presidential election was even held. *See id.*

175 *Id.*

176 McCurry, *supra* note 151, at 51 ("Operating without any mandate from 'the people,' Democratic governors thus colluded on secession to make it happen.").

177 *Id.*

178 *Id.* at 55.

6; Florida on December 18; Mississippi on December 20; Alabama on December 24; Georgia on January 2; Louisiana on January 7; and Texas on January 8.[179] The conventions themselves took place shortly thereafter. South Carolina held its secession convention on December 17; Florida on January 3; Mississippi and Alabama on January 7; Georgia on January 16; Louisiana on January 23; and Texas on January 28.[180] Thus, the most momentous decision any group of American voters has ever faced was made on a remarkably short timeframe.

The speed with which the states held delegate elections gave the secessionists a critical advantage. Opponents of secession—often described collectively as "cooperationists"[181]—did not have time to galvanize around a coherent set of policy alternatives.[182] Some advocated cooperating with other slaveholding states in taking a wait-and-see attitude.[183] Others supported remaining in the Union unconditionally.[184] Not surprisingly, opposition to secession ran strongest in southern counties with few or no slaveholders.[185] But none of the opposition groups could match the organizational efficiency of the secessionists.[186] The secessionists had a clear policy objective: immediate secession from the Union.[187] And the driving force behind secession—the slaveholder class—worked with relentless intensity to establish an independent slaveholding oligarchy in the South.[188]

Recognizing that racism and fear were their most effective weapons of persuasion, secessionists stoked a crisis atmosphere throughout the region.[189] A war to defend wealthy white southerners' financial investment in slavery would not motivate the rest of the South to wage war, especially when the heaviest burden

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179 Potter, *supra* note 166, at 46.

180 *Id.*

181 Cooper, Jr. & Terrill, *supra* note 168, at 340; Emory M. Thomas, The Confederate Nation 41-2 (1979).

182 McPherson, *supra* note 98, at 237 (noting that secession's opponents "did not fully agree among themselves"); Thomas, *supra* note 181, at 42.

183 Cooper, Jr. & Terrill, *supra* note 168, at 340-1; McCurry, *supra* note 151, at 20, 54-5; McPherson, *supra* note 98, at 237; Thomas, *supra* note 181, at 41-2.

184 William W. Freehling, The South vs. the South: How Anti-Confederate Southerners Shaped the Course of the Civil War (2001); Thomas, *supra* note 181, at 42 ("[S]till others assumed a cooperationist stance to conceal from themselves and/or others unionist sympathies in hopes that 'cooperation' would slow, then stall the secession bandwagon").

185 McPherson, *supra* note 98, at 242; Daniel W. Crofts, Reluctant Confederates: Upper South Unionists in the Secession Crisis xvi (1989) ("High-slaveowning areas across the South generally displayed more support for secession, and slaveowning was more concentrated in the lower than the upper South"); Cooper, Jr. & Terrill, *supra* note 168, at 340 ("People who questioned the wisdom of a pell-mell rush to immediate secession . . . lived chiefly in areas and counties with few slaves").

186 McCurry, *supra* note 151, at 48; Cooper, Jr. & Terrill, *supra* note 168, at 341 ("The most striking characteristic of the cooperationists in the crisis was confusion. They could not decide whether to campaign and could not agree on a political goal to articulate if they did.").

187 Cooper, Jr. & Terrill, *supra* note 168, at 340-1.

188 Channing, *supra* note 109, at 261 (explaining how South Carolina's secessionists "were unrelenting in their efforts to establish an irresistible motion towards disunion").

189 *Id.* at 251, 261-5.

of fighting and dying would be borne by non-slaveholders.[190] As North Carolina secessionists C.B. Harrison noted, the fact that non-slaveholding whites constituted a majority of the South's population meant that "secession in favor of slavery alone won't do."[191] Accordingly, to win the support of non-slaveholding whites, secessionists relentlessly employed images of interracial murder and rape as a scare tactic.[192] The secessionists claimed that the "Black Republicans" would not only abolish slavery and create social equality for African Americans but would also incite freed slaves to kill white men and rape white women across the region.[193] In South Carolina, for example, secessionist propaganda claimed that Lincoln's presidency meant that "pillage, violence, murder, poison, and rape will fill the air" in the South as freed slaves, "urged to madness by the licentious teachings of our northern brethren," would indiscriminately take their revenge on whites.[194]

In tandem with their racist fear-mongering, secessionists recruited non-slaveholding whites to serve in paramilitary "freemen" organizations.[195] The ostensible purpose of such units was to protect the region against Republicans, abolitionists, and rebellious slaves.[196] But the real purpose was to suppress class divisions among white southern men by emphasizing racial solidarity and militant masculinity.[197] The tactic proved extremely effective.[198] In South Carolina, for example, militia units known as "Minute Men" helped slaveholders recruit non-slaveholding white men to the secessionist cause.[199] Wearing blue cockades, pro-secession paramilitary forces created a "climate of terror" in the days leading up to the 1860 delegate election in South Carolina.[200] By militarizing their campaign in favor of the state's secession, slaveholders and their allies discouraged secession's critics from fielding convention candidates.[201] The intimidation campaign worked. In the end, only candidates who favored secession appeared on the ballot in a

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190 McCurry, *supra* note 151, at 41 ("But to unite the planter class behind secession as a means to perpetuate slavery was not enough. Even in South Carolina it had to be sold to yeoman and poor white voters who were, after all, the majority of the electorate. . . . In South Carolina as elsewhere, one of the main tasks facing Southern nationalists was to manage the challenge issuing from nonslaveholding voters.").

191 *Id.* at 43.

192 *Id.* at 28-9 ("In all of the speeches and appeals, the truly inflammatory pair presented was white women and black men. The threat of violence Black Republicans posed was . . . by black and usually slave men incited to rape and pillage. The racial and gender threats were invariably a linked pair. And they were linked in pursuit of the nonslaveholders' vote.").

193 *Id.* at 28 ("politicians and propagandists pointedly insisted that political action was necessary to protect white women from imminent rape at the hands of Black Republicans and their (male) slave allies.").

194 *Id.* at 29.

195 *Id.* at 46-7.

196 *Id.* at 46-7.

197 *Id.* at 47.

198 *Id.* at 47.

199 *Id.* at 48.

200 *Id.* at 49 ("South Carolina voters went to the polls in a climate of political terror, surrounded by armed companies of men and hordes of citizens all wearing the blue cockade").

201 *Id.* at 50.

majority of delegate races in South Carolina.[202] Opposition to secession was thus effectively silenced as a political option, leaving "no way for ordinary voters to register dissent."[203]

The rushed timing and crisis-like atmosphere of South Carolina's secession convention was not its only extraordinary feature. The districting of delegate elections proved critical to the slaveholders' success as well. In electing delegates to the secession conventions, the southern states used district lines heavily gerrymandered in favor of secessionist candidates.[204] South Carolina was the preeminent example. South Carolina apportioned its secession conventions on the same basis as it apportioned the state legislature. The use of state legislative district lines virtually guaranteed that secession would be approved by the state convention. To reduce the influence of non-slaveholding white voters, South Carolina included slaves in determining district population for purposes of state legislative apportionment.[205] Consequently, South Carolina's low country districts which had the largest slave populations wielded disproportionately large influence in the state legislature.[206] South Carolina Senator James Henry Hammond, a fierce defender of slavery, freely admitted that the state's apportionment "system of rotten boroughs and aristocratic incubi" made the state a bastion of pro-slavery conservatism.[207] By basing its convention delegate apportionment on the same system, the South Carolina legislature guaranteed an outcome favorable to secession.

The combination of intimidation and pro-secessionist district lines gave secessionists a resounding victory in South Carolina. On December 20, 1860, the state's secession convention voted 117 to 0 to secede from the Union.[208] South Carolina was crucial. As the first state to crash out of the Union, South Carolina created crucial momentum for the secessionist cause in other states.[209] South Carolina's slaveholder class understood that "the secessionist act of one state might influence the decision and force the hand of neighbor states."[210]

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202 *Id.* at 51.

203 *Id.*

204 Chacon & Jensen, *The Political and Economic Geography of Southern Succession*, 80 J. Econ. Hist., 388 (2020) ("Given the economic geography of slavery, a large share of counties had either a high or low share of slaves in the population, and thus tended to be non-competitive with large majorities either in favor or opposed to secession. This lack of local competitiveness was associated with a low number of effective votes, a high proportion of wasted votes, as well as low turnout, particularly in high slave-share counties that overwhelmingly supported secessionist candidates. As a result, the use of conventions reduced the share of the electorate whose support was necessary to achieve secession. In the Lower South states for which we have complete returns, we find that the effective number of votes from the counties electing secessionist candidates—which comprised more than 50 percent of the delegates to each convention—represented only 9 percent of the electorate of these states").

205 McCurry, *supra* note 151, at 42.

206 *Id.*

207 *Id.*

208 Potter, *supra* note 134, at 492; McCurry, *supra* note 151, at 52.

209 William W. Freehling, The Road to Disunion: Secessionists Triumphant, 1854-1861, 490 (2007) ("Lower South secession resembled a snowball rolling downhill. From east to west, one state and then another and another and another and another and another added to the irresistible momentum.").

210 Potter, *supra* note 166, at 211.

They were exactly right. The dynamics that secured secessionist victory in South Carolina in December 1860 played out in nearly identical fashion in six other Deep South states in January 1861. As in South Carolina, secessionists won lopsided victories in four states: Florida (with a convention vote of 62 to 7); Louisiana (113 to 17); Mississippi (84 to 15); and Texas (166 to 8).[211]

However, in two Deep South states, secessionists only barely prevailed. In Georgia, the convention voted 166 to 130 in favor of secession.[212] Later, a revote was taken to promote an image of unity. On the final vote 208 delegates supported secession, but 89 still voted against it.[213] Alabama also saw a close vote.[214] In the state convention, 46 percent of the delegates opposed immediate secession.[215] Even when a "unity" vote was subsequently taken, the opponents still garnered 39 percent.[216]

Most striking of all, secessionists incurred resounding defeats in the Upper South and border states.[217] When Virginians went to the polls to elect their convention delegates on February 4, candidates supporting immediate secession only won 32 out of 152 seats.[218] Adding insult to injury for the slaveholder cause, the state's electorate voted by a 2-1 margin to require the legislature to submit the issue of secession to a statewide popular vote.[219] On February 9, Tennessee voters rejected the proposal to even call a secession convention by a vote of 69,387 to 57,798.[220] North Carolina voters also rejected the call for a secession convention.[221] Even if the convention proposals had carried the day in Tennessee and North Carolina, the voters in those states had provisionally elected a super majority of delegates opposed to secession.[222] Arkansas completed the Upper South's rejection of immediate secession. Although Arkansas voters approved a secession convention on February 18, Unionists won a majority of delegate elections.[223]

Voters in the slaveholding border states rejected secession by even more decisive margins. In Missouri, Unionists won virtually every delegate to the state's

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211 McCurry, *supra* note 151, at 55; Thomas, *supra* note 181, at 48, 52, 55, 56.

212 McCurry, *supra* note 151, at 58. A motion to delay secession failed by a similar margin (164 against delay and 133 in favor of delay). *See* Thomas, *supra* note 181, at 54.

213 McCurry, *supra* note 151, at 58; Thomas, *supra* note 181, at 54.

214 Thomas, *supra* note 181, at 50-1.

215 McCurry, *supra* note 151, at 61; Thomas, *supra* note 181, at 50.

216 McCurry, *supra* note 151, at 61; Thomas, *supra* note 181, at 50-1.

217 Potter, *supra* note 134, at 505; Daniel W. Crofts, Reluctant Confederates xvii (1993) ("But in the upper South—unlike the lower South—the first wave did not dislodge any state from the Union. Instead, the push for secession created an explicitly antisecession countermobilization").

218 Potter, *supra* note 134, at 507-8; Crofts, *supra* note 217, at 140.

219 Potter, *supra* note 134, at 507; Crofts, *supra* note 217, at 140.

220 Potter, *supra* note 134, at 509; Crofts, *supra* note 217, at 149.

221 Potter, *supra* note 134, at 509; Crofts, *supra* note 217, at 149; Barton A. Myers, Rebels Against the Confederacy: North Carolina's Unionists 38 (2014)("[T]he February 1861 convention vote was a close race statewide with 47,338 opposed and 46,671 in favor of the convention. Interpreting these numbers is more complicated than it might seem on the surface, however, since some conditional and unconditional Unionists voted for a convention in the hopes that the Unionist delegates they nominated would help turn back a secessionist effort.").

222 Potter, *supra* note 134, at 509; Crofts, *supra* note 217, at 149-52.

223 Potter, *supra* note 134, at 509.

secession convention.[224] The state legislatures in Kentucky and Delaware voted against even holding secession conventions in the first place.[225] And in Maryland, the governor refused to call the state legislature into session, thus effectively stopping the state's secession movement in its tracks.[226]

Even in the Deep South, opposition to secession ran much deeper than the convention votes suggested. For example, in its January delegate elections, a majority of Georgia voters supported candidates opposed to immediate secession.[227] But at the state convention, secessionists mustered a majority of delegates.[228] The reason was because slaveholders exercised influence at the secession conventions that far surpassed slaveholder numbers. Indeed, a recent study by Mario L. Chacon and Jeffrey L. Jensen found that 9% of the electorate in the Deep South controlled over 50% of the delegates elected to the secession conventions.[229] Moreover, counties with the largest concentrations of slaveholders "were systematically over-represented" in the conventions.[230] Consequently, according to Chacon and Jensen, the use of conventions in lieu of a popular referendum "significantly lowered the share of the electorate whose support was necessary to achieve secession."[231]

In the end, the success of secessionists in the seven Deep South states doomed secession's opponents in the four Upper South states. As the *Richmond Examiner* predicted, an "actual conflict of arms" between the Confederates and the federal government would force the reluctant Upper South to "take sides as one with their Southern brethren."[232] That fateful day arrived on April 12, 1861, when Confederate artillery opened fired on the federal garrison at Fort Sumter in Charleston, South Carolina.[233] In response, President Lincoln announced that he would use force to retake the federal garrisons in the South.[234] The eruption of violence polarized the country along regional lines. The *Staunton Vindicator* reflected the views of many Virginians when it declared, "We must either identify ourselves with the North or the South."[235] Slavery proved an irresistible bond for southern states. As North Carolina secessionists explained: "The division must be made on the line of slavery.

