No. 20170447-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL,
Plaintiff,
v.
RICHARD WARREN ROBERTS,
Defendant.

SUPPLEMENTAL BRIEF OF RICHARD WARREN ROBERTS

On certified question of law from the United States District Court,
District of Utah, Honorable Evelyn J. Furse, Case No. 2:16-cv-00843-EJF

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Introduction

In its July 10, 2019 Order, this court directed the parties to submit supplemental briefing on this question:

> Under the Utah Constitution, does the Utah Legislature have the power to revive a claim that was barred by the previously applicable statute of limitations, and if so, what limitations, if any, does the Utah Constitution impose on that power?

(Suppl. Br. Order, at 2.)

For more than a century, this court has held, in an unbroken line of cases, that the legislature does not have the power to revive an expired statute of limitation. This court decided the foundational case articulating this rule, *Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900), less than five years after the ratification of the Utah Constitution. It reflects the ratifying generation's understanding of the constitutional limitations on legislative power to revive expired claims. These limitations are embodied in the following provisions: Legislative Vesting, Separation of Powers, Due Process, and Open Courts.

First, the original meaning of the "Legislative power" that Utah's Legislative Vesting Clause provides to the legislature did not encompass the ability to revive time-barred claims. When Utah ratified its constitution, the defense of an expired statute-of-limitation was understood to be a vested property right protected from legislative interference. A wealth of evidence, including then-contemporary legal scholarship, statements of Utah's

constitutional delegates, court opinions from Utah's sister states, and Western states in particular, supports the conclusion that the voters who ratified the Utah Constitution viewed expired claims as vested property rights that the legislature was not empowered to infringe. Utah's constitutional separation-of-powers mandate, and its early interpretation by this court, confirms that the legislature may not interfere with a vested right by statute.

Second, Utah's Due Process Clause prevents the legislature from reviving expired claims, because it prevents defendants' vested property rights in such claims from being stripped without due process. As originally understood, due process protected against *legislative* interference with vested rights. The legislature thus could not, consistent with due process, revive an expired claim by statute. The U.S. Supreme Court recognized that protection for real property and personal property claims, but interpreted the scope of due process protected in the Fourteenth Amendment differently for contract claims. That interpretation was recognized as aberrational at the time and was not understood to articulate the scope of due process required under the Utah Constitution. The ratifying generation understood the Utah Constitution to have a different meaning.

Finally, while evidence of the original understanding of the Open Courts Clause is sparse, open-courts protections reinforce the separation-of-powers values protected by the Legislative Vesting, Due Process, and Separation of Powers Clauses.

Taken together, the historical evidence bolsters this court's conclusion in *Ireland*—less than five years after ratification—that the legislature lacks the power, under the Utah Constitution, to revive time-barred claims. Even if the evidence of the original understanding of the Utah Constitution were ambiguous—and it is not—an originalist approach would demand deference to longstanding precedent. The court should reaffirm that precedent in answering the certified questions.[1]

Argument

1. According to the Original Public Meaning of Utah's Legislative Vesting Clause, the Legislature Lacks the Power to Interfere with a Defendant's Vested Property Right in a Time-barred Claim

Article VI, section 1 of the Utah Constitution provides:

> The Legislative power of the State shall be vested in: (a) a Senate and House of Representatives which shall be designated the Legislature of the State of Utah; and (b) the people of the State of Utah as provided in Subsection (2).

Utah Const. art. I, § 1. This power does not include the power to revive an expired statute of limitation and thereby extinguish a vested right.

As this court has recognized since the time of ratification, legislative power is "plenary," "excepting such as is *expressly or impliedly* withheld by the state or

[1] Because the Utah Constitution does not grant the Utah Legislature the power to revive a claim that was barred by a statute of limitation, the framers need not have imposed any limitations on that non-existent power. As there are no restrictions on a power that the legislature does not have, there are no standards (or level of scrutiny) to apply in assessing the constitutionality of a statute that the legislature lacks the power to enact.

federal constitution." *Kimball v. Grantsville City*, 57 P. 1, 4 (Utah 1899) (emphasis added); *see also* Thomas M. Cooley, *A Treatise on the Con. Limitations Which Rest Upon the Legis. Power of the States of the Am. Union* 87 (2d ed. 1871) [hereinafter Cooley, *Constitutional Limitations*, 2d ed., attached as Add. A] ("The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority").

The original public meaning of the "Legislative power" that was "vested" in the legislature did not include the authority to revive expired claims by statute. The generation that ratified the Utah Constitution regarded the defense of an expired statute of limitation as a vested right that the legislature lacked the power to infringe.

Dispositive evidence of that original understanding is provided by the definitive case on point, *Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900), in which this court stated that when a "right of action . . . became barred under the previous statute [of limitation], the [defendant] acquired a vested right, in this state, to plead that statute as a defense and a bar to the action." Once the defendant acquired such a right, "[t]he subsequent passage of an act by the legislature increasing the period of limitation *could not* operate to affect or renew a cause of action already barred." *Id.* (emphasis added). This is because it is "beyond the power of legislation" to "restore" a "demand" from which the

defendant "has become released . . . by the operation of the statute of limitations." *Id.* at 903 (internal quotation marks omitted). *Ireland* provides the best evidence of how the generation that ratified the Utah Constitution understood the scope of that constitution's grant of legislative power.[2]

From *Ireland* onward, this court repeatedly reaffirmed that the legislature lacks the power to revive an expired claim. *See Roark v. Crabtree*, 893 P.2d 1058, 1062 (Utah 1995) ("[W]hen the statute has run on a cause of action, so that it is dead, it *cannot be revived* by any . . . statutory extension." (omission in original) (quotation marks and citation omitted)); *State v. Lusk*, 2001 UT 102, ¶ 30, 37 P.3d 1103 (holding that "a subsequent legislative extension of the statute of limitations would resurrect that dead crime, solely upon the whim and vagary of the legislature," and thus is "untenable"); (*see generally* Roberts Opening Br. 15-27 (reviewing Utah precedent).) The court has emphasized consistency on this point, stating in 1995 that, "[s]ince 1900, this court has consistently maintained that the defense of an expired statute of limitations is a vested right" that could not be eliminated through legislation. *Roark*, 893 P.2d at 1062; *see also State v. Apotex Corp.*, 2012 UT 36, ¶ 67, 282 P.3d 66 (same).

Additional evidence of the original public meaning of the scope of the "Legislative power" granted in article VI, section 1 confirms the conclusion that

[2] As described in Roberts' Response Brief at 8 n.4, the inherent constitutional limitation on legislative power was an independent and sufficient basis for *Ireland*'s holding that the legislature could not re-open the expired claim at issue in that case.

the Utahns who ratified the Utah Constitution did not vest the legislature with the power to revive expired claims. This evidence, discussed below, includes contemporary treatises, scholarly authorities, and the stated views of those who participated in the Utah Constitutional Convention. The majority of Utah's sister states—and Western states in particular—similarly recognized that their legislatures did not have the power to revive expired claims.

1.1 The right to be free from expired claims is a vested property right

At the time when the Utah Constitution was adopted, vested rights were a well-established class of property rights that included the right to be free from claims whose statute of limitation had expired.

The year before Utah joined the Union, the Supreme Court of the Territory of Utah defined a vested right as "title, legal and equitable, to the present and future enjoyment of property, or to the present enjoyment of a demand or a *legal exemption from a demand made by another*." *Toronto v. Salt Lake Cty.*, 37 P. 587, 588 (Utah 1894) (emphasis added). Thomas M. Cooley—"the preeminent authority of the late nineteenth century on state constitutional matters," *American Bush v. City of South Salt Lake*, 2006 UT 40, ¶ 13, 140 P.3d 1235—defined it similarly: "a vested right . . . is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or *a legal exemption from a demand*

made by another." Cooley, *Constitutional Limitations* 2d ed. 359 (emphasis added); *Am. Bush*, 2006 UT 40, ¶ 13 (noting that the "framers of Utah's constitution" during the "constitutional convention" frequently "quoted… Cooley's treatise").

Another contemporary authority defined a vested right as "one which has been fixed by operation of law and is therefore not subject to re-examination, but remains in the beneficiary until forfeited by some subsequent act." T. W. Brown, *Due Process of Law*, 32 Am. L. Rev. 14, 24 (1898).[3] And a pre-statehood treatise called vested rights "property as tangible things are when they spring from contract or the principles of the common law." J.G. Sutherland, *Statutes and Statutory Construction* 627 (1891). In short, "'vested rights' [was] . . . a term of art with a specific, historical meaning" at the time of ratification. *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 81, 416 P.3d 635 (Lee, A.C.J., concurring).

1.2 The voters who ratified Utah's Constitution understood the legislature to lack power to interfere with vested rights

Jurists at the time the Utah Constitution was ratified understood that, once "a vested interest in property is acquired . . . the legislature is powerless to disturb" that right. *Ireland*, 61 P. at 903. Contemporary legal scholarship recognized this limit on legislative power to disturb vested rights. *See* Edward S. Corwin, *The Basic Doctrine of Am. Con. Law*, 12 Mich. L. Rev. 247, 255 (1914) ("the

[3] Such a "subsequent act" could include, for example, waiving the affirmative defense or making a new promise to pay a debt after the statute of limitation had expired on the original debt—a promise that would not revive the original obligation, but would create a new obligation. *See Ireland*, 61 P. at 904.

Doctrine of Vested Rights, which – to state it in its most rigorous form – setting out with the assumption that the property right is fundamental, treats any law impairing *vested rights*, whatever its intention, as a bill of pains and penalties, and so, void"); *The Variable Quality of a Vested Right*, 34 Yale L.J. 303, 304 (1925) ("[T]he term 'vested right' indicates a property interest which the court believes to be so fixed that it cannot be impaired by retrospective legislation.").

Delegates to the Utah Constitutional Convention also understood that the legislature could not interfere with vested rights. Their recorded statements assist the court as it seeks "to ascertain and give power to the meaning of the text as it was understood by the people who validly enacted it as constitutional law." *Richards v. Cox*, 2019 UT 57, ¶ 13, ---P.3d--- (citation omitted).

Delegate Maloney declared that the state "cannot take away vested rights by constitutional amendment or enactment, or by any act of the Legislature. That has been determined over and over again." Official Report of the Proceedings and Debates of the Convention, Day 47 (Apr. 19, 1895) (Salt Lake City, Star Printing Co. 1898) [hereinafter Constitutional Convention].[4] Delegate Franklin Richards agreed, arguing that even the *constitution* – much less ordinary legislation – could not impair vested rights: "[I]t has been said that the adoption of any article or provision in this Constitution cannot interfere with vested rights; that is true." *Id.*, Day 54 (Apr. 26, 1895). Delegate Charles Stetson Varian also

[4] Transcripts of the Utah Constitutional Convention are available at https://le.utah.gov/documents/conconv/utconstconv.htm.

recognized that the constitution enshrines protection of vested rights: "the vested right of property… [is] protected, not only in the Constitution in other sections, but by the general law underlying all constitutions." *Id.*, Day 22 (Mar. 25, 1895). In fact, no delegate contested the idea that "the vested rights that have already accrued shall not be disturbed." *Id.*, Day 47 (Apr. 19, 1895) (remarks of Mr. Nebeker).[5]

Two years after the Utah Constitution was ratified, the Utah Supreme Court affirmed that the legislature lacked the power to divest vested rights. In *In re Handley's Estate*, the "legislature attempted by a retrospective act"—namely, a statute requiring courts to re-hear cases that had been fully adjudicated under a previous statute—"to furnish a method by which vested rights could be divested." 49 P. 829, 831 (Utah 1897). The court held that the new statute was unconstitutional because, once rights were "subject to no contingency" but rather "completed and consummated," then "[t]hey were vested, and beyond the reach of any remedy the legislature could employ, or the legislature could invent. No retroactive, explanatory, or declaratory enactment thereafter could have any effect upon them." *Id.* As the court explained, the legislature could not "destroy

[5] The undisputed view that vested rights should "not be disturbed" reinforced the convention's general concern with protecting citizens' "sacred" rights to property. *See, e.g.*, *id.*, Day 23 (Mar. 26, 1895) (remarks of Mr. Evans) (discussing "sacred rights of property and the vested rights of property"); *id.*, Day 22 (Mar. 25, 1895) (remarks of Mr. Thurman) ("I believe that the right of property is a sacred right.").

and annihilate vested rights" for the simple reason that "[t]he people of the state have not intrusted such powers to the legislature." *Id*.[6]

This early decision also relied on article V, section 1 of the Utah Constitution, which mandates the separation of powers and forbids each branch from "exercis[ing] any functions appertaining to either of the others."[7] This clause is one of several provisions of the Utah Constitution that, as this court put it when discussing the prohibition on "private" laws in article VI, section 26, "can be seen as policing the separation of powers." *Carter v. Lehi City*, 2012 UT 2, ¶ 43, 269 P.3d 141.

In *Handley's Estate*, the court interpreted the separation-of-powers principle in article V, section 1 as a restriction on the legislature's power to affect vested rights. It held that "the legislature cannot affect" a statute protecting a vested right by "giving the law under which the [judicial] decree was rendered a different construction," because doing so would violate the separation of powers: "[t]he purpose of separating and classifying the powers of government . . . was to

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[6] Other Utah opinions from before and after statehood embrace the same principle. *See, e.g.*, *Tufts v. Tufts*, 30 P. 309, 310 (Utah 1892) (citation omitted) (recognizing that "a vested right . . . stands independent of the statute"); *Garland v. Bear Lake & River Waterworks & Irrigation Co.*, 34 P. 368, 370 (1893) ("[T]he possessors and owners of such vested rights shall be maintained and protected." (quoting a federal water statute)), *aff'd*, 164 U.S. 1, 17 (1896).

[7] "The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." Utah Const. art. V, § 1.

prevent the evils that would arise if all were concentrated and held by the same hand." *Handley's Estate*, 49 P. at 830.

Thus, allowing the legislature to revive a time-barred claim would violate Utah's constitutional structure as set forth in both the Legislative Vesting Clause and article V, section 1.

1.3 Leading treatises and Utah's sister states recognized the bar on bringing expired claims as a vested property right protected against legislative interference

Three years after *In re Handley's Estate*, this court recognized in *Ireland* that, once the "prescribed period [in which to bring a claim] has expired," the defendant acquired "a vested, permanent right" that could not be changed by legislation purporting to re-open the expired statute of limitation. 61 P. at 902.[8] *Ireland*'s holding was consistent with "the overwhelming majority of authority" at the time. *Constitutional Law - Bar of Statute of Limitations - Vested Right*, 9 Harv. L. Rev. 219 (1895).

1.3.1 Treatises agreed that the defense of an expired statute of limitation was a vested right protected from legislative interference

The leading late nineteenth-century legal treatises confirm that the defense of an expired statute of limitation was a vested right with which the Legislature lacked the power to interfere. In his definitive treatise on the scope of legislative

[8] This court has recognized other litigation-related rights as "vested rights." *See Halling v. Indus. Comm'n of Utah*, 263 P. 78, 81 (Utah 1927) ("'A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.'" (citation omitted)).

power and its constitutional limits, Cooley explained that "[w]hen the Period prescribed by statute has once run, . . . [a] subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly." Thomas M. Cooley & Alexis C. Angell, *A Treatise on the Con. Limitations Which Rest Upon the Legis. Power of the States of the Am. Union* 448 (6th ed. 1890).[9]

Other scholars concurred. Harvard professor James Barr Ames explained that an expired statute of limitation extinguished the "right to sue in the jurisdiction where the statute has run, and a subsequent repeal of the statute will not revive it." J.B. Ames, *The Disseisin of Chattels*, 3 Harv. L. Rev. 313, 319 n.5 (1890) (citation omitted). And renowned treatise writer Joel Prentiss Bishop taught that "[i]n civil cases . . . the legislature cannot [] take away the vested right by removing the statutory bar." Joel Prentiss Bishop, *Comments on the Law of Statutory Crimes* § 265, at 176 (1873).

Ireland expressly relied on this consensus view of legal scholars. In addition to Cooley and Bishop, the court cited H.G. Wood, *Limitation of Actions* § 11 at 36 (2d ed. 1893), which stated that "[s]tatutes of limitation . . . may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action." *See*

[9] This court continues to rely on Cooley's treatise to define "the nature and limits of legislative power." *Carter*, 2012 UT 2, ¶ 43, 269 P.3d at (citing Cooley & Angell, *Constitutional Limitations* 6th ed. at 484).

Ireland, 61 P. at 904. The court also cited J.G. Sutherland's treatise on statutory interpretation, which taught that the vested right in the bar on bringing expired claims, like other vested rights, "cannot be destroyed, divested, or impaired by direct legislation" and is "secure against legislative interference." J.G. Sutherland, *Statutes and Statutory Construction* at 626-27 (1891); *see Ireland*, 61 P. at 904.

1.3.2 Most states recognized a defendant's right to rely on the statute of limitation as a defense to time-barred actions as a vested right

In addition to reflecting scholarly authority, *Ireland's* recognition that the bar on bringing expired claims was a vested right that the legislature could not alter was in line with the law of most states in 1895. This court "look[s] to court decisions made contemporaneously to the framing of Utah's constitution in sister states" to interpret Utah's constitutional provisions. *Am. Bush*, 2006 UT 40, ¶ 11. A large majority of sister states held that the bar on bringing an expired claim was a vested right and could not be altered by legislation.

In the year Utah ratified its Constitution, the Supreme Court of Illinois noted that "[i]n almost all of the states of the Union in which the question has arisen, it has been held that the right to set up the bar of a statute of limitations as a defense to a cause of action, after the statute has run, is a vested right, and cannot be taken away by legislation." *Bd. of Educ. of Normal Sch. Dist. v. Blodgett*, 40 N.E. 1025, 1027 (Ill. 1895) (citations omitted). Many states relied expressly on

the legislature's lack of power to disturb vested rights. *See, e.g.*, *Rhodes v. Cannon*, 164 S.W. 752, 754 (Ark. 1914) (citing *Couch v. McKee*, 6 Ark. 484, 495 (1846) (holding that a defendant has "a vested right in the defense of the statute of limitations of which one could not be deprived by subsequent legislation.")); *Dingey v. Paxton*, 60 Miss. 1038, 1056-57 (1883) ("[W]e believe [it has] been universally held that where a defendant had become entitled to the protection of a defence arising under a Statute of Limitations, it is not competent for the Legislature to give an action for the enforcement of the demand, because such legislation would be an interference with the vested rights of the defendant.").

As of 1895, 25 of the 44 states prohibited legislatures from reviving expired statutes of limitation.[10] And in subsequent years, the court in additional states

[10] *See Banks v. Speers*, 11 So. 841, 845 (Ala. 1892) (holding that it "is not within the power of legislation" to re-open a claim after it has expired); *Willoughby v. George*, 5 Colo. 80, 82 (1879) (same); *Bradford v. Shine*, 13 Fla. 393, 410–11, 415-17 (1869) (same); *Pridgeon v. Greathouse*, 1 Idaho 359, 360–61 (1871) (same); *Bd. of Educ. of Normal Sch. Dist. v. Blodgett*, 40 N.E. 1025, 1027 (Ill. 1895) (same); *Morrison v. Kendall*, 33 N.E. 370, 372 (Ind. 1893) (same); *Thompson v. Read*, 41 Iowa 48, 50 (1875) (same); *Bowman v. Cockrill*, 6 Kan. 311, 340 (1870) (same); *Lawrence v. City of Louisville*, 29 S.W. 450, 452 (Ky. 1895) (same); *Atkinson v. Dunlap*, 50 Me. 111, 117 (1862) (same); *Bigelow v. Bemis*, 84 Mass. 496, 497 (1861) (same); *Phenix Ins. Co. v. Pollard*, 63 Miss. 641, 664 (1886) (same); *Coady v. Reins*, 1 Mont. 424, 428 (1872) (same), *overruled on diff. grounds*, *Johnson v. St. Patrick's Hosp.*, 417 P.2d 469 (Mont. 1996); *Horbach v. Miller*, 4 Neb. 31, 45–46 (1875) (same); *Woart v. Winnick*, 3 N.H. 473, 477 (1826) (same); *Moore v. State*, 43 N.J.L. 203, 208 (1881) (same); *Whitehurst v. Dey*, 90 N.C. 542, 545-46 (1884) (same); *Perry Cty. v. R.R. Co.*, 2 N.E. 854, 869 (Ohio 1885) (same); *Baldro v. Tolmie*, 1 Or. 176, 177 (1855) (same); *Stoddard v. Owings*, 20 S.E. 25, 26 (S.C. 1894) (same); *Girdner v. Stephens*, 48 Tenn. 280, 286 (1870) (same); *Mellinger v. City of Houston*, 3 S.W. 249, 254–55 (Tex. 1887) (citation omitted) (same); *Lowry v. Keyes*, 14 Vt. 66, 69 (1842) (same); *Packscher v. Fuller*, 33 P. 875, 876 (Wash. 1893) (same); *Huffman v. Alderson's Adm'r*, 9 W. Va. 616, 626 (1876) (same).