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224 *Id.*

225 *Id.* at 510.

226 *Id.*

227 McCurry, *supra* note 151, at 58-9 ("Governor Brown claimed that at the convention election delegates pledged to immediate secession had taken a comfortable 57 percent lead at the polls. . . . But it turns out that Brown cooked the numbers. One careful recount now accepted as definitive confirms that Brown counted in the secession camp men who had been elected on cooperationist tickets. . . . [T]he most accurate estimate indicates that cooperationists had won just over 50 percent of the votes. The votes cast on January 2 suggest that the people had rejected the secessionist solution by a tiny majority. In Georgia, there was no mandate for secession."). Michael P. Johnson, *A New Look at the Popular Vote for Delegates to the Georgia Secession Convention*, 56 Ga. Hist. Q. 259 (1972).

228 McCurry, *supra* note 151, at 58.

229 Chacon & Jensen, *supra* note 204, at 388.

230 *Id.*

231 *Id.* at 412.

232 Crofts, *supra* note 217, at 278.

233 McPherson, *supra* note 98, at 273.

234 *Id.* at 274.

235 *Id.* at 277.

The South must go with the South."[236] Consequently, a second wave of state conventions in April and May 1861 resulted in secessionist victories in Virginia, North Carolina, Tennessee, and Arkansas.[237]

Did a majority of white southerners support secession in the winter of 1860-61?[238] Historians have long disagreed over the answer to that question. Some, such as James McPherson, have argued that white southerners disagreed "mainly over tactics and timing, not goals."[239] Conversely, historians such as Stephen Kantrowitz have argued that secession amounted to a "coup d'etat against antisecession majorities."[240] Similarly, William Freehling asserted that "[o]utnumbered secessionists impelled most of the South toward Armageddon by pressing the leverage of one state's disunion on the next state's decision."[241] Still others, such as Stephanie McCurry, have argued that secession "was neither a popular democratic movement nor the accomplishment of a small slaveholding political elite." Instead,

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236 *Id.*

237 *Id.* at 279-84.

238 *See* Marc Egnal, *Rethinking the Secession of the Lower South: The Clash of Two Groups*, 50 Civi. War Hist. 261 (2004) ("At least 40 percent of voters, and in some cases half, opposed immediate secession in Georgia, Alabama, Mississippi, Louisiana, and Florida. In Texas more than 20 percent of the electorate rejected disunion, and even South Carolina had important pockets of resistance."); Ralph A. Wooster, *The Secession of the Lower South: An Examination of Changing Interpretations*, 7 Civi. War Hist. 117, 126-7 (1961)("Thus the aforementioned contentions that a minority group carried secession seem open to question. That there was opposition to immediate separation both within and without the conventions is true; that this opposition was equal to the secessionist strength is not. . . . Rightly or wrongly, the majority of people in the lower South were convinced that their hopes lay not within but without the Union."); and William J. Donnelly, *Conspiracy or Popular Movement: The Historiography of Southern Support for Secession*, 42 N.C. Hist. Rev. 70, 84 (1965)("Many historians yet feel required to pronounce on secession and the popular will, a supposed article of democratic faith. . . . But unaided by some criteria for sampling the whole of public opinion—such as opinion polls—historians should leave 'the people' out of their arguments.").

239 *See* McPherson, *supra* note 98, at 235 ("Except in Texas, the conventions did not submit their ordinances to the voters for ratification. This led to charges that a disunion conspiracy acted against the will of the people. But in fact the main reason for non-submission was a desire to avoid delay. The voters had just elected delegates who had made their positions clear in public statements; another election seemed superfluous. The Constitution of 1787 had been ratified by state conventions, not by popular vote; withdrawal of that ratification by similar conventions satisfied a wish for legality and symmetry."), 235-6 ("Divisions in the lower South occurred mainly over tactics and timing, not goals. A majority favored the domino tactics of individual state secession followed by a convention of independent states to form a new confederacy. But a significant minority, especially in Alabama, Georgia, and Louisiana, desired some sort of cooperative action preceding secession to ensure unity among at least the cotton South states.").

240 Stephen Kantrowitz, Ben Tillman and the Reconstruction of White Supremacy 34 (2000) ("Throughout the South, white-belt unionists demanded that secession follow democratic principles, and secessionist elites resorted to preemptive and often violent coercion. In many areas, secession amounted to a coup d'etat against antisecession majorities."). *See* also David M. Potter, Lincoln and his Party in the Secession Crisis 208 (1942) ("At no time in the winter of 1860-61 was secession desired by a majority of the people of the slave states.").

241 Freehling, *supra* note 209, at 533.

McCurry contends, it was "a hybrid thing, evincing at once the character of an administrative coup and of an open-fisted democratic brawl."[242]

In any case, slaveholders' manipulation of election rules clearly played a significant role in the outcome. As the historian Emory Thomas observed, "[s]ecession was a radical act, and the process of disunion was the product of radical men and tactics."[243] Likewise, the historian David Potter concluded that the secessionists prevailed "because of the extreme skill with which they utilized an emergency psychology, the promptness with which they invoked unilateral action by individual states, and the firmness with which they refused to submit the question of secession to popular referenda."[244] In the view of the secessionists, the safest course was to control the election rules to ensure the result they wanted.

But even after leaving the Union, slaveholders feared that the non-slaveholding majority might turn against secession. As the historian William Barney has observed, "Publicly, the secessionists reasoned that the people had already spoken in the election of [pro-secession] delegates, but privately many admitted that the masses could not be trusted."[245] Almost immediately after approving secession and joining the Confederacy, southern legislatures took steps to suppress dissent. Georgia, for example, enacted a law that made opposition to secession a capital offense.[246]

The North, however, took the opposite approach. Throughout the war, northern political leaders, newspaper editors, and ordinary people conducted a vigorous and passionate debate over the wisdom of Lincoln's decision to use force against the secessionists. In the most momentous campaign in American history—the 1864 federal and state elections—northern voters expressed their verdict in unmistakably clear and decisive fashion.

V. Democracy Revitalized

The American Civil War is a story of democratic breakdown, racist demagoguery, and internecine violence on a massive scale. But it is also a story of democratic resilience, vitality, and renewal. By the time the war ended in the spring of 1865, the Confederates had utterly failed to establish an independent slaveholding oligarchy in North America. Instead, American democracy emerged from the Civil War stronger than ever before.

One of the most remarkable features of the Civil War was the North's willingness to sustain staggering casualties to save the Union. Over 360,000 Union soldiers died in the Civil War, which is the demographic equivalent of 3.6 million American troops dying in battle today.[247]

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242 McCurry, *supra* note 151, at 39-40.

243 Thomas, *supra* note 181, at 56.

244 Potter, *supra* note 240, at 208.

245 Barney, *supra* note 109, at 195.

246 McCurry, *supra* note 151, at 59.

247 At least 260,000 Confederate soldiers died in the war, raising the total Civil War fatalities to 620,000. *See* Drew G. Faust, this Republic of Suffering xi (2008) ("The Civil War's rate of death, its incidence in comparison with the size of the American population, was six times that of World War II. A similar rate, about 2 percent, in the United States today would mean six million fatalities.").

Why was the North so willing to sacrifice to keep the South in the Union? One might argue that moral revulsion against southern slavery and racial inequality inspired the northern war effort. After all, the war's greatest accomplishment was the destruction of slavery. Lincoln's 1862 Emancipation Proclamation declared free all slaves behind Confederate lines, effective January 1, 1863.[248] Two years later, the Thirteenth Amendment went into effect, barring slavery throughout the United States.[249]

But slavery's destruction was a byproduct of the North's war aims, not a motivating factor in and of itself. By any measure, the North was far from a racially enlightened region.[250] For example, Abraham Lincoln's home state of Illinois barred African Americans from even living in the state.[251] In a popular referendum, the state's voters reaffirmed that ban in 1862, the same year as the Emancipation Proclamation.[252] As Lincoln was keenly aware, therefore, the destruction of slavery on moral grounds alone would not have received sufficient support in the North to sustain the war effort.[253] Indeed, Republicans lost badly in the 1862 election, which most historians have concluded was a result of a northern backlash against the Emancipation Proclamation.[254] The fact was few northerners supported racial equality.[255] White supremacy was deeply entrenched in the North.[256] But northerners came to view Black soldiers, many of whom were runaway slaves, as invaluable to the Union cause.[257] Thus, when a majority of northerners eventually embraced Lincoln's emancipation policies, they did so because they viewed it as a military necessity for defeating the Confederacy.

If abolition was insufficient motivation, why then did the North wage war for four devastating years despite hundreds of thousands of northern casualties? The answer is because northerners viewed the war as a battle for the survival of democracy itself.[258] If the Confederate states were allowed to reject the 1860 election results with impunity, it would have set a precedent that threatened political stability throughout the country.[259] No democratically held election would ever have been binding if losers could simply break free and form their own government. Political and geographical divisions within northern states reinforced the North's

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248 Donald, *supra* note 92, at 375.

249 McPherson, *supra* note 98, at 840.

250 *Id.* at 506-7.

251 *Id.* at 507.

252 *Id.*

253 *Id.* at 506 ("The emergence of slavery as the most salient war issue in 1862 threatened to turn a large element of the Democrats into an antiwar party. This was no small matter. The Democrats had received 44 percent of the popular votes in the free states in 1860. If the votes of the border states are added, Lincoln was a minority president of the United States.").

254 *Id.* at 561.

255 Paludan, *supra* note 90, at 240 ("Adding to the complexity was the problem that increasing rights for blacks alienated growing numbers of whites").

256 *Id.* at 221 ("Most white people disliked blacks as a group").

257 *Id.* at 227 ("Blacks were proving to be good soldiers and were helping to win the war.").

258 James M. McPherson, Drawn with the Sword 209-10 (1996) ("If the Confederate rebellion succeeded in its effort to sever the United States in twain, popular government would be swept into the dustbin of history.").

259 *Id.* at 210 ("The next time a disaffected minority lost a presidential election, as Southern Rights Democrats had in 1860, that minority might invoke the Confederate precedent to proclaim secession. *United* States would be an oxymoron.")(emphasis in original).

commitment to enforcing the 1860 election results. Like the southern states, many northern states spanned geographically diverse regions and large land areas. Ohio, for example, stretched from the Appalachian Mountains to Lake Erie and covered nearly 45,000 square miles. New York stretched from the Atlantic Ocean to Canada and spanned more than 54,000 square miles. If secession came to be viewed as a legitimate response to defeat at the ballot box, it was conceivable that even northern states might eventually break apart as well.

Accordingly, from his first day in office, Lincoln defined the Civil War as a test of whether the democratic form of government was viable. As the historian James McPherson has observed, "[t]he central vision that guided him [Lincoln] was preservation of the United States as a republic governed by popular suffrage, majority rule, and the Constitution."[260] In Lincoln's First Inaugural Address on March 4, 1861, Lincoln described secession as "the essence of anarchy."[261] He insisted that government by majority rule "is the only true sovereign of a free people."[262] As long as the majority exercised its power within "constitutional checks and limitations," the minority was obligated to accept election results.[263] But if disgruntled losers refused to honor the "majority principle," they would inevitably plunge the country into "anarchy or despotism."[264]

A majority of northerners agreed with Lincoln.[265] They saw secession as a direct assault on self-government and the binding nature of democratic elections.[266] Turnout in the 1860 election exceeded 80 percent, one of the highest turnouts in the nation's history.[267] Although the people had spoken decisively in favor of Lincoln and the Republicans, the secessionists sought to overturn the 1860 election results by force. As the historian Philip Paludan has explained, the central idea of secession was that "votes peacefully registered could be trumped by men carrying guns who would not wait until the next election to have their way. They would demand it now, take it by force if necessary."[268] Time and again Lincoln warned that secession meant anarchy and a spiraling cycle of political collapse.[269] In an 1861 speech, the president explained: "We must settle this question now whether in a free government the minority have the right to break up the government whenever they choose. If we fail it will go far to prove the incapability of the people to govern themselves."[270]

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260 *Id.* at 209.

261 *First Inaugural Address of Abraham Lincoln,* Yale Law School Avalon Project, (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp.

262 *Id.*

263 *Id.*

264 *Id.*

265 McPherson, *supra* note 258, at 211 ("Most Northern people in 1861 shared Lincoln's conviction that the fate of democratic government hung on the outcome of the Civil War. That passion sustained them through four years of the bloodiest war in the Western world between 1815 and 1914.").

266 Paludan, *supra* note 90, at 5-6 ("[S]ecession threatened the orderly operations of self-government. . . . The most promising experiment in self-government in the world would have failed.").

267 *Id.* at 13.

268 *Id.* at 6.