reached the same conclusion.[11] An additional five prohibited reviving a time-barred claim insofar as the statute of limitation operated as the foundation of title to real property.[12]

1.3.3 Western states that adopted their constitutions in the late 1800s were especially likely to interpret their constitutions to prevent the legislature from reviving expired claims

In light of Utah's circuitous path to statehood, many delegates to the Utah Constitutional Convention "were determined to 'play it safe,' to avoid experimentation, and to copy provisions from the constitutions of other states to avoid uncertainty." Jean Bickmore White, *The Utah State Constitution* 12 (2011). This court has looked to the "original constitutions of other western states" to

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[11] *Rhodes v. Cannon*, 164 S.W. 752, 754 (Ark. 1914) (holding that "no law can change" the "bar created by the statute of limitations" and that "[t]he proposition that the Legislature has the power" to alter the property right created by that bar is "absurd"); *Bussey v. Bishop*, 150 S.E. 78, 80-81 (Ga. 1929) (same), *overruled by Canton Textile Mills, Inc. v. Lathem*, 317 S.E.2d 189 (Ga. 1984); *Peninsula Produce Exch. v. N. Y., Phila. & Norfolk. R.R. Co.*, 137 A. 350, 350–51 (Md. 1927) (same); *Lohrstorfer v. Lohrstorfer*, 104 N.W. 142, 147 (Mich. 1905) (same); *Whittier v. Vill. of Farmington*, 131 N.W. 1079, 1081 (Minn. 1911) (same), *abrogated by Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413 (Minn. 2002); *Germania Sav. Bank v. Vill. of Suspension Bridge*, 54 N.E. 33, 34–35 (N.Y. 1899) (same); *Mires v. Hogan*, 192 P. 811, 818 (Okla. 1920) (same); *Ireland v. Mackintosh*, 61 P. 901, 904 (Utah 1900) (same); *Kesterson v. Hill*, 45 S.E. 288, 289 (Va. 1903) (same); *Eingartner v. Ill. Steel Co.*, 79 N.W. 433, 435 (Wis. 1899) (same).

[12] *Peiser v. Griffin*, 57 P. 690, 692 (Cal. 1899) (holding that by the running of the statute of limitation "the title to the property irrespective of the original right is regarded as vested in the possessor, and the subsequent repeal of the limitation law cannot be given a retroactive effect so as to disturb the title"); *Gilbert v. Selleck*, 93 Conn. 412, 441 (1919) (same); *Calvit v. Mulhollan*, 12 Rob. (LA) 258, 270–71 (1845) (same); *Nash v. NW. Land Co.*, 108 N.W. 792, 793 (N.D. 1906) (citing *Campbell v Holt*, 115 U.S. 620 (1885)) (same); *Robb v. Harlan*, 7 Pa. 292, 293 (1847) (same).

identify "a consistent pattern" in their jurisprudence. *Laney v. Fairview City*, 2002 UT 79, ¶ 31 n.8, 57 P.3d 1007 (quotation marks and citation omitted), *abrogated on other grounds by Waite v. Utah Labor Comm'n*, 2017 UT 86,¶ 95, 416 P.3d 635.

By 1895, Colorado, Idaho, Montana, Oregon, Texas, and Washington had held that expired statutes of limitation could not be revived. *Willoughby v. George*, 5 Colo. 80, 82 (1879) (holding that where a statute of limitation has expired, "the right to plead it as a defense is a vested right which cannot be taken away or impaired by subsequent legislation"); *Pridgeon v. Greathouse*, 1 Idaho 359, 360–61 (1871) (if a statute extending a limitation period is enacted after the limitation period has expired, "the cause of action would have been dead, and no amount of remedial legislation could have revived it any more than the material body of man can be brought to life when once dead"); *Coady v. Reins*, 1 Mont. 424, 428 (1872) ("Of course [the statute of limitation] could not be construed to apply to causes of action which have accrued more than five years previous, to the time limited in said act, without a violation of vested rights."); *Baldro v. Tolmie*, 1 Or. 176, 177 (1855) ("When a statute of limitation, which has run so long against a cause of action, as to become a perfect bar, is repealed, such bar is not thereby destroyed."); *Mellinger v. City of Houston*, 3 S.W. 249, 254-55 (Tex. 1887) ("[I]f an attempt were made by law, either by implication or expressly, to revive causes of action already barred, such legislation would be retrospective, within the intent of the prohibition, and would therefore be wholly inoperative." (quotation marks

omitted)); *Packscher v. Fuller*, 33 P. 875, 876 (Wash. 1893) ("In other words, the statute in force at the time the action is brought controls unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar."); *see also City of Seattle v. De Wolfe*, 49 P. 553, 554-55 (Wash. 1897) ("The plaintiff having had a right in this case to proceed against the property only, and that right having been barred by the statute, we are clearly of the opinion that it was not in the power of the legislature to revive the right.").[13]

These Western states' recognition that the legislature lacks the power to revive an expired statute of limitation shows "a consistent pattern," *Laney*, 57 P.3d at 1018 n.8, which illuminates the original public meaning of Utah's Legislative Vesting Clause.

2. According to the Original Public Meaning of Utah's Due Process Clause, a Defendant Enjoys a Vested Property Right in a Time-Barred Claim that Is Protected from Legislative Interference

Utah's Due Process Clause provides:

> No person shall be deprived of life, liberty or *property*, without due process of law.

Utah Const. art. I, § 7 (emphasis added).

Vested rights were viewed as a species of "property" rights. *Supra* Part 1.1. As such, vested rights were protected by Utah's Due Process Clause. In light of

[13] Other western states followed suit after 1895. *See, e.g*, *Peiser*, 57 P. 690, 692.

the fact that the framers of the Utah Constitution considered the right to rely upon a statute of limitation defense to be such a vested property right, Utah's Due Process Clause protected individuals from being "deprived" of that right without "due process of law."

It has been clear since ratification that the Utah Due Process Clause protects *against* the legislature. Early case law, treatises, and statements of delegates to the Utah Constitutional Convention support the conclusion that, under the original public meaning of Utah's Due Process Clause, the legislature could not deprive a person of a vested property right. The Utah Constitution provided more protection for the vested right to be free from revival of expired claims than does the federal constitution.

2.1 According to the original public meaning of the Utah Due Process Clause, only certain judicial proceedings could deprive one of a vested property right

The doctrine that judicial proceedings are required to divest a person of a vested property right dates from pre-statehood case law. *See Jenkins v. Ballantyne*, 30 P. 760, 760 (Utah 1892) (holding that absent "emergencies," such as life-threatening circumstances or the imminent destruction of property, "[*j*]*udicial* action is usually required to determine property rights against its owner" and to satisfy "due process of law"(emphasis added)). During the era of ratification, this court continued to view *judicial process* as necessary to constitutionally deprive a person of a vested property right. *See In re McKee*, 57 P. 23, 26-27 (Utah 1899)

(citation omitted) ("due process of law," means "law in the regular course of administration *through the courts* . . . [t]his seems to be a good definition" (emphasis added) (quotation marks omitted)).

While judicial proceedings could result in the loss of a vested property right, legislative enactments could not. *See Handley's Estate*, 49 P. at 831 (holding that the Utah Constitution placed vested rights "beyond the reach of any remedy . . . the legislature could invent"); *Due process of law*, Black's Law Dictionary, (1st ed. 1891) (defining "due process of law" as "[l]aw in its regular course of administration through courts of justice").

This approach to due process persisted after statehood. *See, e.g.*, *Buttrey v. Guaranteed Sec. Co.*, 300 P. 1040, 1045 (Utah 1931) (holding that a party's vested right was "within the protection of the Constitution and could not be destroyed by legislation."); *Halling v. Indus. Comm'n of Utah*, 263 P. 78, 81 (Utah 1927) (holding that a party's "vested right" is a "constitutional right which cannot be denied . . . except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had. To hold otherwise would be depriving the [individual] of property without due process of law.").[14] This longstanding rule reflects the doctrine that notice to affected individuals, along with the opportunity to be heard, are the hallmarks of judicial action, in contrast to

[14] The distinction Plaintiff and *amici* have briefed concerning "substantive due process" and "procedural due process," was not a feature of early cases explicating the original meaning of the Utah due process clause. It is addressed on the merits in Defendant's Response Brief at 12.

legislative action, which concerns "broad policy considerations, not the specific facts of individual cases." *Carter v. Lehi City*, 2012 UT 2, ¶ 38, 269 P.3d 141 (contrasting legislative with executive and judicial action).[15]

The delegates to the Utah Constitutional Convention set the stage for this case law by emphasizing that the legislature lacked authority to extinguish vested rights. To underscore the importance of the due process "restriction upon legislative authority," Mr. Kimball explained that "'law of the land,' is meant, not the arbitrary edict of any body of men – not an Act of Assembly, though it may have all the outward form of a law – but *due process of law*, by which either what one alleges to be his property is *adjudged* not to be his, or it is forfeited upon conviction by his peers . . . . If this be not so, every restriction upon legislative authority would be a vain formula of words, without life or force." *Constitutional Convention*, Day 31 (Apr. 3, 1895) (emphases added) (remarks of Mr. Kimball).

This constitutional principle also found expression in legal treatises, which conceptualized due process as preventing the *legislature* from stripping away a vested right. The era's scholarly consensus held that, once a right was classified

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[15] Under this original understanding of due process in Utah, the legislature could deprive people only of *non-vested* property rights. *See, e.g.*, *People v. Hasbrouck*, 39 P. 918, 920 (Utah 1895) (holding that a law establishing certain requirements for the practice of medicine is "a legitimate exercise of the police power of the state, and that depriving persons not so qualified of the right to practice [medicine] is not obnoxious to the inhibition of the federal constitution against the deprivation of property without due process of law"). Whatever the contours of the line between vested and non-vested rights, it is clear that the right to be free from the revival of expired claims was a vested right. *See supra* Part 1.

as vested, it would "thereby be placed beyond legislative interference." *The Constitutional Protection of Vested Rights*, 1 W. Jurist 273 (1867); *see also* J.G. Sutherland, *Statutes and Statutory Construction* 626-27 (1891) ("Vested rights cannot be destroyed, divested or impaired by direct legislation. . . . There is a vested right in . . . the statute of limitations when the bar has attached. . . . it is then secure against legislative interference.").

Local newspapers also reflect the popular understanding that "'due process of law' signifies only a regular proceeding before a constituted *judicial* tribunal." *State Rights*, The Salt Lake Herald, May 10, 1891, at 4 (emphasis added). The prominent Salt Lake Herald – which was cited by this court and its predecessor shortly before and after the ratification of the Constitution – published an article stating that "discretion, opinion, whim or caprice of executive or ministerial officers, *or even a state statute*, is not due process of law." *Equality Before the Law*, The Salt Lake Herald, Aug. 6, 1890, at 4 (emphasis added). Rather, the "phrase 'due process of law' means a course of legal proceedings in which there is a judicial tribunal, parties, accusers and accused, an offense charged on fixed and certain law, and last a judgment, rather than a mere record of popular clamor or official favoritism." *Id.* These contemporary sources underscore the meaning of "due process" expressed in early Utah case law and

confirm that vested rights could only be abridged through a judicial proceeding.[16]

2.2 Utah's Due Process Clause provides more protection for vested rights than does the Fourteenth Amendment

2.2.1 Utah's Due Process Clause does not follow *Campbell v. Holt*

Against the consensus opinion of treatises and the law of many states, the U.S. Supreme Court in *Campbell v. Holt* held that legislatures were permitted, under the Fourteenth Amendment's Due Process Clause, "to remove the bar which the statute of limitations enables a debtor to interpose to prevent the

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[16] Vested property rights cannot be taken away without just compensation. Utah Const. art. I, § 22 ("private property shall not be taken or damaged for public use without just compensation"). In 1899, this court held that "it would be in violation of section 7, art. 1, of the constitution of this state, which provides that no person shall be deprived of life, liberty, or property without due process of law; and of section 22, art. 1, which provides that property shall not be taken or damaged for public use without just compensation" to deprive someone of a vested property right. *Fisher v. Bountiful City*, 59 P. 520, 522 (Utah 1899). "'Due process of law requires that the owner of any such right or interest should have a reasonable opportunity to be heard upon the question of compensation before he can be deprived thereof for public use. This is a matter of constitutional right, and not dependent upon the will of the Legislature.'" *Brigham City v. Chase*, 85 P. 436, 439 (Utah 1906) (citation omitted).

Thus, if this court were to conclude that Utah's legislature has the power to deprive a defendant of the vested property right to rely on an expired statute of limitation as a defense – and it should not – then Utah's constitution would independently require that just compensation be paid. In the context of an expired claim, "just compensation" would be whatever monetary judgment is leveled against the defendant as a result of the legislature's taking of the vested statute-of-limitations defense. Applying such a system would create enormous practical difficulties, because defendants would be forced to defend themselves in adversary proceedings for which they could not be required to pay any judgment.

payment of his debt." 115 U.S. 620, 624 (1885).[17] As the U.S. Supreme Court later recognized, Utah, like most states, did not adopt that view of due process as provided by Utah's Constitution. *See Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 312-13 & n.9 (1945).

When it was decided, *Campbell* stood "opposed to the great weight of authority in this country, and is opposed to the policy of these statutes." H.G. Wood, *Limitation of Actions* § 11 at 41 (2d ed. 1893). Nor did *Campbell* prompt a wave of states to re-interpret their precedent on vested rights.[18] Five years before ratification of the Utah Constitution, Professor Ames observed that "[t]he case of *Campbell v. Holt* . . . stands almost alone." J. B. Ames, *The Disseisin of Chattels*, 3 Harv. L. Rev. 313, 319 n.5 (1890).

The U.S. Supreme Court recognized as much in *Chase Securities Corp. v. Donaldson*, where it noted that, 60 years after *Campbell*, "some states have not followed [*Campbell*] in construing provisions of their constitutions similar to the due process clause," identifying Utah as one such state. 325 U.S. 304, 312-13 & n.9 (1945) (citing state court cases, including *In re Swan's Estate*, 79 P.2d 999, 1002 (Utah 1938)). Many states repudiated *Campbell*. *See, e.g.*, *Dingey v. Paxton*, 60 Miss.

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[17] Even the *Campbell* majority, though, recognized that due process protects the defense of an accrued statute of limitation against real property and personal property claims. 115 U.S. at 623.

[18] Nor should it have. The United States Constitution does not define the scope of legislative power for the states. The issue in *Campbell* could therefore only be whether it offends due process for a legislature in a state that has been given such power to exercise it. The issue is quite different for a state supreme court that is charged with determining the scope of legislative power.

1038, 1056-57 (1883); *see generally* Wood, *Limitation of Actions*, § 11 at 41 (citing cases).

This court in *Ireland v. Macintosh* examined *Campbell* and observed that "a much greater number" of states "sustain the minority opinion," adopting the *Campbell* dissenters' position that "when the statute of limitations gives a man a defense to an action, and that defense has absolutely arisen, it is a vested right . . . and is an absolute bar to the action there, and is protected . . . from legislative aggression." 61 P. 901, 902-04 (Utah 1900). The court in *Ireland* noted that *Campbell* recognized that the federal Due Process Clause might be violated if the legislature revived claims other than claims for repayment of debts (as were at issue in *Campbell*):

> [I]t may very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law.

Id. (quotation marks omitted)(quoting *Campbell*, 115 U.S. at 623). The fact that *Campbell*'s holding was limited to the debts context, along with the weight of scholarly and sister-state authority, support the conclusion that Utah's Due Process Clause was understood in 1895 to protect the vested right to be free from expired claims from legislative interference.

2.2.2 Utah's Due Process Clause provides greater protection for vested rights than does the Fourteenth Amendment's Due Process Clause.

Historical evidence and case law demonstrate that the Utah Constitution, as originally understood, protected defendants' vested property right to rely on an expired statute of limitation. The fact that Utah's Due Process Clause has a different scope from the Fourteenth Amendment—at least with respect to expired claims—is consistent with the federal structure and the original public understanding of the relationship between Utah's constitution and the federal Constitution.

Utah's Due Process Clause "protects individuals from state-induced deprivations of 'life, liberty or property, without due process of law.'" *Kuchcinski v. Box Elder Cty.*, 2019 UT 21, ¶ 41, ---P.3d--- (quoting Utah Const. art. I, § 7). The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV. The similar language does not mean that these two clauses were understood to have same meaning.

As early as 1899, this court noted that blind deference to the federal constitution as interpreted by the U.S. Supreme Court "would deprive the states of their right to regulate its procedure, laws, and rules of practice in their own courts, so as to protect life, liberty, and property by such due process of law." *In re McKee*, 57 P. 23, 27 (Utah 1899). This understanding was reflected in popular news sources at the time of ratification. *See* Bar Association, *Hon. W.N.*

Dusenberry Reads an Able Paper on the Grand Jury System, The Evening Dispatch, No. 78. v. 4 (Feb. 4, 1895) ("The Constitution of the United States gives the states the right to designate in their constitutions just what the states shall desire to be 'due process of law."').

This court has reaffirmed that "[t]he fact that the state and federal constitutional language is identical does not require a claimant to create some threshold for independent analysis of the state language. This court, not the United States Supreme Court, has the authority and obligation to interpret Utah's constitutional guarantees, *including the scope of due process*…." *State v. Tiedemann*, 2007 UT 49, ¶ 33, 162 P.3d 1106 (emphasis added). And this court has indicated that Utah's Due Process Clause may provide more expansive protection than does the 14th Amendment's Due Process Clause. *See State v. Ramirez*, 817 P.2d 774, 784 (Utah 1991) (stating that Utah's approach "is certainly as stringent as, if not more stringent than, the federal analysis").

The core premise of federalism is that "state[] and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 548 (1986) ("[F]ederal preservation of civil liberties is a minimum, which the states may surpass so long

as there is no clash with federal law."). This federal scheme reflects the understanding of "the Framers of the United States Constitution," who "contemplated that state constitutions, rather than the federal constitution, would provide the legal basis for protecting civil liberties from invasion by state action." *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 941 (Utah 1993) (Stewart, J., dissenting).

This court has held that the Utah Constitution must be interpreted on its own terms, rather than as a carbon copy of the U.S. Constitution. *See Tiedemann*, 2007 UT 49, ¶ 33 ("[I]f state statutes, rules, or constitutional principles preclude the state action in question, there is no need to assess the federal constitutionality of that action."') (citation omitted). "By looking first to state constitutional principles," *West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994), this court has interpreted a number of its constitutional provisions more expansively than their counterpart provisions in the federal constitution. *See State v. Harris*, 2004 UT 103, ¶ 23, 104 P.3d 1250 (stating "that the double jeopardy guarantees afforded defendants under the Utah Constitution are different from and provide greater protection than those afforded by the United States Constitution").