269 McPherson, *supra* note 258, at 211; Paludan, *supra* note 90, at 54.

270 McPherson, *supra* note 258, at 210.

The Confederacy quickly became a case in point. Early in the conflict, individual southern states began to fragment internally. Every Confederate state faced the intractable problem that many non-slaveholders, especially in the South's mountainous regions, would never reconcile themselves to living in a Confederacy dominated by slaveholders.[271] As the historian Timothy Huebner has explained, "Nearly all-white, nonslaveholding areas proved to be the least committed to the Confederate experiment, and both before and during the war, planter elites in the seceded states held onto lingering fears that nonslaveholders would upend elites' political power and eventually fall under the spell of abolitionism."[272] For example, strongly pro-Union East Tennessee mounted an insurgency to break free of the Confederacy, a goal achieved in 1863 with the victorious arrival of Union armies.[273] Arkansas became the scene of civil war within a civil war as pro-Union guerillas battled pro-Confederate guerillas in the Ozark Mountains.[274] The mountains of Western North Carolina served as a haven for Confederate army deserters.[275] But the most successful example of anti-Confederate breakaway efforts was West Virginia, which "carried the logic of secession to the next step of seceding from seceders."[276] In October 1861, residents of Virginia's 50 westernmost counties held a popular referendum on whether to create their own state.[277] The resolution passed overwhelmingly.[278] Two years later the United States Congress admitted West Virginia into the Union as the nation's 35th state.[279] The Confederacy responded by waging a brutal campaign of repression in Unionist regions across the South.[280]

Northerners, in contrast, resolved their disputes at the ballot box. Throughout the four-year-long war, the northern and border states conducted free, fair, and competently administered federal and state elections. Democrats hotly contested the elections, condemning Lincoln's war policies in bitter and inflammatory language.[281] Some "Peace" Democrats even called for ending the war and allowing the Confederate states to leave the Union.[282] Yet, despite the intense domestic

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271 Timothy S. Huebner, Liberty & Union 270 (2016) ("From the beginning, the border states and Upper South states possessed stronger ties to the North and demonstrated less enthusiasm for secession than did the Deep South. . . . But even after the secession of the Upper South, pro-Union sentiment continued to thrive in the mountainous areas of these states, where slavery hardly existed.").

272 *Id.* at 270.

273 *Id.* at 271, 310.

274 *Id.* at 310.

275 McPherson, *supra* note 98, at 694-5.

276 Paludan, *supra* note 90, at 161.

277 Huebner, *supra* note 271, at 271; Paludan, *supra* note 90, at 162.

278 Paludan, *supra* note 90, at 162.

279 *Id. See* Vasan Kesavan & Michael S. Paulsen, *Is West Virginia Unconstitutional?,* 90 Cal. L. Rev. 291, 397 (2002) ("The truly amazing thing is how little legal breakage there was in the American Civil War, how much constitutional propriety remained in the forefront, and how much that constitutional propriety was measured in formal, literal terms. We got through the Civil War precisely because Lincoln anchored his theory of the war in the Constitution. Similarly, West Virginia is legitimately a State of the Union because the loyalists followed the letter of the constitutional law.").

280 Huebner, *supra* note 271, at 271-2, 309-11.

281 McPherson, *supra* note 98, at 592.

282 *Id.* at 594-5.

opposition that he faced, Lincoln did not postpone the 1864 election.[283] It went forward as scheduled. Amid a calamitous civil war, the Lincoln Administration steadfastly adhered to fundamental principles of democracy, subjecting itself to democratic accountability and honoring the principle of majority rule.

The Confederates themselves understood that the North conducted free and fair elections. Throughout the war, a central goal of Confederate military strategy was to assist Democrats in defeating Lincoln and the Republicans at the ballot box. Confederate General Robert E. Lee invaded Maryland in 1862 for the express purpose of undermining Republicans in the 1862 elections.[284] In 1864, as huge Union armies approached Richmond and Atlanta, the outnumbered Confederate armies desperately tried to win last-ditch victories before the November presidential election.[285] As the tide of battle turned irreversibly against them, Confederates placed their hopes on the pro-slavery 1864 Democratic nominee, George McClellan, a Union general Lincoln had fired two years before.[286] As a Georgia newspaper frankly admitted, the Confederacy's only chance for survival depended on northern Democrats defeating "the tyrant" Lincoln at the ballot box in 1864.[287] Likewise, a Confederate War Department official observed that the South's war policy was geared toward "giving an opportunity for the Democrats to elect a President."[288]

Yet, even as Confederate armies sought to influence northern elections, the Confederate leadership suppressed partisan politics in southern elections, convinced that "the absence of public agitation or even electoral competition would be a sure sign of political health."[289] Virtually without exception, Confederate elected officials adamantly rejected partisan politics.[290] The Confederate Vice President Alexander Stephens condemned parties as the "curse and bane of republics."[291] Confederate President Jefferson Davis went further still, insisting that patriotism and racial solidarity required white southerners to place Confederate unity above partisan interests.[292] Accordingly, Davis and Stephens won election without opposition in 1861, as did most members of the Confederate Congress.[293]

But the lack of party organizations and competitive elections did not prevent profound divisions from emerging within the Confederate leadership class.[294] Without parties, southern politics turned on personality conflicts.[295] Davis in particular became a lightning rod for critics of Confederate war policies.[296] With no party loyalists to defend him, and with no organized identifiable opposition to run against, Davis became increasingly isolated. As early as 1862, southern newspapers

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283 Huebner, *supra* note 271, at 247.
284 McPherson, *supra* note 98, at 535.
285 *Id.* at 743.
286 *Id.* at 771, 855.
287 *Id.* at 721.
288 *Id.*
289 Rable, *supra* note 128, at 88.
290 McPherson, *supra* note 98, at 689; Rable, *supra* note 128, at 30-1.
291 Rable, *supra* note 128, at 284.
292 *Id.* at 154.
293 James M. McPherson, Embattled Rebel: Jefferson Davis as Commander in Chief 64 (2014).
294 Rable, *supra* note 128, at 128-9, 242-5.
295 William J. Cooper, Jr., & Tom Terrill, The American South 377 (1990).
296 *Id.* at 377-8.

asserted that Davis had "lost the confidence of the country."[297] With Union armies conquering huge swaths of the South and Confederate battlefield defeats mounting, Davis incurred withering public criticism from newspapers, politicians, Confederate generals, and even his own vice president.[298] Vice President Stephens became one of Davis's fiercest critics, scornfully describing the Confederate president as "my poor old blind and deaf dog."[299] Class divides also widened in the South under the strain of war, as growing numbers of nonslaveholders viewed secession as a "rich man's war and a poor man's fight."[300] As northern armies drove deeper into the South, heated arguments among southern politicians rendered the Confederate Congress "little more than a shouting hall."[301]

In sharp contrast, partisan politics aided the Lincoln Administration. The partisan divisions between Republicans and Democrats empowered Lincoln to enforce party discipline.[302] Time and again, when Lincoln needed support in Congress, Republicans closed ranks behind him.[303] Lincoln also used party patronage to reward his supporters and punish his opponents.[304] Most important of all, when northern voters went to the polls during the Civil War, the Republican-Democratic partisan divide gave them a clear choice.[305]

In the end, voters rewarded Lincoln for his commitment to the democratic process. Republicans won sweeping victories in the 1864 presidential, congressional, and state elections.[306] Lincoln won 55 percent of the popular vote and carried 212 electoral votes to only 12 for McClellan.[307] Republicans also won huge majorities in Congress, taking the House by 149 to 42 seats and the Senate 42 to 10.[308] In a victory address on November 10, Lincoln explained the significance of the North's decision to go forward with elections despite the crisis of civil war:

> "[T]he present rebellion brought our republic to a severe test; and a presidential election occurring in regular course during the rebellion added not a little to the strain. . . . But the election was a necessity. We cannot have free government without elections; and if the rebellion could force us to forego, or postpone a national election it might fairly claim to have already conquered and ruined us. . . . But the election, along with its incidental, and undesirable strife, has done good too. It has demonstrated that a people's government can sustain a national election, in the midst of a great civil war."[309]

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297 McPherson, *supra* note 293, at 62.

298 McPherson, *supra* note 98, at 692-8; Cooper, Jr., and Terrill, The American South 377-78; McPherson, *supra* note 293, at 205, 225; Rable, *supra* note 128, at 166-7.

299 McPherson, *supra* note 98, at 692.

300 Rable, *supra* note 128, at 244; McPherson, *supra* note 98, at 855.

301 Cooper & Terrill, *supra* note 295, at 378.

302 McPherson, *supra* note 98, at 690.

303 *Id.*

304 *Id.*

305 *Id.*

306 Paludan, *supra* note 90, at 290; McPherson, *supra* note 98, at 805.

307 McPherson, *supra* note 98, at 805.

308 Paludan, *supra* note 90, at 290.

309 *Abraham Lincoln, In Response to a Serenade,* Nat'l. Park Service (Nov. 10, 1864),https://www.nps.gov/liho/learn/historyculture/1864election.htm.

The Republican Party's resounding victories confirmed that a strong majority of the northern people supported the war effort. As Frederick Douglass put it, Lincoln's reelection served as the northern electorate's "full and complete" endorsement of the administration's policies.[310] Consequently, the 1864 election results crushed what little morale remained in the battered and collapsing Confederacy. Lincoln's reelection rendered inevitable the Confederacy's defeat because it meant the Union war effort would continue unabated.[311] One month after Lincoln's second inauguration, Lee surrendered his army at Appomattox.[312] In a very real sense, therefore, democratically held elections strengthened the Lincoln Administration during the Civil War.

Ironically, despite the war's devastation, the United States government emerged stronger in 1865 than it had been in 1861. The Constitutional debate over secession—which had plagued the young nation since its founding—was resolved decisively in favor of the federal government.[313] As the Supreme Court explained in an 1869 case, the Constitution formed an "indissoluble" and "perpetual Union."[314] In *Texas v. White*, the Court held that the states had no authority to secede under the United States Constitution.[315] Writing for the majority, Chief Justice Salmon Chase emphatically declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[316] The Court concluded, therefore, that the Confederate states' secession ordinances "were absolutely null" and "utterly without operation in law."[317]

The Union's victory vindicated democracy as a form of government. The Confederacy's crushing defeat demonstrated that democracies could successfully navigate even the most extreme forms of civil disorder. Consequently, the North's victory inspired democratic reforms overseas, especially in Europe.[318] When the war began in 1861, European conservatives interpreted Confederate secession "as evidence of democracy's failure" and welcomed the Union's collapse.[319] For example, Sir Edward Bulwer-Lytton, a conservative member of the British Parliament, admitted to an American acquaintance that "I had indulged the hope that your country might break up into two or perhaps more fragments. I regard the United States as a menace to the whole civilized world."[320] The Union victory dashed Bulwer-Lytton's hopes. In April 1865, he complained that the North's

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310 Huebner, *supra* note 271, at 247.

311 Alan T. Nolan, Lee Reconsidered: General Robert E. Lee and Civil War History 118 (1991); Cooper & Terrill, *supra* note 295, at 381-2.

312 McPherson, *supra* note 98, at 848-50.

313 *See* Daniel Farber, Lincoln's Constitution 90-1 (2003) ("The basic flaw in the secession argument is its failure to recognize a key aspiration of the Constitution: to replace a regime of multilateral negotiation with the democratic rule of law. Rather than allowing states to use the threat of exit as a bargaining chip, the Constitution made federal legislation 'the supreme law of the land.'").

314 Texas v. White, 74 U.S. 700, 725 (1869).

315 *Id.* at 725-6.

316 *Id.*

317 *Id.* at 726.

318 McPherson, *supra* note 258, at 225-6.

319 *Id.* at 225.

320 *Id.*

victory represented a defeat for anti-democratic forces around the world.[321] The worst fears of British aristocrats materialized two years later. In 1867, Parliament voted to enfranchise one million working-class men, a measure that doubled the size of the British electorate.[322] As the historian Robert Saunders has observed, the 1867 reform act "created a mass, working class electorate, recasting the relationship between Parliament and people and calling into life the institutions and practices of democratic politics."[323]

Most important of all, the Civil War era gave rise to a dramatic expansion in the inclusiveness of American democracy. Southern slaveholders seceded in order to create a permanent, white supremacist, slaveholding oligarchy in North America. But their effort backfired spectacularly. As Stephanie McCurry has noted, secession "brought down the single most powerful slave regime in the Western world and propelled the emergence of a new American republic that redefined the very possibilities of democracy at home and abroad."[324] Indeed, the enormous contributions made by 180,000 African American soldiers to the Union war effort created irresistible momentum for Constitutional change.[325] In 1868—three years after General Robert E. Lee's surrender at Appomattox—the United States adopted the 14th Amendment, establishing "equal protection of the laws" as a constitutional right for all Americans.[326] Two years later, the United States adopted the 15th Amendment, prohibiting racial discrimination in voting.[327] The war years also saw landmark innovations in voting practices. For example, to facilitate voting by Union soldiers, nineteen northern states adopted laws permitting absentee ballots.[328]

Not all of the gains made during the Civil War era would last. The Confederacy's ghosts would haunt southern politics for generations after Appomattox.[329] For a full century after the Civil War, the defeated white South violently and viciously undermined the 14th and 15th amendments.[330] Ex-Confederates and their descendants used murder, torture, and terrorism to systematically disenfranchise African Americans across the South.[331] The campaign of white supremacist terror continued long after most Confederate veterans had died away. The Confederate flag thus came to symbolize not only the white South's failed effort to secede but

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321 *Id.*

322 Robert Saunders, Democracy and the Vote in British Politics, 1848-1867: The Making of the Second Reform Act 1 (2011) ("The second reform act enfranchised a million new voters, doubling the electorate and propelling the British state into the age of mass politics."); McPherson, *supra* note 258, at 226.

323 Saunders, *supra* note 322, at 1.

324 McCurry, *supra* note 151, at 1.

325 Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 69-70 (rev. ed. 2009).