Many states have, like Utah, concluded that their due process clauses are broader than the federal due process clause. At least 23 states—the plurality of those to address the question—interpret their own due process clause to confer

broader protection than the Fourteenth Amendment.[19] A number of these state courts have expressly differentiated their due process clauses from the federal analog in the context of analyzing a defendant's right to be free from suits based on expired claims. *See, e.g.*, *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475, 484-85 (Ill. 2009) (applying state due process to protect the vested right of a defendant once

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[19] *See Balough v. Fairbanks N. Star Borough*, 995 P.2d 245, 263 n.64 (Alaska 2000) (citation omitted) ("Alaska's . . . due process clauses confer broader protection than do their federal counterparts."); *Doe v. Saenz*, 140 Cal. App. 4th 960, 994 (2006) (citation omitted) (same); *People ex rel. Juhan v. Dist. Court for Jefferson Cty.*, 439 P.2d 741, 745 (Colo. 1968) (recognizing state's right to provide broader due process protection); *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 496 (Conn. 2015) (citations omitted) (same); *State v. Guidry*, 96 P.3d 242, 251 (Haw. 2004) ("this court has provided broader due process protection under the Hawaii Constitution."); *Cootz v. State*, 785 P.2d 163, 166 (Idaho 1989) (same); *Doe A. v. Diocese of Dallas*, 917 N.E 2d 475, 484-85 (Ill. 2009) (same); *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999) (recognizing broader state due process right); *State v. Jones*, 94-0459 (La. 7/5/94); 639 So. 2d 1144, 1156 (Kimball, J., conc.) (criticizing majority's implication that the due process clause of the Louisiana Constitution provides broader protection) *suspended by constitutional amendment as stated in State v. Loyd*, 96-1805 (La. 2/13/97); 689 So. 2d 1321, 1323-24; *Givens v. Anchor Packing*, Inc., 466 N.W.2d 771, 773-74 (Neb. 1991) (same); *State v. Damiano*, 124 N.H. 742, 746 (1984) (citing *State v. Ball*, 124 N.H. 226 (1983)) (state constitution not bound by federal due process); *State v. Stever*, 527 A.2d 408, 415 (N.J. 1987) (same); *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 102, 356 P.3d 564 (same); *People v. Hoff*, 110 A.D.2d 782, 782 (N.Y. 1978)) (same); *Wake Cty. ex rel. Carrington v. Townes*, 281 S.E.2d 765, 773 (N.C. 1981) (citation omitted) (same); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993) (same); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996) (reviving time-barred claim would violate state due process); *Doe v. Crooks*, 613 S.E. 2d 536, 538 (S.C. 2005) (same); *State v. Bilben*, 2014, S.D. 24, ¶ 31, 846 N.W.2d 336, 344 (S.D. 2014) (Gilbertson, J., diss.) (criticizing South Dakota's history of granting greater protection than that granted by the United States Constitution's Due Process Clause); *State v. Ferguson*, 2 S.W.3d 912, 914 (Tenn. 1999) (same); *State v. Davis*, 686 P.2d 1143, 1145 (Wash. 1984) (same); *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658, 663 (W.Va. 1993) (same); *State v. Luedtke*, 2015 WI 42, ¶ 48, 362 Wis.2d 1, 863 N.W.2d 592 (same).

a statute of limitation has expired); *Givens v. Anchor Packing*, 466 N.W.2d 771, 773-74 (Neb. 1991) (anchoring rights against expired claims in state due process); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996) (reviving time-barred claim would violate state due process); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2000) (same). The scope of due process in the Fourteenth Amendment is not dispositive as to the scope of due process in article I, section 7.

2.2.3 Traditional canons of interpretation support the conclusion that Utah's Due Process Clause offers greater protection than does its federal counterpart

The framers of the Utah Constitution could have elected not to include a state due process clause if they intended to set a due process standard identical to the Fourteenth Amendment. The framers of Oregon's constitution, for example, eschewed a due process clause.[20] By including a due process clause, the framers of the Utah Constitution demonstrated their "belie[f] that the federal due process clause did not make it unnecessary . . . to guarantee [an independent] due process of law" in their own constitution. *Cootz v. State*, 785 P.2d 163, 165 (Idaho 1989) (inferring that the drafters of Idaho's 1889 constitution held such a belief).

The canons against superfluity and redundancy reinforce the conclusion that Utah's Due Process Clause was not understood at the time of ratification to

[20] *See generally* Thomas A. Balmer, *"Does Oregon's Constitution Need a Due Process Clause?" Thoughts on Due Process and Other Limitations on State Action*, 91 Wash. L. Rev. Online 157 (2016).

have the same scope as the Fourteenth Amendment. Interpreting the Utah and federal due process clauses in "lockstep" would create "an atmosphere in which it is unnecessary to distinguish between the state and federal constitutions because they are generally held to have the same meaning." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 804 (1992).

This result would reduce the Utah Constitution "to a redundancy." *Id.* Under traditional canons of statutory interpretation, texts should be construed whenever possible "so that no part [or provision] will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another." *State in Interest of J.M.S.*, 2011 UT 75, ¶ 22, 280 P.3d 410 (quotation marks and citation omitted); *see also Turner v. Staker & Parson Companies*, 2012 UT 30, ¶ 12, 284 P.3d 600 ("Wherever possible, we give effect to every word" to avoid "'[a]ny interpretation which renders parts or words in a statute inoperative or superfluous."') (citation omitted).

The canons against superfluity and redundancy apply "with particular force in a textualist interpretation of the Constitution, '[s]ince a textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage.'" Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 Campbell L. Rev. 115, 122 (2010) (quoting William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 Mich. L. Rev. 487, 532 (2007)). The Utah Due

Process Clause would serve no purpose if its meaning were coterminous with the Fourteenth Amendment, which expressly applies to the states. The Utah provision, therefore, should be interpreted to have its own meaning distinct from its federal analog, just as it was understood at the time of ratification to have its own independent meaning.

3. The Original Meaning of the Open Courts Clause Reinforces the Conclusion that Defendants Have a Vested Right to Rely on an Expired Statute of Limitation

The Open Courts Clause provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11. This clause protects a litigant's right to rely on vested legal *defenses* as well as causes of action. (*See* Roberts Opening Br. at 31-33.) This court has held that rights protected under that Clause are vested rights. As the court explained:

> once a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment.

Berry By and Through Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985). While this statement relates to the affirmative right to bring an action, this court recognizes that the Open Courts Clause also protects "the opportunity to present . . . defenses." *Daines v. Vincent*, 2008 UT 51, ¶ 46, 190 P.3d 1269.

Because the Open Courts Clause—like the Due Process Clause—protects "vested rights, including the degree to which the legislature could retroactively alter the law governing a cause of action that accrued prior to the new legislation," *Waite v. Utah Labor Comm'n*, 2017 UT 86, ¶ 65, 416 P.3d 635 (Lee, A.C.J., concurring), it reinforces the conclusion that the legislature cannot divest a defendant of a vested right in a statute-of-limitation defense.

4. An Originalist Approach Would Validate this Court's Unbroken Line of Precedent Holding that Expired Claims Cannot Be Revived

Originalism recognizes an important role for stare decisis. An originalist approach "places a premium on precedent" when there is historical doubt about whether overruling the precedent would deviate from a law's "historically-settled meaning." Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1923 (2017).

Leading scholars of originalism agree that "a precedent should be followed when the original meaning of a provision is unclear, the precedent followed a reasonable interpretation of the provision, that interpretation established a clear rule, and the precedent has been relied upon significantly." John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 N.W. U. L. Rev.

803, 843 (2009). Originalist justices likewise recognize that "within th[e] range of permissible interpretations," "precedent is relevant" because "reasonable people" can "arrive at different conclusions." *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring).

Where, as here, the historical evidence leaves no such doubt about the original meaning of the constitutional text, following established precedent is an additional reason to interpret Utah's Constitution according to its "historically settled meaning." The evidence that Utah's Legislative Vesting, Separation-of-Powers, Due Process, and Open Courts Clauses were originally understood to protect defendants' vested property right in an expired statute of limitation from legislative interference provides a clear answer to the certified questions in favor of Defendant on originalist grounds.

While the evidence dispels any ambiguity, any doubt should be resolved in favor of Utah's 112-year line of unbroken precedent—seven of this court's opinions without a single dissent—and the significant reliance interests at stake. (*See* Roberts Opening Br. at 40-42 (applying the factors described in *Eldridge v. Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553, to assess the weight of a precedent)); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 11 (2001) (a uniform series of decisions is "particularly strong evidence of the correctness of a particular rule precisely because the judges in the series would have overruled decisions that they deemed demonstrably erroneous").

Conclusion

Because the original public meaning of the Legislative Vesting Clause, Separation-of-Powers Clause, Due Process Clause, and Open Courts Clause demonstrate that an expired statute of limitation is a vested property right that the legislature cannot revive, the court should answer the certified questions as follows:

1. The Legislature has no power to revive time-barred claims through a statute.

2. The Legislature cannot revive expired claims, regardless of its express intention to do so in section 78B-2-308(7).

DATED this 25th day of September, 2019.

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Certificate of Compliance

I hereby certify that:

1. This brief complies with the Utah Supreme Court's July 10, 2019 Supplemental Briefing Order because this brief contains 35 pages, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 13-point Book Antiqua.

3. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 25th day of September, 2019.

/s/ Troy L. Booher

Certificate of Service

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Addendum A

A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

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ONE OF THE JUSTICES OF THE SUPREME COURT OF MICHIGAN, AND JAY PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN.

SECOND EDITION,

WITH CONSIDERABLE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES.

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*CHAPTER V. [*85]

OF THE POWERS WHICH THE LEGISLATIVE DEPARTMENT MAY EXERCISE.

In considering the powers which may be exercised by the legislative department of one of the American States, it is natural that we should recur to those possessed by the Parliament of Great Britain, after which, in a measure, the American legislatures have been modelled, and from which we derive our legislative usages and customs, or parliamentary common law, as well as the precedents by which the exercise of legislative power in this country has been governed. It is natural, also, that we should incline to measure the power of the legislative department in America by the power of the like department in Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws could do, might also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the government if it wills so to do; while on the other hand the legislatures of the American States are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative.

"The power and jurisdiction of Parliament," says Sir *Edward Coke*,[1] "is so transcendent and absolute, that it cannot be confined, either for persons or causes, within any bounds. And of this high court it may truly be said: 'Si antiquitatem spectes, est vetustissima; si dignitatem est honoratissima; si jurisdictionem, est capacissima.' It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abro-

[1] 4 Inst. 36.

gating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or [*86] temporal, * civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reign of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great Lord Treasurer Burleigh, 'that England could never be ruined but by a Parliament'; and as Sir *Matthew Hale* observes: 'This being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should fall upon it, the subjects of this kingdom are left without all manner of remedy.'"[1]

The strong language in which the complete jurisdiction of Parliament is here described is certainly inapplicable to any authority in the American States, unless it be to the people of the States when met in their primary capacity for the formation of their fundamental law; and even then there rest upon them the restraints of the Constitution of the United States, which bind them as absolutely as they do the governments which they create. It becomes important, therefore, to ascertain in what respect the State legislatures resemble the Parliament in the

[1] 1 Bl. Com. 160.

powers they exercise, and how far we may extend the comparison without losing sight of the fundamental ideas and principles of the American system.

The first and most notable difference is that to which [87] we have already alluded, and which springs from the different theory on which the British Constitution rests. When Parliament is recognized as possessing the sovereign power of the country, it is evident that the resemblance between it and American legislatures in regard to their ultimate powers cannot be carried very far. The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people; and the legislatures which they have created are only to discharge a trust of which they have been made a depository, but with well-defined restrictions.

Upon this difference it is to be observed, that while Parliament, to any extent it may choose, may exercise judicial authority, one of the most noticeable features in American constitutional law is, the care taken to separate legislative, executive, and judicial functions. It has evidently been the intention of the people in every State that the exercise of each should rest with a separate department. The different classes of power have been apportioned to different departments; and this being all done by the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.

There are two fundamental rules by which we may measure the extent of the legislative authority in the States: —

1. In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency, for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at discretion.

2. But the apportionment to this department of legislative power does not sanction the exercise of executive or judicial functions, except in those cases, warranted by parliamentary usage, where they are incidental, necessary, or proper to the exercise of legislative authority, or where the constitution itself, in specified

cases, may expressly permit it. Executive power is so intimately connected with legislative, that it is not easy to draw a line of separation; but the grant of the judicial power to the [* 88] department * created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to. While, therefore, the American legislatures may exercise the legislative powers which the Parliament of Great Britain wields, except as restrictions are imposed, they are at the same time excluded from other functions which may be, and sometimes habitually are, exercised by the Parliament.

"The people in framing the constitution," says *Denio*, Ch. J., "committed to the legislature the whole law-making power of the State, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against every thing contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature."[1]

[1] People *v.* Draper, 15 N. Y. 543.

"It has never been questioned, so far as I know," says *Redfield*, Ch. J., "that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. *That must be conceded, I think, to be a fundamental principle in the political organization of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question."[1] [*89]

"I entertain no doubt," says *Comstock*, J., "that aside from the special limitations of the Constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the Constitution, distributed to other departments of the government. It is only the 'legislative power' which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice *Marshall* said: 'How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.'[2] That very eminent judge felt the difficulty; but the danger was less apparent then than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied, as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and

[1] Thorpe *v.* Rutland & Burlington Railroad Co., 27 Vt. 142. See also Leggett *v.* Hunter, 19 N. Y. 445; Cochran *v.* Van Surlay, 20 Wend. 365; People *v.* Morrell, 21 Wend. 563; Sears *v.* Cottrell, 5 Mich. 251; Mason *v.* Wait, 4 Scam. 134; People *v.* Supervisors of Orange, 27 Barb. 593; Taylor *v.* Porter, 4 Hill, 144, per *Bronson*, J.

[2] Fletcher *v.* Peck, 6 Cranch, 136.

speculation a license to oppose themselves to the just and legitimate powers of government." [1]

[* 90] Numerous other opinions might be cited to the same effect with * those from which we have here quoted; but as we shall have occasion to refer to them elsewhere, in considering the circumstances under which a statute may be declared unconstitutional, we shall refrain from further references in this place. Nor shall we enter upon a discussion of the question suggested by Chief Justice Marshall as above quoted; [2] since, however interesting it may be as an abstract question, it is made practically unimportant by the careful separation of duties between the several departments of the government which has been made by each of the State constitutions. Had no such separation been made, the disposal of executive and judicial duties must have devolved upon the department vested with the general authority to make laws; [3] but assuming them to be apportioned already, we are only at liberty to liken the power of the State legislature to that of the Parliament, when it confines its action to an exercise of legislative functions; and such authority as is in its nature either executive or judicial is beyond its constitutional powers, with the few exceptions to which we have already referred.

It will be important therefore to consider those cases where legislation has been questioned as encroaching upon judicial authority; and to this end it may be useful, at the outset, to endeavor to define legislative and judicial power respectively, that we may the better be enabled to point out the proper line of distinction when questions arise in their practical application to actual cases.

The legislative power is the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or

[1] Wynehamer *v.* People, 13 N. Y. 391.

[2] The power to distribute the judicial power, except so far as that has been done by the constitution, rests with the legislature; but when the constitution has conferred it upon certain specified courts, this must be understood to embrace the whole judicial power, and the legislature cannot vest any portion of it elsewhere. State *v.* Maynard, 14 Ill. 420; Gibson *v.* Emerson, 2 Eng. 173; Chandler *v.* Nash, 5 Mich. 409.

[3] Calder *v.* Bull, 2 Root, 350, and 3 Dall. 386; Ross *v.* Whitman, 6 Cal. 361; Smith *v.* Judge, 17 Cal. 547; per *Patterson*, J., in Cooper *v.* Telfair, 4 Dall. 19; Martin *v.* Hunter's Lessee, 1 Wheat. 304.

statutes, which the legislative will has prescribed. "The laws of a State," observes Mr. Justice *Story*, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having *the force of laws."[1] "The difference between [*91] the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law."[2] And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions.[3] And in another case it is said: "The legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the Federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts: for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."[4] "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."[5]

On the other hand, to adjudicate upon, and protect, the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.[6] "No particular definition of judicial power," says *Wood-*

[1] Swift *v.* Tyson, 16 Pet. 18.

[2] Per *Marshall*, Ch. J., in Wayman *v.* Southard, 10 Wheat. 46; Per *Gibson*, Ch. J., in Greenough *v.* Greenough, 11 Penn. St. 494. See State *v.* Gleason, 12 Fla. 190.

[3] Bates *v.* Kimball, 2 Chip. 77.

[4] Newland *v.* Marsh, 19 Ill. 382.

[5] Ervine's Appeal, 16 Penn. St. 266. See also Greenough *v.* Greenough, 11 Penn. St. 494; Dechastellux *v.* Fairchild, 15 Penn. St. 18.

[6] Cincinnati, &c. Railroad Co. *v.* Commissioners of Clinton Co. 1 Ohio N. S. 81. See also King *v.* Dedham Bank, 15 Mass. 454; Gordon *v.* Ingraham, 1 Grant's Cases, 152; People *v.* Supervisors of New York, 16 N. Y. 432; Beebe *v.* State, 6 Ind. 515; Greenough *v.* Greenough, 11 Penn. St. 494; Taylor *v.* Place, 4 R. I. 324. In State *v.* Adams, 44 Mo. 570, a legislative act which

bury, J., "is given in the constitution [of New Hampshire], and, considering the general nature of the instrument, none was to be expected. Critical statements of the meanings in which all important words were employed would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But 'powers [* 92] judicial,' *'judiciary powers,' and 'judicatures' are all phrases used in the constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, — to compare the claims of parties with the law of the land before established, — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as 'a rule of civil conduct;'[1] because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated.

"It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State. Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else

declared certain college officers to have vacated their offices by failure to take an oath prescribed by a previous act, and which proceeded to appoint successors, was held void as an exercise of judicial power.

[1] 1 B. Com. 44.

they forbear to interfere with past transactions and vested rights."[1]

With these definitions and explanations, we shall now proceed to consider some of the cases in which the courts have attempted to draw the line of distinction between the proper functions of the legislative and judicial departments, in cases where it has been claimed that the legislature have exceeded their power by invading the domain of judicial authority.

* *Declaratory Statutes.* [* 93]

Legislation is either introductory of new rules, or it is declaratory of existing rules. "A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been.[2] Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was before it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts. Thus Mr. Fox's Libel Act declared that, by the law of England, juries were judges of the law in prosecutions for libel; it did not purport to introduce a new rule, but to declare a rule already and always in force. Yet previous to the passage of this act the courts had repeatedly held that the jury in these cases were only to pass upon the fact of publication and the truth of the innuendoes; and whether the publication was libellous or not was a question of law which addressed itself exclusively to the court. Thus the legislature declared the law to be what the courts had declared it was not. So in the State of New York, after the courts had held that insurance companies were taxable to a certain extent under an existing statute, the legislature passed another act, declaring that such companies were only taxable at a certain other rate; and it was thereby declared that such was the intention

[1] Merrill *v.* Sherburne, 1 N. H. 204. See Jones *v.* Perry, 10 Yerg. 69; Taylor *v.* Porter, 4 Hill, 144; Ogden *v.* Blackledge, 2 Cranch, 272; Dash *v.* Van Kleek, 7 Johns. 498; Wilkinson *v.* Leland, 2 Pet. 657; Leland *v.* Wilkinson, 10 Pet. 297.

[2] Bouv. Law Dic. "Statute."

and true construction of the original statute.[1] In these cases it will be perceived that the courts, in the due exercise of their authority as interpreters of the laws, have declared what the rule established by the common law or by statute is, and that the legislature has then interposed, put its own construction upon the existing law, and in effect declared the judicial interpretation to be unfounded and unwarrantable. The courts in these cases have clearly kept within the proper limits of their jurisdiction, and if they have erred, the error has been one of judgment only, and has not extended to usurpation of power. Was the legislature also within the limits of its authority when it passed the declaratory statute?

[* 94] *The decision of this question must depend upon the practical application which is sought to be made of the declaratory statute, and whether it is designed to have practically a retrospective operation, or only to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where it is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.[2]

[1] People *v.* Supervisors of New York, 16 N. Y. 424.

[2] In several different cases the courts of Pennsylvania had decided that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the name was written by his express direction, was not the signature required by the statute, and the legislature, to use the language of Chief Justice *Gibson*, "declared, in order to overrule it, that every last will and testament heretofore made, or hereafter to be made, except such as may have been fully adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid. How this mandate to the courts to establish a particular interpretation of a particular statute, can be taken for any thing else than an exercise of judicial power in settling a question of interpretation, I know not The judiciary had certainly recognized a legislative interpretation of a

As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. "To declare what the law *is, or has been,* is a judicial power; to declare what the law *shall be,* is legislative. One of the fundamental principles of all our governments is, that the legislative power * shall be separate from the judicial."[1] If the legislature [* 95] would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment.[2] But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is the best, most decorous and suitable that could have been adopted or not.

If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders,[3] or directing what particular

statute before it had itself acted, and consequently before a purchaser had been misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, and to enact that white meant black, or that black meant white, would in the same degree be an exercise of arbitrary and unconstitutional power." Greenough *v.* Greenough, 11 Penn. St. 494. The act in this case was held void so far as its operation was retrospective, but valid as to future cases. And see Reiser *v.* Tell Association, 39 Penn. St. 137.