326 *See* Const. Amend. XIV.

327 Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, 445-7 (1988).

328 Keyssar, *supra* note 325, at 83.

329 For the ways in which white southerners' memory of the war shaped the region's post-war development, *see* Gaines M. Foster, Ghosts of the Confederacy: Defeat, The Lost Cause, and the Emergence of the New South (1987).

330 *See* Keyssar, *supra* note 325, at 84-93, 206-213.

331 *See, e.g.*, Stephen D. Kantrowitz, Ben Tillman and the Reconstruction of White Supremacy 306-7 (2000); Richard Zuczek, State of Rebellion: Reconstruction in South Carolina 207-9 (1996).

also the century-long effort of white southerners to preserve the region's white supremacist social, economic, and political order.[332]

Deep into the twentieth century, southern politicians proudly cloaked themselves in the Confederacy's white supremacist legacy. For example, Alabama Governor George Wallace delivered his 1963 "Segregation Forever" Speech on the exact spot where Jefferson Davis was inaugurated as the first Confederate president in 1861. In his speech, Governor Wallace emphasized the connection between the Confederate war effort in the 1860s and the South's segregationist policies in the 1960s:

> "Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever."[333]

Thus, as late as the 1960s, the South's political elites saw their campaign of racial disenfranchisement as a continuation of the Confederate war effort.

But in the end, the latter-day Confederates lost the war for segregation just as their grandparents and great-grandparents had lost the war for slavery. In the final decades of the twentieth century, democratic forces ultimately prevailed even in the heart of the ex-Confederacy. In 1965 Congress enacted the Voting Rights Act, a law expressly designed to enforce—belatedly—the 15th Amendment.[334] The VRA transformed southern politics. In Mississippi, for example, African American registration rates increased six-fold.[335] In the South overall, Black registration rates soared to 62 percent after the VRA's adoption.[336] When he signed the VRA into law, President Lyndon Johnson—a son of the segregated state of Texas—observed that "[t]he vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls that imprison men because they are different from other men."[337]

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[332] For a history of the Confederate battle flag's varied uses, *see* John M. Coski, The Confederate Battle Flag: America's Most Embattled Emblem 134-5 (2005) ("events in the 1960s . . . intensified the flag's association with segregation and racism. . . . Beginning with the Confederacy itself, whenever the racial order of the South has come under serious challenge, defenders of the status quo have found the Confederate battle flag a powerful symbol for their opposition to change."). For a discussion of what states constitute the "South" in modern America, *see* John S. Reed, My Tears Spoiled my Aim and Other Reflections on Southern Culture 5-28 (1993).

[333] George Wallace, Inaugural address of Governor George Wallace, (Jan. 14, 1963), Ala. Dep't Hist. Archives, https://digital.archives.alabama.gov/digital/collection/voices/id/2952.

[334] Keyssar, *supra* note 324, at 211-13.

[335] *Id.* at 212.

[336] *Id.* at 212.

[337] James T. Patterson, Grand Expectations: The United States: 1945-1974, 584 (1996).

The North's victory in 1865 thus did more than save the Union. It changed the trajectory of American democracy. From the ashes of the Civil War emerged a deeply-flawed nation, but one with vastly more promise than the fragile country that had entered the conflict four years before.

VI. Conclusion

The Civil War demonstrated that democratic stability is not a given, even in the United States. Donald Trump's effort to overturn the 2020 election provided a sobering reminder of that point. Most troubling of all, the Trump supporters' attack on the Capitol made it clear that some segments of the American electorate would prefer to replace democracy with authoritarianism.

But the most important lesson of the Civil War is that American democracy is extraordinarily resilient. The public's overwhelmingly negative response to the Capitol violence provides a case in point. Indeed, polls show that a huge bipartisan majority of Americans opposed the attack on the Capitol[338] and supported the criminal prosecution of the pro-Trump rioters.[339] In addition, major institutions across American society have begun to confront the anti-democratic elements that Trump unleashed.[340] The House of Representatives impeached Trump for seditiously inciting the attack on the Capitol and the Senate voted 57-43 to convict.[341] Although

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338 Scott Clement, Emily Guskin & Dan Balz, *Post-ABC poll: Overwhelming opposition to Capitol attacks, majority support for preventing Trump from serving again*, Wash. Post (Jan. 15, 2021), https://www.washingtonpost.com/politics/trump-poll-post-abc/2021/01/14/aeac7b96-5690-11eb-a817-e5e7f8a406d6_story.html.

339 *Insurrection at the Capitol: Americans Divide About Removing Trump from Office, Most Say Capitol Hill Rioters Should be Prosecuted*, Pbs Newshour/Marist Poll (Jan. 8, 2021), http://maristpoll.marist.edu/pbs-newshour-marist-poll-results-analysis-insurrection-at-the-capitol/#sthash.opi1PuU9.dbXbArOg.dpbs.

340 Marie Fazio, *Notable Arrests After the Riot at the Capitol*, N.Y. Times (Jan. 13, 2021), https://www.nytimes.com/2021/01/10/us/politics/capitol-arrests.html?action=click&module=Top%20Stories&pgtype=Homepage; Josh Dawsey, David A. Fahrenthold & Jonathan O'Connell, *Backlash to riot at Capitol hobbles Trump's business as banks, partners flee the brand*, Wash. Post (Jan. 12, 2021), https://www.washingtonpost.com/politics/trump-company-backlash-riot/2021/01/12/40cb91fc-5514-11eb-a931-5b162d0d033d_story.html?utm_campaign=wp_politics_am&utm_medium=email&utm_source=newsletter&wpisrc=nl_politics.

341 Mike DeBonis & Paul Kane, *House hands Trump a second impeachment, this time with GOP support*, Wash. Post (Jan. 13, 2021), https://www.washingtonpost.com/politics/house-impeachment-trump/2021/01/13/05fe731c-55c5-11eb-a931-5b162d0d033d_story.html; Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. Times (Jan. 13, 2021), https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html?campaign_id=2&emc=edit_th_20210114&instance_id=25936&nl=todaysheadlines&regi_id=69180613&segment_id=49247&user_id=e7f8c3ebe81e6670085e810242e0ad70. Ten House Republicans joined the Democratic majority in voting to impeach Trump and 7 Senate Republicans joined 50 Democrats in voting to convict. John Eligon & Thomas Kaplan, *These Are the Republicans Who Supported Impeaching Trump*, N.Y. Times (Jan. 13, 2021), https://www.nytimes.com/article/republicans-impeaching-donald-trump.html?action=click&module=Spotlight&pgtype=Homepage; Amy Gardner, Mike DeBonis, Seung Min Kim & Karoun Demirjian, *Trump acquitted on impeachment charge of inciting deadly attack on the Capitol*, Wash. Post (Feb.

the Senate fell short of the Constitutional requirement of 67 votes to convict, the 57 votes nevertheless constituted the largest bipartisan majority in history to favor the conviction of an impeached president.[342] The business community also took historic action. Dozens of the largest companies in corporate America announced that they would no longer make campaign contributions to the Republicans who undermined the Electoral Vote Count.[343] Equally noteworthy, social media and technology companies took steps to purge their platforms of false allegations of election fraud.[344] And a multi-billion dollar defamation suit brought against Fox

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13, 2021), https://www.washingtonpost.com/politics/trump-acquitted-impeachment-riot/2021/02/13/dbf6b172-6e12-11eb-ba56-d7e2c8defa31_story.html. In addition, Republican Senate Majority Leader Mitch McConnell joined Democrats in condemning Trump for provoking the riot and for falsely claiming election fraud. Nicholas Fandos, *Deepening Schism, McConnell Says Trump 'Provoked' Capitol Mob*, N.Y. Times (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/us/politics/mcconnell-trump-capitol-riot.html; Amber Phillips, *Mitch McConnell's forceful rejection of Trump's election 'conspiracy theories'*, Wash. Post (Jan. 6, 2021), https://www.washingtonpost.com/politics/2021/01/06/mitch-mcconnells-forceful-rejection-trumps-election-conspiracy-theories/.

342 Philip Bump, *An incomparable historic rebuke of a president by his own party*, Wash. Post (Feb. 13, 2021), https://www.washingtonpost.com/politics/2021/02/13/an-incomparable-historic-rebuke-president-by-his-own-party/.

343 Todd C. Frankel, Jeff Stein & Tony Romm, *Campaign finance system rocked as firms pause or halt contributions after election results challenged*, Wash. Post (Jan. 11, 2021), https://www.washingtonpost.com/business/2021/01/10/marriott-campaign-donations-congress/; Sergio Hernandez & Tal Yellin, *Tracking Corporate America's revolt against the Electoral College objectors*, CNN (Jan. 26, 2021), https://www.cnn.com/interactive/2021/01/business/corporate-pac-suspensions/; Douglas MacMillan & Jena McGregor, *Lawmakers who objected to election results have been cut off from 20 of their 30 biggest corporate PAC donors*, Wash. Post (Jan. 19, 2021), https://www.washingtonpost.com/business/2021/01/19/gop-corporate-pac-funding/.; Alyssa Fowers, Chris Alcantara & Jena McGregor, *Companies are halting PAC contributions after U.S. Capitol riots. Here's where their money went.*, Wash. Post (Jan. 15, 2021), https://www.washingtonpost.com/graphics/2021/business/pac-donations-capitol-riots/; David Gelles, *'We Need to Stabilize': Big Business Breaks With Republicans*, N.Y. Times (Jan. 15, 2021), https://www.nytimes.com/2021/01/15/business/republicans-business-trump.html?action=click&module=Spotlight&pgtype=Homepage; Kate Kelly, Emily Flitter & Shane Goldmacher, *Companies Pull Back Political Giving Following Capitol Violence*, N.Y. Times (Jan. 11, 2021), https://www.nytimes.com/2021/01/11/business/corporate-donations-politics.html.

344 Tony Romm, *President Trump lashes out at social media companies following Twitter ban*, Wash. Post (Jan. 12, 2021), https://www.washingtonpost.com/technology/2021/01/12/facebook-twitter-trump-capitol-riot/; Elizabeth Dwoskin & Craig Timberg, *Misinformation dropped dramatically the week after Twitter banned Trump*, Wash. Post (Jan. 16, 2021), https://www.washingtonpost.com/technology/2021/01/16/misinformation-trump-twitter/; Taylor Telford, *Twitter bans MyPillow CEO and Trump ally Mike Lindell*, Wash. Post (2021), https://www.washingtonpost.com/politics/2021/01/26/trump-impeachment-joe-biden-live-updates/#link-32ERTZOM7VG2JJQL4ONKRU5SPA; ; Tony Romm & Rachel Lerman, *Amazon suspends Parler, taking pro-Trump site offline indefinitely*, Wash. Post (Jan. 11, 2021), https://www.washingtonpost.com/technology/2021/01/09/amazon-parler-suspension/; Jordan Novet, *Parler's de-platforming shows the exceptional power of cloud providers like Amazon*, CNBC (Jan. 16, 2021), https://www.cnbc.com/2021/01/16/

News by voting machine companies prompted the network to fire its hosts and disinvite guests who promoted false claims of election fraud.[345] Indeed, when faced with a voting machine defamation suit of her own, pro-Trump lawyer Sidney Powell conceded that her voter fraud claims were obviously baseless and that "[r]easonable people would not accept such statements as fact."[346]

Yet, clear warning signs exist that American democracy faces significant challenges ahead. An August 2021 survey found that 66% of Republicans continue to believe the falsehood that Democrats stole the 2020 election from Trump.[347] And despite promises to the contrary, several major companies eventually resumed donations to Republicans who undermined the January 6 electoral count.[348] Most troubling of all, a September 2021 CNN poll found that 93% of Americans believe that American democracy is in danger.[349]

A federal republic on the continental scale of the United States can never take democratic stability or unity for granted. The American Civil War underscored that point in stark fashion. But it remains a striking fact that Washington has not faced a serious secession threat since 1865.[350] In the century and a half since the war ended, the United States has repeatedly experienced intense regional divides over

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how-parler-deplatforming-shows-power-of-cloud-providers.html; Tony Romm & Elizabeth Dwoskin, *Twitter purged more than 70,000 accounts affiliated with QAnon following Capitol riot*, Wash. Post (Jan. 11, 2021), https://www.washingtonpost.com/technology/2021/01/11/trump-twitter-ban/.

345 Elahe Izadi & Sarah Ellison, *Fox News has dropped 'Lou Dobbs Tonight,' promoter of Trump's false election fraud claims*, Wash. Post (Feb. 5, 2021), https://www.washingtonpost.com/media/2021/02/05/lou-dobbs-canceled-fox/; Aaron Blake, *Lou Dobbs, and the most problematic claims Trump allies made about voting machines*, Wash. Post (Feb. 6, 2021); Jeremy Barr, *Rudy Giuliani and Sidney Powell have disappeared from Fox airwaves*, wash. post (Jan. 14, 2021), https://www.washingtonpost.com/politics/2021/02/05/most-legally-problematic-claims-trumps-allies-made-about-voting-machines/; Emma Brown, *Dominion sues pro-Trump lawyer Sidney Powell, seeking more than $1.3 billion*, Wash. Post (Jan. 8, 2021), https://www.washingtonpost.com/politics/dominion-sues-pro-trump-lawyer-sidney-powell-seeking-more-than-13-billion/2021/01/08/ebe5dbe0-5106-11eb-b96e-0e54447b23a1_story.html; Tonya Riley, *Dominion lawsuit could be just start of legal action against Trump allies*, Wash. Post (Jan. 11, 2021), https://www.washingtonpost.com/politics/2021/01/11/cybersecurity-202-dominion-lawsuit-could-be-just-start-legal-action-against-trump-allies/.