[1] Dash *v.* Van Kleek, 7 Johns. 498, per *Thompson,* J.; Ogden *v.* Blackledge, 2 Cranch, 272.

[2] Governor *v.* Porter, 5 Humph. 165; People *v.* Supervisors, &c., 16 N. Y. 424; Reiser *v.* Tell Association, 39 Penn. St. 137; O'Conner *v.* Warner, 4 W. & S. 227; Lambertson *v.* Hogan, 2 Penn. St. 25.

[3] In State *v.* Fleming, 7 Humph. 152, a legislative resolve that "no fine, forfeiture, or imprisonment, should be imposed or recovered under the act of 1837 [then in force], and that all causes pending in any of the courts for such offence should be dismissed," was held void as an invasion of judicial authority. The

steps shall be taken in the progress of a judicial inquiry.[1]
[* 96] * And as a court must act as an organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members.[2]

legislature cannot declare a forfeiture of a right to act as curators of a college. State *v.* Adams, 44 Mo. 570. But to take away by statute a statutory right of appeal is not an exercise of judicial authority. *Ex parte* McCardle, 7 Wal. 506. And it has been held that a statute allowing an appeal in a particular case was valid. Prout *v.* Berry, 2 Gill, 147; State *v.* Northern Central R.R. Co. 18 Md. 193. But see cases cited in next note.

[1] Opinions of Judges on the Dorr case, 3 R. I. 299. In the case of Picquet, Appellant, 5 Pick. 64, the Judge of Probate had ordered letters of administration to issue to an applicant therefor, on his giving bond in the penal sum of $50,000, with sureties within the Commonwealth, for the faithful performance of his duties. He was unable to give the bond, and applied to the legislature for relief. Thereupon a resolve was passed "empowering" the Judge of Probate to grant the letters of administration, provided the petitioner should give bond with his brother, a resident of Paris, France, as surety, and "that such bond should be in lieu of any and all bond or bonds by any law or statute in this Commonwealth now in force required," &c. The Judge of Probate refused to grant the letters on the terms specified in this resolve, and the Supreme Court, while holding that it was not compulsory upon him, also declared their opinion that, if it were so, it would be inoperative and void. In Bradford *v.* Brooks, 2 Aik. 284, it was decided that the legislature had no power to revive a commission for proving claims against an estate after it had once expired. See also Bagg's Appeal, 43 Penn. St. 512. In Hill *v.* Sunderland, 3 Vt. 507; and Burch *v.* Newberry, 10 N. Y. 374, it was held that the legislature had no power to grant to parties a right to appeal after it was gone under the general law. Besides the authorities referred to, to show that the legislature cannot grant a new trial, see Lewis *v.* Webb, 3 Greenl. 326; Durham *v.* Lewiston, 4 Greenl. 140; Bates *v.* Kimball, 2 Chip. 77; Staniford *v.* Barry, 1 Aik. 314; Merrill *v.* Sherburne, 1 N. H. 199; Dechastellux *v.* Fairchild, 15 Penn. St. 18; Taylor *v.* Place, 4 R. I. 324; Young *v.* State Bank, 4 Ind. 301; Lanier *v.* Gallatas, 13 La. An. 175; Miller *v.* State, 8 Gill, 145; Beebe *v.* State, 6 Ind. 515; Atkinson *v.* Dunlap, 50 Me. 111; Weaver *v.* Lapsley, 43 Ala. 224; Saunders *v.* Cabaniss, *ib.* 173. In Burt *v.* Williams, 24 Ark. 91, it was held that the granting of continuances of pending cases was the exercise of judicial authority, and a legislative act assuming to do this was void.

[2] In Clapp *v.* Ely, 3 Dutch, 622, it was held that a statute which provided that no judgment of the Supreme Court should be reversed by the Court of Errors

Nor is it in the power of the legislature to bind individuals by a recital of facts in a statute, to be used as evidence against the parties interested. A recital of facts in the preamble of a statute may perhaps be evidence, where it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country;[1] but where the facts concern the rights of individuals, the legislature cannot adjudicate upon them. As private statutes are generally obtained on the application of some party interested, and are put in form to suit his wishes, perhaps their exclusion from being made evidence against any other party would result from other general principles; but it is clear that the recital could have no force, except as a judicial finding of facts; and that such finding is not within the legislative province.[2]

* We come now to a class of cases in regard to which [*97] there has been serious contrariety of opinion; springing from the fact, perhaps, that the purpose sought to be accomplished by the statutes is generally effected by judicial proceedings, so that if the statutes are not a direct invasion of judicial authority, they at least cover ground which the courts usually occupy under general laws which confer the jurisdiction upon them. We refer to

Statutes conferring Power upon Guardians and other Trustees to sell Lands.

Whenever it becomes necessary or proper to sell the estate of a decedent for the payment of debts, or of a lunatic or other incompetent person for the same purpose, or for future support, or of a minor to provide the means for his education and nurture, or for the more profitable investment of the proceeds, or of tenants in common to effectuate a partition between them, it will

and Appeals, unless a majority of those members of the court who were competent to sit on the hearing and decision should concur in the reversal, was unconstitutional. Its effect would be, if the court were not full, to make the opinion of the minority in favor of affirmance control that of the majority in favor of reversal, unless the latter were a majority of the whole court. Such a provision in the constitution might be proper and unexceptionable; but if the constitution has created a Court of Appeals, without any restriction of this character, the ruling of this case is that the legislature cannot impose it. The court was nearly equally divided, standing seven to six.

[1] Rex *v.* Sutton, 4 M. & S. 532.

[2] Elmendorf *v.* Carmichael, 3 Litt. 478; Parmelee *v.* Thompson, 7 Hill, 80.

probably be found in every State that some court is vested with jurisdiction to make the necessary order, if the facts seem to render it important after a hearing of the parties in interest. The case is eminently one for judicial investigation. There are facts to be inquired into, in regard to which it is always possible that disputes may arise; the party in interest is often incompetent to act on his own behalf, and his interest is carefully to be inquired into and guarded; and as the proceeding will usually be *ex parte*, there is more than the ordinary opportunity for fraud upon the party interested, as well as upon the authority which grants permission. It is highly and peculiarly proper, therefore, that by general laws judicial inquiry should be provided for these cases, and that these laws should provide for notice to all proper parties, and an opportunity for the presentation of any facts which might bear upon the propriety of granting the applications.

But it will sometimes be found that the general laws provided for these cases are not applicable to some which arise; or if applicable, that they do not always accomplish fully all that seems desirable; and in these cases, and perhaps also in some others without similar excuse, it has not been unusual for legislative authority to intervene, and by special statute to grant the power which, under the general law, is granted by the courts. [* 98] The * power to pass such statutes has often been disputed, and it may be well to see upon what basis of authority as well as of reason it rests.

If in fact judicial inquiry is essential in these cases, it would seem clear that such statutes must be ineffectual and void. But if judicial inquiry is not essential, and the legislature may confer the power of sale in such a case upon an *ex parte* presentation of evidence, or upon the representations of the parties without any proof whatever, then we must consider the general laws to be passed, not because the cases fall within the province of judicial action, but because the courts can more conveniently consider, and properly, safely, and inexpensively pass upon such cases, than the legislative body, where the power primarily rests.[1]

[1] There are constitutional provisions in Kentucky, Virginia, Missouri, Oregon, Nevada, Indiana, Maryland, New Jersey, Arkansas, Florida, and Michigan, forbidding special laws licensing the sale of the lands of minors and other persons under legal disability. Perhaps the general provision in some other constitu-

The rule upon this subject, as we deduce it from the authorities, seems to be this: If the party standing in position of trustee applies for permission to make the sale, for a purpose apparently for the interest of the *cestui que trust*, and there are no adverse interests to be considered and adjudicated, the case is not one which requires judicial action, but it is optional with the legislature to grant the relief by statute, or to refer the case to the courts for consideration, according as the one course or the other, on considerations of policy, may seem desirable.

In the case of Rice *v.* Parkman,[1] it appeared that, certain minors having become entitled to real estate by descent from their mother, the legislature passed a special statute empowering their father as guardian for them, and, after giving bond to the judge of probate, to sell and convey the lands, and put the proceeds at interest on good security for the benefit of the minor owners. A sale was made accordingly; but the children, after coming of age, brought suit against the party claiming under the sale, insisting that the special statute was void. There was in force at the time this special statute was passed a general statute, under which license might have been granted by the courts; but it was held that this general law did not deprive the legislature of that full * and complete control over such cases which it would [* 99] have possessed had no such statute existed. "If," say the court, "the power by which the resolve authorizing the sale in this case was passed were of a judicial nature, it would be very clear that it could not have been exercised by the legislature without violating an express provision of the constitution. But it does not seem to us to be of this description of power; for it was not a case of controversy between party and party, nor is there any decree or judgment affecting the title to property. The only object of the authority granted by the legislature was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this State, since the adoption of the constitution, and by the legislature of the province and of the colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects, time out

tions, forbidding special laws in cases where a general law could be made applicable, might also be held to exclude such special authorization.

[1] 16 Mass. 326.

of mind. Indeed, it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere of converting lands into money. For otherwise many minors might suffer, although having property; it not being in a condition to yield an income. This power must rest in the legislature, in this Commonwealth; that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

"It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular application brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of law, for its due exercise, but still partaking in no degree of the characteristics of judicial power. It is doubtless included in the general authority granted by the people to the legislature by the constitution. For full power and authority is given from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, stat-
[*100] utes, and ordinances, directions and restrictions (so as the same be not repugnant or contrary to the constitution), as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects thereof. No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed.

"If this be not true, then the general laws, under which so many estates of minors, persons *non compos mentis*, and others, have been sold and converted into money, are unauthorized by the constitution, and void. For the courts derive their authority from the legislature, and, it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government — that of providing for the welfare of the citizens — would be lost. But the argument which has most weight on the part of the defendants is, that the legislature has exercised its power over this subject in the only constitutional way, by establishing a general provision; and that, having done this, their authority has ceased, they having no right to interfere in particular cases. And if the question were one of expediency only, we should perhaps be convinced by the argument, that it would be better for all such applications to be made to the courts empowered to sustain them. But as a question of right, we think the argument fails. The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do; and especially when that constituent is the legislature, and is not prohibited by the constitution from exercising the authority. Indeed, the * whole authority might be revoked, and the [* 101] legislature resume the burden of the business to itself, if in its wisdom it should determine that the common welfare required it. It is not legislation which must be by general acts and rules, but the use of a parental or tutorial power, for purposes of kindness, without interfering with or prejudice to the rights of any but those who apply for specific relief. The title of strangers is not in any degree affected by such an interposition."