346 Tom McCarthy, *Pro-Trump lawyer says 'no reasonable person' would believe her election lies*, The Guardian (March 23, 2021), https://www.theguardian.com/us-news/2021/mar/23/sidney-powell-trump-election-fraud-claims.

347 Caitlin Dickson, *Poll: Two-thirds of Republicans still think the 2020 election was rigged*, YAHOO NEWS (August 4, 2021), https://news.yahoo.com/poll-two-thirds-of-republicans-still-think-the-2020-election-was-rigged-165934695.html.

348 Isaac Stanley-Becker, *American Airlines, other companies resume donations to Republicans who objected to election results*, WASH. POST (July 15, 2021), https://www.washingtonpost.com/politics/2021/07/15/american-airlines-overturn-election-january-6/.

349 Jennifer Agiesta and Ariel Edwards-Levy, *CNN Poll: Most Americans feel democracy is under attack in the US*, CNN (Sep. 15, 2021), https://www.cnn.com/2021/09/15/politics/cnn-poll-most-americans-democracy-under-attack/index.html.

350 Jack Shaefer, *How Secession Became America's Favorite Idle Threat*, Politico (Dec. 16, 2020), https://www.politico.com/news/magazine/2020/12/16/how-secession-became-americas-favorite-idle-threat-447083.

public policy. In the 1950s and 1960s, for example, white southerners violently resisted the federal government's effort to enforce the 14th and 15th amendments in the ex-Confederate states. But unlike the 1860s, white southern opposition to federal civil rights policies did not manifest itself in a secession movement. Indeed, although rhetorical threats of secession have become popular among ideologues, no state since the Civil War has embraced secession as a viable policy option.[351] As the Supreme Court Justice Antonin Scalia observed in 2010, "If there was any constitutional issue resolved by the Civil War, it is that there is no right to secede."[352]

In the end, the voters themselves provide the most compelling reason for cautious optimism about the future of American democracy. By any measure, the United States does not suffer from an apathetic electorate. Quite the reverse. Americans are more engaged in their national elections than ever before. Over 155 million Americans voted in the 2020 presidential election, a turnout rate of 66.2%, the highest level in 120 years.[353] Moreover, the share of eligible voters was far greater in 2020 than in 1900 and all the elections that preceded it. Prior to 1920, women—who account for half the population of the United States—lacked the right to vote in federal elections.[354] Accordingly, the 2020 turnout numbers are arguably the most impressive in American political history. The participation of over 155 million voters in the 2020 federal elections[355] is evidence that Americans have not given up on their democracy yet.

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351 *Id.*

352 Debra C. Weiss, *Scalia Opines on Right to Secede in Letter to Screenwriter*, ABA J. (Feb. 17, 2010), https://www.abajournal.com/news/article/scalia_opines_on_right_to_secede_in_letter_to_bloggers_screenwriting_brothe.

353 Drew Desilver, *Turnout soared in 2020 as nearly two-thirds of eligible U.S. voters cast ballots for president*, Pew Research Center (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/; Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 turnout is the highest in over a century*, Wash. Post (Dec. 28, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/.

354 Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 turnout is the highest in over a century*, Wash. Post (Dec. 28, 2020), https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/.

355 *Presidential Election Results: Biden Wins*, N.Y. Times (Feb. 9, 2021), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html.

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Orwellian Opinions: The Language of Power and The Power of Language

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ABSTRACT

In 1984 and other writings, George Orwell explored the language of power and the power of language. As illustrations of the abuses he identified, this essay analyzes a pair of famous constitutional opinions, Justice Brown's Plessy v. Ferguson *and Justice Douglas'* Griswold v. Connecticut.

KEYWORDS

George Orwell, Justice Brown, Justice Douglas, white supremacy, privacy

CONTENTS

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I. Introduction

For many English intellectuals, the years preceding the Second World War marinated in exasperation, resentment, and anger.[1] On the right, figures like T.S. Eliot bemoaned the erosion of traditional authority and its replacement with vacuous vulgarity.[2] On the left, figures like W.H. Auden bemoaned the presence of traditional authority and its vacuous vulgarity.[3] Neither camp much considered the everyday lives, hopes, and fears of ordinary people, so caught up were they in Deep Thoughts. George Orwell, though emphatically a man of the Left, was even more emphatically his own man. He regarded the preoccupation with ideological abstractions as not simply an inadequate path to understanding the world, but also a dangerous one; for in dismissing the value of the mundane and the specific, it opened the door to an arrogance that was thoroughly hostile to liberty and decency. Thus, he wrote books detailing the life of being down and out in Paris and London[4] or mining in Wigan,[5] and found time to praise suet pudding.[6]

This quotidian concern never leaves Orwell's *Nineteen Eighty-Four,*[7] the most famous modern dystopian novel. In contrast, earlier efforts with their focus on futuristic technology seem remote fantasies, speculative, removed from today, lacking in bite. In *We* (1924)[8] by Yevgeny I. Zamyatin, for example, a rational, technological society ruled by The Benefactor puts down a rebellion and uses x-rays to eliminate nerve centers responsible for imagination. Scientifically managed and emotionally neutered, the society exhibits a kind of frightening harmony. Aldous Huxley's *Brave New World* (1932)[9] features innovations in human engineering and reproductive technology that make possible a society where hedonistic pleasures lull the inhabitants into a helpless stupor; if they did not exactly consent to their docility, they certainly do not seem troubled by it.[10] In these dystopias, we are our

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1 Marc Stears, Out of the Ordinary: How Everyday Life Inspired a Nation and How It Can Again (2021).

2 Orwell was troubled by Eliot's persistent "conscious futility." *See* 2 George Orwell, *Review, in* 2 The Collected Essays, Journalism and Letters: My Country Right or Left, 1940-1943 236, 240 (Sonia Orwell & Ian Angus eds., 1968).

3 Orwell thought Auden spent the war "watching his navel in America." George Orwell, *Literature and the Left, in* The Collected Essays, Journalism and Letters: My Country Right or Left, 1940-1943 292, 294 (Sonia Orwell & Ian Angus eds., 1968).

4 George Orwell, Down and Out in Paris and London (1933).

5 George Orwell, The Road to Wigan Pier (1937).

6 *In Defense of English Cooking*, Evening Standard, Dec. 15, 1945. Orwell's preoccupation with the everyday led one anthropologist to call him an ethnographer, an honorific the decidedly non-academic Orwell would surely have laughed off. Michael Amundson, *George Orwell's Ethnographies of Experience: "The Road to Wigan Pier" and "Down and Out in Paris and London"*, 25 Anthro. J. Eur. Cult. 9 (2016).

7 George Orwell, Nineteen Eighty-Four (1949).

8 Yevgeny I. Zamyatin, We (Gregory Zilboorg trans., 1924).

9 Aldous Huxley, Brave New World (1932).

10 It has long been a cliché that in the West, particularly, the United States, the population is either anesthetized or distracted by its incessant, booming materialism. Alexander Solzhenitsyn, *The Exhausted West*, Harv. Mag., Jul.-Aug. 1978, at 20; Thorstein Veblen, The Theory of the Leisure Class: An Economic Study of Institutions (B.W. Huebsch 1918) (1899); John K. Galbraith, The New Industrial State (New. Am. Libr., 2d ed., 1971) (1968); David Reisman et al., The Lonely Crowd: A Study

own worst enemies, as our powerful drives for pleasure and comfort undermine and vanquish our urge for autonomy and freedom, but unlike *Nineteen Eighty-Four*, set less than forty years away, we do not read them and think they are about us.

It is fair to ask whether Orwell's reflexive hostility to abstractions was carried too far. We do, after all, need some kind of overall theory or concept or prejudice to make sense from what otherwise would simply be onrushing disparate facts. If we do not openly acknowledge the theory, we may be guided by an implicit version we never bothered to examine, and that can hardly be a useful way to try to understand the world. Orwell, in his preference for the concrete, sometimes makes lists of things do the work of argumentation, gliding over the fact that a different list might support a different argument. Yet if he occasionally falls into this trap, his preoccupation with the tangible and the real works far more often as a bracing intellectual vaccine that wards off the inane and toxic ideas poised to attack us.

In *Nineteen Eighty-Four*, the setting is almost familiar and thoroughly unpleasant, reflecting dreary postwar London and the bleak isle of Jura where a dying Orwell wrote the novel; everything is gloomy, gritty, and gray. Freedom has been eliminated not through Zamyatin and Huxley's malevolent technology of a distant future, but instead with the use of an elaborate and self-reinforcing system of education, censorship, terror, and above all, the language of Newspeak. The people receive no benefit in return.

To today's reader of *Nineteen Eighty-Four,* the most obvious dystopian loss is privacy, in Warren and Brandeis' famous formulation, "the right to be let alone."[11] Like Hitler's Germany and Stalin's Soviet Union, Orwell's superstates aim at the obliteration of individuality in the service of an elite-determined common good, really, the production of a new kind of person. Privacy in the sense of authorities respecting our need for solitude, secrecy, and autonomy is in his world nowhere to be found. This absence is epitomized by the telescreen, a ubiquitous technology that facilitates continual surveillance of everyone, recalling the Christian surveillance cliché that God notes the fall of every sparrow.[12] Big Brother, a fictional construct making a profoundly practical point, is watching you. He is "infallible and all-powerful," Orwell tells us. "Nobody has ever seen Big Brother. . . . His function is to act as a focusing point for love, fear, and reverence. . . [13]

Unlike most dystopias, which are chock full of gadgets, the telescreen is the only significant technology that Orwell introduces, and its very uniqueness highlights its importance. It molds the people through propaganda, including its two minutes of hate, but its chief value is intimidating them; the point is not that it observes everything they do, but that this is made public and drummed into them. It is the *publicizing* of the surveillance more than the surveillance itself that generates

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of the Changing American Character (Yale Univ. Press 1950); Vance Packard, The Status Seekers (1959). William Wordsworth, The World Is Too Much with Us (1807) (as Wordsworth puts it, "The world is too much with us . . . getting and spending; we lay waste our powers").

11 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 205 (1890). At the same time, we are social creatures who abhor loneliness, and we live in societies dominated by private norms and official rules that do not let us alone.

12 Matthew 10:29.

13 Orwell, *supra* note 7, at 213.

a sense of powerlessness that conduces to passivity.[14] Where opacity permits diversity, allowing us within a "broad sphere of action"[15] to go our own way, transparency facilitates centralized control and its offspring, homogeneity, docility, and obedience. Thus, the feature that we celebrate in public life as indispensable to accountability becomes our enemy in private life as the foe of privacy and liberty.

Orwell's principal concern, which he developed in a number of essays that preceded *Nineteen Eighty*-Four,[16] was the power of language. Indeed, his "fascination with language is almost an obsession."[17] He went so far as to provide an appendix to the novel, fourteen pages on "The Principles of Newspeak." In "Politics and the English Language," he inveighed against stale imagery, lack of precision, worn out metaphors, pretentious diction, jargon, and the passive voice. This essay is often read as a kind of self help guide to better prose, but in fact Orwell had a larger goal in mind. He believed in the truism that thought shapes language, not merely in the trite sense that words refer to things but also that the "great enemy of clear language is insincerity."[18]

One of the first tasks of toddlers is to learn the names of things; they see a doll and convert the thought to "doll." This guileless process, however, is not Orwell's concern. Instead, he focuses on the cynical thought that shapes language. "The first thing that we ask of a writer is that he shall not tell lies, that he shall say what he really thinks, what he feels."[19] Thus, the writer's mortal sin of insincerity: American white supremacy packaged as the Southern Way of Life, the wealthy seeking to avoid taxes calling themselves job creators. The point had been made often, but Orwell's unadorned prose gives it an impact that is distinctive.

Yet for Orwell, as for Dewey, "Society not only continues to exist . . . *by* communication, but it may fairly be said to exist *in* communication."[20] Words, that is, do not simply represent things in the world, but in a practical sense may also constitute these things. Hence, what makes *Politics and the English Language* so provocative is Orwell's subversive notion that language shapes thought, for the point of shaping language deceptively is to shape the thought of the audience.

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14 Similarly, while Russian officials today offer perfunctory denials that their security service poisons dissidents, the fact that Soviet era toxins are used makes the point that opponents must beware. The brazenness is a most effective show of power.

15 John S. Mill, On Liberty 11 (Elizabeth Rapaport ed., Hackett Pub. Co., 1978) (1859).

16 *E.g.,* George Orwell, *The Frontiers of Art and Propaganda*, The Listener, May 29, 1941;George Orwell, *Literature and Totalitarianism*, The Listener, June 19, 1941; George Orwell, *Pamphlet Literature*, New Statesman and Nation, Jan.9, 1943; 3 George Orwell, *Propaganda and Demotic Speech*, *in* The Collected Essays, Journalism and Letters: As I Please, 1943-1945, 135 (Sonia Orwell & Ian Angus eds., 1968); 4 George Orwell, *The Prevention of Literature*, *in* The Collected Essays, Journalism and Letters: In Front of Your Nose, 1945-1950, 59 (Sonia Orwell & Ian Angus eds., 1968); George Orwell, *Writers and Leviathan*, New Leader, June 19, 1948.

17 Florence Lewis, *Forebears: Orwell and Wescott*, 267 N. Am. Rev. 59 (1982).

18 4 George Orwell, *Politics and the English Language, in* The Collected Essays, Journalism and Letters: In Front of Your Nose, 1945-1950, 127, 137 (Sonia Orwell & Ian Angus eds., 1968).

19 George Orwell, *Literature and Totalitarianism, in* 2 The Collected Essays, Journalism and Letters: My Country Right or Left, 1940-1943, 134 (Sonia Orwell & Ian Angus eds., 1968).

20 John Dewey, Democracy and Education 4 (1916).

Hence, the advertising campaigns aimed at creating panic over halitosis[21] and body odour[22] and the fibs and platitudes of ordinary social life.[23] Can words simply mean whatever those in charge say they mean? Humpty Dumpty replied, "The question is which is to be master—that's all."[24] Orwell had in mind not a children's book, but the horrifying examples of Nazi Germany and the Soviet Union; Goebbels had raised the Big Lie to an art form, and the Communist party line zigged and zagged without apology. "If thought corrupts language," he wrote, "language can also corrupt thought."[25]

As Orwell wrote of Newspeak, a version of English invented by the Party, its purpose "was not only to provide a medium of expression for the world-view of and mental habits proper to the devotees of [the state], but to make all other modes of thought impossible. . . . literally unthinkable, at least in so far as thought is dependent on words."[26] Thus, the normal rationale for language, communication, is subordinated to a higher purpose, control. [27]

We understand that government addressing the public, marketers reaching customers, parents entertaining young children, and a vast range of other speakers deliberately devise words and phrases for a vast range of purposes. But we are also comforted by the thought that no one created and thereby can control entire languages, that they develop as a kind of spontaneous, uncoordinated consequence of innumerable human encounters. But in *Nineteen Eighty-Four*, Orwell posits a state far more ambitious than even the totalitarian systems of his day, and in an appendix to the novel he explains the state's wholesale revisions of English that will simplify nouns and verbs, remove synonyms, redefine problematical terms, and greatly reduce the number of words – all in the service of securing willing, submissive obedience. "The enemies of intellectual liberty," he observes, "always try to present their case as a plea for discipline versus individualism."[28] The state aims to complete the project ending in total control by 2050.

The language revision campaign is famously epitomized in a series of oxymoronic slogans, like War Is Peace.[29] What can this possibly mean? That war may be a necessary prelude to peace? That war produces a peaceful sensation? That

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21 Esther Inglis-Arkell, *The Medical Condition Invented by Listerine*, Gizmodo, (Jan. 27, 2015), https://gizmodo.com/the-medical-condition-invented-by-listerine-1682070561.

22 Sarah Everts, *They Smelled Bad*, Smithsonian Mag., Aug. 2, 2012.

23 Erving Goffman, The Presentation of Self in Everyday Life (1959).

24 Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking-Glass 247 (1924).

25 Orwell, s*upra* note 18.

26 Orwell, s*upra* note 7, at 309-10.

27 The Polish philosopher, Leszek Kolakowski, wrote of the Soviet Union, "At public meetings, and even in private conversations, citizens were obliged to repeat in ritual fashion grotesque falsehoods about themselves, the world, and the Soviet Union, and at the same time to keep silent about things they knew very well, not only because they were terrorized but because the incessant repetition of falsehoods which they knew to be such made them accomplices in the campaign of lies inculcated by the party and state." 3 Main Currents of Marxism: The Breakdown 96 (P.S. Falla trans. 1978).

28 George Orwell, *The Prevention of Literature*, *in* 4 The Collected Essays, Journalism and Letters: In Front of Your Nose, 1945-1950, 59,61 (Sonia Orwell & Ian Angus eds., 1968).

29 Orwell, s*upra* note 7, at 189.

only through war can peace be found? The answer sidesteps all circumlocutions. War and peace have been successfully redefined, so that they literally mean the same thing. The point is made elsewhere, when a Party member, O'Brien, holds up four fingers and asks Winston, the protagonist, how many he sees. Winston answers, "Four! Four! What else can I say? Four!" Whereupon O'Brien tortures Winston, who then utters the desired answer, "Five." But O'Brien will have none of it. "You are lying. You still think there are four."[30] The object is not to elicit the correct response, but to control the thought; Winston must not merely say five, he must believe five. Given scenes like this, it is no wonder that "Orwellian," with its decidedly sinister overtones, is "the most widely used adjective derived from the name of a modern writer."[31]

One device that facilitates thought control is the memory hole, literally a hole in the wall leading to a chute and then to an incinerator. The ministry of truth (that is, falsehood) uses the holes to destroy evidence, so that it can continually rewrite history in support of its current positions. Through this endless process of post hoc revision, the Party is always right. Indeed, it is right by definition. As he explained in *The Prevention of Literature*, lying is "something integral to totalitarianism. . . . A totalitarian state is in effect a theocracy, and its ruling caste, in order to keep its position, has to be thought of as infallible. But since, in practice, no one is infallible, it is frequently necessary to rearrange past events in order to show that this or that mistake was not made, or that this or that imaginary triumph actually happened."[32] Thus does language emasculate thought and serve as a foundation for power.

The implications for law, a chief means of social control, are plain. Law, in the words of a founder of the law and literature school of thought, "establishes the terms on which its actors may talk in conflict and cooperation among themselves."[33] Judicial opinions, then, may be conceived as part of an ongoing conversation on the issues raised, and so concern with the language employed becomes a major element in analysis. In the light of Orwellian language, consider a pair of famous judicial opinions that (unintentionally) illustrate the abuses that attracted Orwell's ire.

II. Henry Billings Brown and *Plessy v. Ferguson*

The first opinion to be examined was written by Henry Billings Brown, perhaps the most famous forgotten justice in the history of the Supreme Court. He was born in the Massachusetts village of South Lee in 1836 into a prosperous Puritan family, in which, he later observed, "there has been no admixture of alien blood for two

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30 *Id.* at 258. When Winston is abruptly told that the state's allies and enemies have suddenly switched places, Orwell is obviously referring to Communists reversing the party line after the Hitler-Stalin pact of 1939. *Id.* at 184-86.

31 Geoffrey Nunberg, *Simpler Terms: If It's Orwellian, It's Probably Not*, N.Y. Times, Jun. 22, 2003.

32 George Orwell, *The Prevention of Literature*, *in* 4 The Collected Essays, Journalism and Letters: In Front of Your Nose, 1945-1950, 63 (Sonia Orwell & Ian Angus eds., 1968).

33 James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community 266 (1984).

hundred fifty years."[34] After a pleasant and uneventful childhood, he recalled, "I was naturally obedient, and when my father said to me one day, 'My boy, I want you to become a lawyer,' I felt that my fate was settled, and had no more idea of questioning it than I should have had in impeaching a decree of Divine Providence."[35] He graduated from Harvard, attended Yale and Harvard law schools for a while, read law in Detroit, where he joined the bar and served as assistant district attorney and then briefly as a judge, when he reported that he "was glad to take refuge in the comparative repose of the bench."[36] He returned to private practice and developed a specialty in admiralty law as applied to Great Lakes shipping, but confessed that his "health was giving way under the uncongenial strifes of the bar."[37] In 1875, he secured a federal district judgeship. Benefitting from a well placed recommendation from an eminent colleague, Brown was appointed to the Supreme Court in 1890 and served until 1906, when declining health and the prospect of continuing to receive full pay at age seventy led him to retire. He died in 1913.

How, then, can we characterize Brown's judicial career? He was a judge of modest abilities and temperament. Though he served with such figures as Holmes, Harlan, and Field, he lacked their intellectual ambition and force of personality. A conventional pro-business Republican, Brown avoided confrontations—hence, his arcane specialization— and seems to have had a deferential, timid streak. He also appears never to have been interested in the question of race, though he lived through a time in which controversies over slavery, Reconstruction, Jim Crow, and the Ku Klux Klan consistently placed it high on the national agenda. A diary he kept during the Civil War contained no reference to slavery or blacks.[38] When as a federal judge after the war he spent an evening with the former president of the Confederacy, Jefferson Davis, Brown recalled, "I am bound to say that I never spent a more delightful evening. I found Mr. Davis a most courteous and agreeable gentleman of the best Southern type."[39]

In 1896, Brown was assigned the majority opinion in *Plessy v. Ferguson* (1896). The case involved the Louisiana Separate Car Act that required trains to "provide separate but equal accommodations for the white and colored races. . . . No person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to."[40] Homer Plessy, who was one-eighth black, challenged the law by sitting in a first class coach reserved for whites. A conductor told him to move to a coach reserved for blacks; he refused, and was ejected from the train and jailed for violating the law.

Plessy pointed out that in New Orleans, where he resided, in addition to blacks, there were (in the language of the day) mulattoes, quadroons, and octoroons, and these latter three groups enjoyed higher social status and dominated African American political life. New Orleans, in short, recognized a variety of races,[41]

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34 Henry B. Brown, Memoirs 1 (1915).
35 *Id.* at 5.
36 *Id.* at 21.
37 *Id.*
38 *Id.* at 45-57.
39 *Id.* at 23.
40 1890 La. Acts c.111, 152.
41 Gwendolyn M. Hall, Africans in Colonial Louisiana 29-32 (1992); Creole New Orleans: Race and Americanization (Arnold R. Hirsch & Joseph Logsdon eds.,

and Plessy, a light complexioned octoroon, was selected to test the law precisely because he epitomized "the arbitrariness of the [binary] classification."[42] As he argued in his brief, it was often "impossible " to determine a person's race;[43] and in his case, Brown noted that "the mixture of colored blood was not discernable in him."[44] If Plessy had not informed the conductor that he was black, in all likelihood he would have passed for white.[45] The Separate Car Act thus threatened people like Plessy, who enjoyed some privileges, rather than darker blacks, who enjoyed none.

How, then, asked Plessy, could assigning passengers on the basis of race be left to untrained conductors? What gave the question great practical importance, he contended, was that race operated as a proxy for reputation. Lighter skin was valued greater than darker skin because under slavery lighter skin African Americans were likely domestic slaves or free persons, while darker skin African Americans were likely field slaves. Reputation was a form of property; the conductor was clothed with the authority of the state; the conductor's action in calling Plessy colored, therefore, constituted state action that deprived him of property without due process of law in violation of the Fourteenth Amendment. So went Plessy's argument. Plessy would have solved the problem by empowering the individual to determine his own race. (Ironically, he refused "to admit that he was in any sense or in any proportion a colored man."[46])

The common law compelled carriers to serve everyone, provided they were orderly and could pay the fare, but granted carriers the power to assign seats. But was the common law superseded by the Fourteenth Amendment's equal protection clause? Brown saw no conflict. "The power to assign [a passenger] to a particular coach implies a power to determine to which race the passenger belongs,"[47] Brown cited ten cases in order to show that "statutes for the separation of the two races upon public conveyances was held to be constitutional."[48] Upon examination, however, one of these cases did not involve race,[49] another did not involve trains,[50] two were decided before the adoption of the Fourteenth Amendment[51] and none of the remainder raised constitutional issues.[52] The ten citations, which together appear impressive, all disappear upon investigation, but the point had been made.

1992); Amy R. Sumpter, *Segregation of the Free People of Color and the Construction of Race in Antebellum New Orleans*, 48 Se. Geographer 19 (2008).

42 Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation 31 (1987).

43 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 33 (Phillip B. Kurland & Gerhard Casper eds., 1975).

44 Plessy v. Ferguson, 163 U.S. 537, 541 (1896).

45 Keith W. Medley, We as Freemen: Plessy v. Ferguson 142 (2003).

46 Brown, s*upra* note 44, at 539-40.

47 *Id.* at 537, 549.

48 *Id.* at 548.

49 Memphis & C. R. Co. v. Benson, 85 Tenn. 627 (1887).

50 People v. King, 18 N.E. 245 (1888).

51 Day v. Owen, 5 Mich. 520 (1858); West Chester & Philadelphia R.R. v. Miles, 55 Pa. 209 (1867).

52 Chicago & Nw. Ry. v. Williams, 55 Ill. 185 (1870); Chesapeake, Ohio & Sw. R.R. v. Wells, 85 Tenn. 613 (1885); The Sue, 22 F. 843 (D. Md. 1885); Logwood v. Memphis & C.R. Co., 23 F. 318 (C.C. W.D. Tenn. 1885); McGuinn v. Forbes, 37 F. 639 (D. Md. 1889); Houck v. South. Pac. Ry. Co, 38 F. 226 (C.C.W.D. Tex. 1888).

In considering the role of the conductor, Brown ignored Plessy's assertion that racial assignment will not always be easy to do. He did not consider Plessy's racial plea for self-assignment, perhaps because it would have encouraged light complexioned African Americans to call themselves white. On the other hand, nor did he consider that Louisiana's practice of relying on the judgment of conductors would introduce an element of unrestrained discretion that would fatally undermine the presumed objectivity of the procedure. Brown seems to have regarded binary racial identification as a question to be solved by common sense; "a legal distinction between the white and colored races . . . is founded in the color of the two races, and . . . must always exist so long as white men are distinguished from the other race by color."[53] As to "the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person," he would leave this "to be determined under the laws of each state and [and] not properly put at issue in this case."[54]

In Brown's eyes, then, we all can distinguish between white and black (except, of course, in the case of Homer Plessy). Race, in this sense, is a fixed and obvious matter of biology, not a category created and enforced by people, and therefore inherently problematic, blurry, and shifting. Thus, assigning Plessy to a black car could not damage his reputation "since he is not lawfully entitled to the reputation of a white man."[55] For Plessy, this was the common sense that tells us the earth is flat.

Plessy had also raised the issue in his brief of the Thirteenth Amendment banning slavery, calling segregation "a badge of servitude," but Brown brushed off the contention as "too clear for argument."[56] In support, he cited the *Slaughterhouse Cases* (1873)[57] as establishing that the Thirteenth Amendment abolished slavery, Mexican peonage, and the Chinese coolie trade. "It was intimated," he wrote, " that this amendment was regarded by statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value."[58] Interestingly, Brown cited only the *Slaughterhouse Cases* as a whole and not, as is customary, the specific relevant passage. Upon investigation, the reason for this omission becomes clear. The *Slaughterhouse Cases* contains no such passage; in fact, the *Slaughterhouse* opinion states, "The prohibition of 'slavery and involuntary servitude' in every form and degree . . . . comprises much more than the abolition or prohibition of African slavery."[59] The case, in short, while it does not support Plessy's argument, does not support Brown's, either. As to the intimated statesmen Brown referred to, he offers no citation to the amendment's legislative history or to anything else.

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53 S*upra* note 44, at 543.
54 *Id.* at 552.
55 *Id.* at 549. On the other hand, "if he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property." *Id.*
56 *Id*. at 542.
57 Slaughterhouse Cases, 83 U.S. 36 (1872).
58 *Supra* note 44, at 542.
59 *Supra* note 57, at 49-50.

After discussing the *Slaughterhouse Cases*, Brown refers to the *Civil Rights Cases* (1883),[60] noting that here the Court held that "the act of a mere individual . . . refusing accommodations to colored people cannot be regarded as imposing any badge of slavery."[61] However, in *Plessy*, the conductor was not acting as a mere individual or agent of the railroad, but rather as an enforcer of a state statute. The citations to the famous *Slaughterhouse Cases* and the *Civil Rights Cases*, then, are irrelevant and prove nothing.

Given the developments sweeping the South in the 1890s, would segregation metastasize to cover virtually every aspect of life? "The reply to all this is that every exercise of the police power must be reasonable," said Brown, "and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[62] In short, mindless fear mongering that can safely be ignored.[63]

The rest of Brown's opinion closely followed that of the lower court. He observed that states are free "to act with reference to the established usages, customs and traditions of the people with a view to the promotion of their comfort, and the preservation of the public peace and good order."[64] Certainly, segregation on trains is no more "unreasonable or more obnoxious" than congressionally mandated segregated schools in Washington, D.C.[65] Louisiana, therefore, is not unreasonable in concluding that racial segregation on trains serves these lawful ends. Brown did not inquire as to why segregation promoted the comfort, public pace, and good order of the populace. Was it simply that adhering to settled tradition, good in itself, produces these results? But, then, hadn't the Civil War been fought to overturn the settled tradition of slavery? Or was the settled tradition white supremacy, in which case references to equality could be disregarded? Brown does not press Louisiana for an explanation, perhaps because he already knew what it would be.

Thus, Brown accepted Louisiana's contention that the law did nothing but legally formalize settled practice. In fact, however, the years preceding the passage of the law were ones of "flux and change [with] no consistent, thorough, and effective system of social control, legal or extralegal, governing relations between the races."[66] Indeed, one observer wrote, "In Louisiana certain railway trains and steamboats run side by side, within a mile of one another, where in the trains a negro or mulatto may sit where he will, and on the boats he must confine himself to a separate quarter called the 'Freedman's Bureau'."[67] The state's Reconstruction

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60 Civil Rights Cases, 109 U.S. 3. (1883).

61 S*upra* note 44, at 543, 546-47.

62 *Id.,* at 550.

63 Three years later, a unanimous Court found no constitutional problem in a school board discontinuing a high school for blacks, while maintaining one for whites, giving budgetary woes as the reason. The Court's opinion was written by Harlan. Cumming v. Richmond Cty. Bd. of Educ., 175 U.S. 528 (1899). *See* J. Morgan Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. Southern Hist. 17 (1980).

64 *Id. Cf. Ex parte Plessy*, 11 So. 948, 951 (1892).

65 *Supra* note *44,* at 551.

66 Henry C. Dethloff & Robert R. James, *Race Relations in Louisiana, 1877-98*, 9 La. Hist. 301, 304-05 (1968).

67 George W. Cable, *The Negro Question, in* The Negro Question 129 (Arlin Turner ed., 1958).

constitution of 1868 explicitly stated, "All persons shall enjoy equal rights and privileges upon any conveyance of a public character,"[68] though it was replaced by a much less friendly constitution in 1879. In other parts of the South, whites and blacks rode "together and without a partition between them,"[69] and in Tennessee, whites who smoked or had second class tickets frequently rode in train cars reserved for blacks.[70] In short, the Louisiana law was enacted less to formalize accepted practice than to change and rigidify it.

For Brown, equal does not mean identical. Of course, in ordinary speech, that is exactly what "equal" means. Two plus two is identical to four. But nearly all laws classify people, and thus treat people in one category differently from those in another. A driver exceeding the speed limit will be treated differently under the law from one who does not. Similarly, in considering benefits, the Court has held that providing Chinese students with exactly the same education as was provided for white students would not meet the test of equality because white and Chinese students were different enough, so that they required a different kind of education if they were to achieve the same result.[71]

But when judges upholding segregation claimed that equal did not mean identical, they had something very different in mind. They were not suggesting that for historical reasons blacks required more resources to reach the same result, but on the contrary, that there was no point in providing more than the minimum amount; intellectually and temperamentally, blacks were considered unfit to make use of more than that, and pretending otherwise would only stoke frustrated ambitions and create divisions in an otherwise harmonious society. Thus, in these situations, inequality would be construed as equality; each race would be treated according to its strengths and limitations, in a word, equally. Differences would not reflect discrimination, but merely inherent differences between the races, justifying greater resources for one than the other. Which naturally raises the question of how much inequality will be tolerated and for what purpose? In the South, of course, the degree of inequality was very substantial, its purpose was to maintain white supremacy, and the advantage always lay with the white population.

But this does not implicate the Fourteenth Amendment's equal protection clause, Brown adds, because it refers only to political and civil equality, which the Louisiana law explicitly guarantees, and not to social equality; because black inferiority is so fundamental and obvious there is nothing government can do to remedy it. This distinction between civil/political rights and social rights was common at the time, and in support Brown cites[72] a well known case, *Roberts v. Boston* (1849).[73] However, this case was decided nearly two decades before the adoption of the Fourteenth Amendment, which in any case, makes no mention of the distinction between different kinds of rights.

Brown's opinion culminates in a passage that over a century later remains astonishing: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the

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68 La. Const. art. XIII.
69 C. Vann Woodward, The Strange Career of Jim Crow 92 (rev. ed. 1957).
70 Logwood v. Memphis C.R. Co., 23 F. 318 (C.W.D. Tenn. 1885).
71 Lau v. Nichols, 414 U.S. 563 (1974).
72 Brown, s*upra* note 44, at 544.
73 Roberts v. City of Bos., 59 Mass. 198 (1849).

colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[74] "Laws . . . requiring . . . separation [of the races] in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other."[75] "Either race" – so whites should be reassured that segregation does not denote their inferiority.[76]

Why, then, would the colored race construe segregation as degrading? As a transplanted Northerner living in Washington, a Southern city, it could hardly have escaped Brown's notice that under segregation, blacks were almost universally treated as inferior to whites. They were expected to step off the sidewalk if a white person approached, never to enter a white person's house by the front door, always to be called by their first names. The inference was obvious. If somehow, all this bypassed Brown's notice, still there was Harlan's famous dissent: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons. [It] proceeds on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[77] Brown did not even take judicial notice of slavery nor inquire as to the true, obvious purpose of the Separate Car Act.

In dismissing the underlying fallacy, Brown offers a counterfactual: "if the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms . . . the white race . . . would not acquiesce in this assumption."[78] The obvious explanation, which he does not entertain, is that it had always assumed its superiority; when a quarter century earlier found blacks able to wield power in Southern legislatures, whites did not regard this as a natural progression that merely put the shoe on the other foot. Indeed, Brown goes on to say, "If one race be inferior to the other socially, the Constitution of the United States cannot pit them upon the same plane." In other words, if segregation marks blacks as inferior socially, it is not really because that is their inexplicable conclusion; it is because it is true.

Brown writes as if racial segregation is indistinguishable from gender segregation in bathrooms or age segregation in grade schools. Yet segregation was never about separation. Blacks and whites interacted more and lived closer together in the South than elsewhere in the nation. Instead, segregation was about power and the effective enforcement of white supremacy.[79] Did blacks consent to such an arrangement? The question never seems to have occurred to Brown.

Brown's opinion reads like a nineteenth century exercise in Newspeak. A reader dropped in from behind a veil of ignorance would have no inkling of the historical treatment of blacks in America. Slavery is barely mentioned; prejudice

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74 *Supra* note 44, at 551.

75 *Id.* at 544.

76 A few years later, Justice Brewer noted that as the Thirteenth Amendment did not single out blacks, its ban on slavery "reaches every race [with] the Anglo-Saxon . . . as much within its compass as . . . the African." *Hodges v. United States*, 203 U.S. 1, 17 (1906). Of course, slaves could be of any color, provided it was black.

77 Brown, s*upra* note 44, at 557, 560.

78 *Id.* at 551.

79 *Id.* at 552.

and the anti-black terrorism of the period in which it was written are omitted entirely. The law on its face favors no race, and we must take it at that. All this despite Brown's certainly having been old enough to remember slavery and the Civil War he lawfully avoided with a legal payment of $850. Was segregation, a system that singled out slaves and their descendants for special treatment, related to slavery? The question never arises. Did segregation entail an official judgment of black inferiority? In a perfect example of Orwell's insincere writing, Brown answers, only if blacks insist on seeing it this way (though elsewhere he admits that in this they are right), adding bogus precedents to prove it. It is as if all relevant history has been thrown down Orwell's memory hole and replaced by a fantasy of benevolent race relations Our ignorant reader could only wonder, stupefied, at Plessy's complaint, revealed as an eccentric act unmoored to reality, past or present.

In the end, we cannot avoid wondering whether history would have been substantially different had the Court decided Plessy in favor of Plessy. A few years later, in *Giles v. Harris* (1903), involving massive black disenfranchisement in Alabama, the Court acquiesced, with the excuse that "the great mass of the white population intends to keep the blacks from voting [and] a name on a piece of paper will not defeat them."[80] Perhaps Brown had this thought of judicial futility in mind, as well. Certainly, it would be naïve to believe that the Court could have held back the tide of white supremacy by itself. Thus, for Brown, the power of language with its metaphors, reassurances, and citations, is transformed both into a language empowering white supremacy and a language acknowledging the weakness of courts.

III. William Orville Douglas and Griswold v. Connecticut

Which brings us to William Orville Douglas, associate justice of the United States Supreme Court from 1938-1975. Can there be a less Orwellian judge than Douglas? Famously cantankerous, he was a notorious loner and iconoclast, who in nearly forty years on the Supreme Court seems to have developed no strong positive attachments to any of his colleagues.[81] Influencing their thoughts or playing at court politics, like, say, Frankfurter or Brennan, was foreign to his nature. It might be tempting to trace this to his hardscrabble childhood, which he described in best-selling memoirs[82] as poverty made worse by polio but overcome in time for military service in Europe in World War I, college, riding the rails across country to law school at Columbia, a professorship at Yale, the chairmanship of the Security and Exchange Commission, and an appointment to the Supreme Court at age forty, the youngest Justice since Joseph Story over a century and a quarter earlier.

However, we know, courtesy of a devastating biography, that the persona that Douglas carefully crafted was full of lies. He was not born in poverty; he never contracted polio; he was never on active military duty in Europe; he was no

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80 Giles v. Harris, 189 U.S. 475, 488 (1903) (Holmes, J.).

81 Melvin I. Urofsky, *Getting the Job Done: William O. Douglas and Collegiality in the Supreme Court, in* He Shall Not Pass This Way Again: The Legend of William O. Douglas 37-41 (Stephen Wasby ed., 1990).

82 William O. Douglas, Go East, Young Man: The Early Years (Random House, 1974).

Depression hobo.[83] We also know that the common decency that Orwell celebrated found little echo in Douglas' treatment of family and friends, in his womanizing and drunken binges, in his preoccupation with money, in his indifference to his children (despite an award as father of the year). Indeed, his life was littered with cruel, cold betrayals, as he discarded one relationship after another. Viewed from a distance, it is hard to imagine why someone apparently so little interested in the esteem of others would work so assiduously to concoct so false an image. Which suggests that Douglas may have been much hungrier for esteem than he liked to appear.

But our concern is not how or why Douglas constructed such a fake persona, but how this Orwellian pattern permeated his work on the Court. It is here that his cynical use of language is on display. Consider *Griswold v. Connecticut* (1965), probably his most important opinion, which established a constitutional right to privacy. The case concerned an 1879 Connecticut statute that made it unlawful to use any drug, medical device or other instrument furthering contraception or assisting, abetting, counseling, causing, or commanding such use.[84] Estelle Griswold, executive director of Planned Parenthood in Connecticut instructed married couples in public sessions on the use of contraceptives, and was convicted under the law and fined $100.[85]

After briefly passing on the question of standing, Douglas announced, "We do not sit as a super-legislature to determine the wisdom, need or propriety of laws that touch on . . . social conditions."[86] With this, he attempted to distance his opinion from the notorious *Lochner* case, where a majority fashioned liberty of contract from the contract clause, the takings clause, and the due process (property) clause.[87] Instead, he chose more benign examples, "the right to educate a child in a school of the parents' choice" (*Pierce v. Society of Sisters*[88]) and "the right to study any particular subject or any foreign language" (*Meyer v. Nebraska*[89]); neither of these rights is mentioned in the Constitution but both were recognized by courts.[90] He also noted that the First Amendment's freedom of assembly had been read by courts also to include freedom of association.[91]

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83 Bruce Allen Murphy, Wild Bill: The Legend and Life of William O. Douglas ch.37 (2003).

84 Gen. Stat. CT. §§. 53-32, 54-196 (1958 rev.).

85 An earlier effort to challenge the statute was rejected by the Court as insufficiently ripe. Violations of the law had been prosecuted only once, fifty-one years earlier, and there appeared to be a tacit agreement that this would not occur again. The Court seemed to have assumed that an absence of prosecutions meant that the law was ignored, but it might instead have signaled conformity so widespread that prosecutions were unnecessary, for example, laws banning cannibalism. Poe v. Ullman, 367 U.S. 497 (1961). Douglas dissented, maintaining that the law violated constitutional guarantees of free expression and privacy, which he located in the liberty provision of the due process clause. *Id.* 509, at 514, 517. It seems that the law was safely ignored by private physicians, but that clinics followed it, leading to a disproportionate impact on minorities, the poor, and the under educated that raised equal protection issues. On the class implications of *Griswold*, *see* Cary Franklin, *The New Class Blindness*, 128 Yale L. J. 2, 18-46 (2018).

86 Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

87 Lochner v. New York, 198 U.S. 45 (1905).

88 Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925).

89 Meyer v. Nebraska, 262 U.S. 390 (1923).

90 *Supra* note 86, at 481-82.

91 *Id.* at 483.

These cases he cited, he concluded, suggest that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[92] Though privacy is not mentioned explicitly in the Constitution, we can infer it, he said, from the First Amendment's freedom of association, the Third Amendment's prohibition against quartering soldiers, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth Amendment's self incrimination privilege, and the Ninth Amendment's broad reminder that not all rights are listed in the Bill of Rights.[93]

"The sole aim of a metaphor," said Orwell, "is to call up a visual image."[94] A penumbra, with its illumination from the sun mostly hidden by a lunar eclipse, clearly calls up a vivid visual image.[95] But is the metaphor helpful? Emanations flow from the entire circular penumbra, in other words, innumerable emanations flow from a single sun in innumerable, 360 degree directions. Douglas' point, however, is precisely the reverse, not that the emanations are widely dispersed but that they all are concentrated and point to one thing, a right to privacy. The metaphor, in short, does not illustrate the phenomenon it is supposed to.

Ordinarily, too, metaphors use the familiar to clarify the unfamiliar. For example, we might say that an academic manuscript reads like a novel, that is, that unexpectedly it is easy and enjoyable to read. The metaphor works because we all know what a novel is. But "penumbra" is not a familiar term. In fact, its look-at-me quality may be exactly what Orwell meant, when he disparaged pretentious metaphors. The problem is not simply that they are snobby affectations; more importantly, their unfamiliarity is a deliberate distraction that takes our attention away from the subject at hand. Here, "emanations from a penumbra" is designed to divert us from noticing that none of the amendments cited is remotely related to the facts of the case. Nor does it address the retort that the Framers' failure to mention a general right to privacy may have meant that they approved only the narrower rights Douglas listed nor that the Third Amendment had not been interpreted by the Court to apply to the states and so, did not belong on the list.

Nor, perhaps most seriously, does a reference to a right to privacy adequately define what the term means.[96] Douglas' usage implicitly suggested a widespread consensus, but even at the time the leading authority on torts had described the

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92 *Id.* at 484.

93 *Id*. Douglas had initially thought to tie privacy to a right to assemble, but Black at conference said that "the right of a husband and wife to assemble in bed is a new right of assembly to me." Thereupon, Paul Posner, a law clerk to Brennan, drafted a letter, which Brennan sent to Douglas, that argued that a right to privacy was implicit in the Third, Fourth, and Fifth Amendments. Douglas added his own reference to emanations and penumbras. David Garrow, Liberty and Sexuality 246 (1994).

94 Orwell, *supra* note 18, at 134.

95 Though Douglas' "penumbra" is the most famous use of the term, it had occasionally appeared in opinions in earlier years. Burr Henley, *"Penumbra": The Roots of a Legal Metaphor*, 15 Hastings Const. L. Q. 81 (1987). Justice Thomas hung a plaque in his chambers reading, "Please don't emanate in the penumbras." David J. Garrow, *The Tragedy of William O. Douglas*, Nation, (Mar. 27, 2003), https://www.thenation.com/article/archive/tragedy-william-o-douglas/.

96 Thomas Halper, *Privacy and Autonomy: From Warren and Brandeis to Roe and Cruzan*, 21 J. Med & Phil. 121 (1996).

private law of privacy as consisting of no fewer than four distinct dimensions.[97] Had the right been embodied in a constitutional amendment, judges could parse the text or examine its legislative history to determine the contours of its application. Clearly, it would forbid the government's reading my diary or videoing my morning shower without a warrant. But would it apply to a woman's right to choose to have an abortion,[98] or one's right to decide when to die[99] or to engage in homosexual sodomy?[100] Without a text to guide it, the Court is on its own, for as Black noted in dissent, "'privacy' is a broad, abstract and ambiguous concept."[101] Ironically, courts have generally shrunk from such broad grants of authority, perhaps from fear of generating a backlash. One reason the forgotten Ninth Amendment[102] has been pretty much forgotten is that it offers no instructions on how courts should identify rights not enumerated in the Constitution. In *Griswold,* Douglas does not flee from what Orwell would surely call a "lack of precision" deriving from a "mixture of vagueness and sheer incompetence."[103]

Douglas follows the emanations passage with a hypothetical of police storming the "sacred precincts of marital bedrooms"[104] in search of contraceptives, ignoring the fact that the Connecticut law had gone unenforced for generations and as if bedrooms had legal status as sanctuaries. If I were suspected of shooting my wife, would the police be barred from searching our bedroom? More pointedly, the facts of the case did not concern the use of contraceptives in a marital bedroom, but rather access to information concerning their use to be provided in an open forum. This, in turn, raises the question as to whether privacy can exist in public.[105] By disregarding the element of seclusion, was Griswold also renouncing privacy claims? It is an interesting question, but Douglas never paused to consider it. The bedroom hypothetical, in any event, appears to have been inserted to gin up outrage, but in truth was apropos of nothing.

The opinion closes with an *homage* to marriage—the joke was that Douglas thought so highly of marriage that he married four times—a subject he had first discussed in *Skinner v. Oklahoma*, over twenty years before. In that case, involving the compulsory sterilization of a chicken thief, Douglas had announced a right to marry and procreate, though the state had not prevented Skinner from marrying.[106] In *Griswold*, he speaks of marital privacy not as a corollary of the spousal privilege, but in words that might better come from clergy at a wedding. "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."[107] All that is missing is 1 Corinthians 13:4-8. It is perhaps a perfect

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97 William L. Prosser, Handbook on the Law of Torts 832 (3d ed. 1964).
98 Roe v. Wade, 410 U.S. 113 (1973).
99 *In re* Quinlan, 70 N.J. 10 (1976).
100 Lawrence v. Texas, 539 U.S. 558, 598 (2003).
101 *Supra* note 86, at 509.
102 Bennett B. Patterson, The Forgotten Ninth Amendment (1955).
103 Orwell, s*upra* note 18, at 129.
104 *Supra* note 86, at 485.
105 That it can is argued by William C. Hefferman, *Privacy Rights*, 29 Suffolk U. L. Rev. 737, 742 (1995).
106 Skinner v. State of Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536, 541 (1942).
107 *Supra* note 86, at 486.

example of what Orwell called "modern writing at its worst [which] consists in gumming together long strips of words which have already been set in order by someone else, and making the results presentable by sheer humbug. The attraction of this writing is that it is easy."[108] The irrelevance of marriage to the contraceptive ban was made clear a few years later, when the Court struck down a prohibition on distributing contraceptives to unmarried persons[109] and then to minors.[110] By this point, one wonders if the real issue had not been privacy but a subset of privacy, sexual freedom. [111]

Douglas' opinion is unencumbered with the conventional judicial focus on the facts of the case, the text of the statute and the Constitution, the relevance of precedents, and deference to lawmakers. Indeed, the entire opinion establishing a fundamental right in a controversial fashion consumed only six pages, of which two were devoted to the facts of the case and standing. This was by no means unusual for Douglas, who flouted convention in these respects, as he did in so many other aspects of his life. After barely a year on the Court, for example, he wrote a far reaching aggressively pro-government opinion in a tax case,[112] when even a friendly observer admitted, "there was little, if anything, in the statute to support it."[113] His opinion was seven pages, of which nearly three covered a statement of the facts.

Whether termed free-wheeling or sloppy, Douglas' approach to opinions granted him vast discretion in his result oriented arguments. What is obvious in *Griswold* is that the entire opinion is an Orwellian exercise in misdirection. Douglas declares that the Court does not sit as a super-legislature and then fashions an opinion as bold as one from a super-legislature. He denies that the Court has adopted the reasoning of the notorious *Lochner* case, and then adopts the reasoning of the *Lochner* case.[114] Sentimental talk about marriage and the sacred marriage bedroom are further distractions. "Privacy" is used in a way suggesting that there is a broad consensus on its meaning, when beyond a few basics, there was no consensus at all. The power of language empowered the Court.

IV. Some Conclusions

It will strike many as odd to pair *Plessy* with *Griswold*, the former being one of the Supreme Court's most vilified decisions[115] and the latter often an occasion

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108 Orwell, s*upra* note 18, at 134.

109 Eisenstadt v. Baird, 405 U.S. 438 (1972).

110 *Carey v. Population Services International*, 431 U.S. 678 (1977). Arguably, Griswold's focus on marital privacy reflected a traditional common law notion that only between heterosexual married couples is sex lawful.

111 *See* David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence, and the Constitution*, 35 Harv. C.R.-C.L. L. Rev. 299 (2000).

112 Helvering v. Clifford, 309 U.S. 331 (1940).

113 Erwin N. Griswold, Foreword, in Bernard Wolfman et al., Dissent without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases (1973).

114 Arguably, the *Lochner* decision was anti-democratic, in that it opposed a popular majority supporting state regulation of labor, while *Griswold* was pro-democratic, in that it opposed a law that had long fallen out of popular favor.

115 One commentator located *Plessy* among a consensus anticanon. Jamel Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 412-17 (2011). Among the innumerable hostile

for celebration.[116] In *Plessy*, Brown's language was at the ugly service of white supremacy; in *Griswold*, Douglas' language elevated privacy to a constitutional right. Who now would speak out for racial segregation or against privacy?

However, an exclusive focus on results hides an ends/means problem. We must concern ourselves not only with the decisions, but also with the paths to the decisions, for if they are not the right paths, they may in other contexts take us to destinations we would do better to avoid. Both opinions appeared when Orwell was not on the scene, *Plessy* before he was born and *Griswold* after he died. But it is not difficult to imagine his reactions upon reading them. The pompous language, abstract and disconnected from reality when it does not literally deny it. The inapposite metaphors designed to deflect our attention away from the issue at hand. Above all, the lethal insincerity, that is, the cynical dishonesty that runs through the opinions like fat in a sausage. For though we may sometimes talk of the "prison-house of language,"[117] imagining how it may confine us without our even knowing it, these opinions are not of that type. Brown and Douglas, it is clear, were confined in no linguistic prison-house, but were quite free in the choices they made.

Meanwhile, ignored by both justices was the central question of the proper role of the unelected, unaccountable Court. Should it take upon itself the job of updating a Constitution it feels has become out of date? The Thirteenth and Fourteenth Amendments addressed the question as to the status of the freed slaves and their descendants. Many issues were left undecided, it is true, but returning blacks to a state of subjugation was clearly not the goal of the framers of the amendments. But by 1896 times had changed, and as we say today, it was time to move on. Reconstruction and the era of relative black freedom were dead and gone. Better, then, to adjust to the new Southern reality. Thus did Brown give the amendments an interpretation in *Plessy* that Southern whites could only applaud. Had they lost the war only to win the peace?

So, too, had attitudes on contraception changed by 1965, partly due to the revolutionary development of the birth control pill. The Connecticut law, which not even its advocates before the Court defended as sensible and up to date, lagged far behind. What, if anything, should the Court do about it? We might assume that if a law has fallen so out of favor, the normal workings of democracy will lead to its legislative repeal. And yet the law was still there. Does this suggest that it is not as out of favor as it appears? Or that its persistence reflects some flaw in the democratic process? Does the obvious importance of the law require the Court to intervene and rectify the anomaly? Or does its importance instead mean that its resolution must be found in the ordinary political process? For Douglas, the law was ridiculous, the Court had the power to get rid of it, and its very ridiculousness

commentaries, *see, e.g.,* Michael W. McConnell, *Originalism and the Segregation Decisions*, 81 Va. L. Rev. 947, 980-82, 1120-31 (1995) and Cheryl L. Harris, *Race Jurisprudence on the Supreme Court: Where Do We Go from Here? In the Shadow of Plessy*, 7 U. Pa. Const. L. 867 (2005).

116 *E.g.,* Priscilla J. Smith, *Contraceptive Comstockery: Reasoning from Immorality to Illness in the Twenty-First Century*, 47 Conn. L. Rev. 971 (2015); Eugene McCarthy, I*n Defense of Griswold v. Connecticut: Privacy, Originalism, and the Iceberg Theory of Omission,* 59 Willamette L. Rev. 335 (2018).

117 Friedrich Nietzsche, *qtd*. in Fredric Jameson, The Prison-House of Language (1972).

created an opportunity to make a larger point about the constitutional right to privacy. The obvious irony is that Douglas' Orwellian manipulation of language is at the service of a value Orwell cherished, privacy

As we read *Plessy* and *Griswold*, it is hard to avoid asking: Do we really want judges to base constitutional rulings on grounds so flimsy that the chief purpose of their opinions is to disguise this fact? To save us from absurdity, a living constitution perspective may sometimes be necessary. Article II makes the President commander in chief of the army and navy; it would be bizarre for courts to rule that a constitutional amendment would be needed to cover the air force. But if the issue, instead, is an important matter of policy, say, racial segregation or the constitutional stature of privacy, it all becomes problematical. We can hardly satisfy ourselves with the assumption that courts will do the right thing. But that, apparently, is what Brown and Douglas would have us do.

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