A similar statute was sustained by the Court for the Correction of Errors in New York. "It is clearly," says the Chancellor, "within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. But even that power cannot constitutionally be so far extended as to transfer the beneficial use of the property to

another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself, as in the case of a provision out of the estate of an infant or lunatic for the support of an indigent parent or other near relative." [1]

[1] Cochran *v.* Van Surlay, 20 Wend. 373. See the same case in the Supreme Court, *sub nom.* Clarke *v.* Van Surlay, 15 Wend. 436. See also Suydam *v.* Williamson, 24 How. 427; Williamson *v.* Suydam, 6 Wal. 723; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Florentine *v.* Barton, 2 Wal. 210. In Opinions of the Judges, 4 N. H. 572, the validity of such a special statute, under the constitution of New Hampshire was denied. The judges say: "The objection to the exercise of such a power by the legislature is, that it is in its nature both legislative and judicial. It is the province of the legislature to prescribe the rule of law, but to apply it to particular cases is the business of the courts of law. And the thirty-eighth article in the Bill of Rights declares that 'in the government of the State the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.' The exercise of such a power by the legislature can never be necessary. By the existing laws, judges of probate have very extensive jurisdiction to license the sale of real estate of minors by their guardians. If the jurisdiction of the judges of probate be not sufficiently extensive to reach all proper cases, it may be a good reason why that jurisdiction should be extended, but can hardly be deemed a sufficient reason for the particular interposition of the legislature in an individual case. If there be a defect in the laws, they should be amended. Under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that an act of the legislature to authorize the sale of the land of a particular minor by his guardian cannot be easily reconciled with the spirit of the article in the Bill of Rights which we have just cited. It is true that the grant of such a license by the legislature to the guardian is intended as a privilege and a benefit to the ward. But by the law of the land no minor is capable of assenting to a sale of his real estate in such a manner as to bind himself. And no guardian is permitted by the same law to determine when the estate of his ward ought and when it ought not to be sold. In the contemplation of the law, the one has not sufficient discretion to judge of the propriety and expediency of a sale of his estate, and the other is not to be intrusted with the power of judging. Such being the general law of the land, it is presumable that the legislature would be unwilling to rest the justification of an act authorizing the sale of a minor's estate upon any assent which the guardian or the minor could give in the proceeding. The question then is, as it seems to

*The same ruling has been made in analogous cases. [*102] In Ohio, a special act of the legislature authorizing commissioners to make sale of lands held in fee tail, by devisees under a will, in order to cut off the entailment and effect a partition between them, — the statute being applied for by the mother of the devisees and the executor of the will, and on behalf of the devisees, — was held not obnoxious to constitutional objection, and as sustainable on immemorial legislative usage, and on the same ground which would support general laws for the same purpose.[1] In a case in the Supreme Court of the United States, where an executrix who had proved a will in New Hampshire made sale of lands without authority in Rhode Island, for the purpose of satisfying debts against the estate, a subsequent act of the Rhode Island legislature, *confirming the sale, was held [*103] not an encroachment upon the judicial power. The land, it was said, descended to the heirs subject to a lien for the payment of debts, and there is nothing in the nature of the act of authorizing a sale to satisfy the lien, which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate rather than by the legislature itself. It is remedial in its nature, to give effect to existing rights.[2] The case showed the actual existence of debts, and indeed a judicial license for the sale of lands to satisfy them had been granted in New Hampshire before the sale was made. The decision was afterwards followed in a carefully considered case in the same court.[3] In each of these cases it is assumed that the legislature does not by the special statute determine the existence or amount of the debts, and

us, Can a ward be deprived of his inheritance without his consent by an act of the legislature which is intended to apply to no other individual? The fifteenth article of the Bill of Rights declares that no subject shall be deprived of his property but by the judgment of his peers or the law of the land. Can an act of the legislature, intended to authorize one man to sell the land of another without his consent, be 'the law of the land' in a free country? If the question proposed to us can be resolved into these questions, as it appears to us it may, we feel entirely confident that the representatives of the people of this State will agree with us in the opinion we feel ourselves bound to express on the question submitted to us, that the legislature cannot authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards."

[1] Carroll *v.* Lessee of Olmsted, 16 Ohio, 251.

[2] Wilkinson *v.* Leland, 2 Pet. 660.

[3] Watkins *v.* Holman's Lessee, 16 Pet. 25-60. See also Florentine *v.* Barton, 2 Wal. 210; Doe *v.* Douglass, 8 Blackf. 10.

disputes concerning them would be determinable in the usual modes. Many other decisions have been made to the same effect.[1]

This species of legislation may perhaps be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal, on the application of the person representing his interest, and under such circumstances that the consent of the owner, if capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other.[2]

But a different case is presented when the legislature assumes to authorize a person who does not occupy a fiduciary relation [*104] to *the owner, to make sale of real estate, to satisfy demands which he asserts, but which are not judicially determined, or for any other purpose not connected with the convenience or necessity of the owner himself. An act of the legislature of Illinois undertook to empower a party who had applied for it to make sale of the lands pertaining to the estate of a deceased person, in order to raise a certain specified sum of money which the legislature assumed to be due to him and another person, for moneys by them advanced and liabilities incurred on behalf of the estate, and to apply the same to the extinguishment of their claims. Now it is evident that this act was in the nature of a judicial decree, passed on the application of parties adverse in interest to the estate, and in effect adjudging a certain amount to be due them, and ordering lands to be sold for its satisfaction. As was well said

[1] Thurston *v.* Thurston, 6 R. I. 296; Williamson *v.* Williamson, 3 S. & M. 715; McComb *v.* Gilkey, 29 Miss. 146; Boon *v.* Bowers, 30 Miss. 246; Stewart *v.* Griffith, 33 Mo. 13; Estep *v.* Hutchman, 14 S. & R. 435; Snowhill *v.* Snowhill, 2 Green, Ch. 20; Dorsey *v.* Gilbert, 11 G. & J. 87; Norris *v.* Clymer, 2 Penn. St. 277; Coleman *v.* Carr, Walker, 258; Davison *v.* Johonnot, 7 Met. 388; Towle *v.* Forney, 14 N. Y. 423; Leggett *v.* Hunter, 19 N. Y. 445; Kibby *v.* Chetwood's Adm'rs, 4 T. B. Monr. 94; Shehan's Heirs *v.* Barnett's Heirs, 6 T. B. Monr. 594; Davis *v.* State Bank, 7 Ind. 316. In Moore *v.* Maxwell, 18 Ark. 469, a special statute authorizing the administrator of one who held the mere naked legal title to convey to the owner of the equitable title was held valid. In Stanley *v.* Colt, 5 Wal. 119, an act permitting the sale of real estate which had been devised to charitable uses was sustained — no diversion of the gift being made.

[2] It would be equally competent for the legislature to authorize a person under legal disability — *e. g.* an infant — to convey his estate, as to authorize it to be conveyed by guardian. McComb *v.* Gilkey, 29 Miss. 146.

by the Supreme Court of Illinois, in adjudging the act void: "If this is not the exercise of a power of inquiry into, and a determination of facts, between debtor and creditor, and that, too, *ex parte* and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to, or hearing of, the parties whose estate is divested by the act. That the exercise of such power is in its nature clearly judicial we think too apparent to need argument to illustrate its truth. It is so self-evident from the facts disclosed that it proves itself."[1]

* A case in harmony with the one last referred to was [* 105] decided by the Supreme Court of Michigan. Under the act of Congress "for the relief of citizens of towns upon the lands

[1] Lane *v.* Dorman, 3 Scam. 242. In Dubois *v.* McLean, 4 McLean, 486, Judge *Pope* assumes that the case of Lane *v.* Dorman decides a special act, authorizing an executor to sell lands of the testator to pay debts against his estate, would be unconstitutional. We do not so understand that decision. On the contrary, another case in the same volume, Edwards *v.* Pope, p. 465, fully sustains the cases before decided, distinguishing them from Lane *v.* Dorman. But that indeed is also done in the principal case, where the court, after referring to similar cases in Kentucky, say: "These cases are clearly distinguished from the case at bar. The acts were for the benefit of all the creditors of the estates, without distinction; and in one case, in addition, for the purpose of perfecting titles contracted to be made by the intestate. The claims of the creditors of the intestate were to be established by judicial or other satisfactory legal proceedings, and, in truth in the case last cited, the commissioners were nothing more than special commissioners. The legislative department, in passing these acts, investigated nothing, nor did an act which could be deemed a judicial inquiry. It neither examined proof, nor determined the nature or extent of claims; it merely authorized the application of the real estate to the payment of debts generally discriminating in favor of no one creditor, and giving no one a preference over another. Not so in the case before us; the amount is investigated and ascertained, and the sale is directed for the benefit of two persons exclusively. The proceeds are to be applied to the payment of such claims and none other, for liabilities said to be incurred but not liquidated or satisfied; and those, too, created after the death of the intestate." See also Mason *v.* Wait, 4 Scam. 127–134. The case of Estep *v.* Hutchman, 14 S. & R. 435, would seem to be more open to question on this point than any of the others before cited. It was the case of a special statute, authorizing the guardian of infant heirs to convey their lands in satisfaction of a contract made by their ancestor; and which was sustained. Compare this with Jones *v.* Perry, 10 Yerg. 59, where an act authorizing a guardian to sell lands to pay the ancestor's debts was held void.

of the United States, under certain circumstances," approved May 23, 1844, and which provided that the trust under said act should be conducted under such rules and regulations as may be prescribed by the legislative authority of the State," &c., the legislature passed an act authorizing the trustee to give deeds to a person named therein, and those claiming under him; thus undertaking to dispose of the whole trust to the person thus named and his grantees, and authorizing no one else to be considered or to receive any relief. This was very plainly an attempted adjudication upon the rights of the parties concerned; it did not establish regulations for the administration of the trust, but it adjudged the trust property to certain claimants exclusively, in disregard of any rights which might exist in others; and it was therefore declared to be [* 106] void.[1] And it has also been held that, whether a * corporation has been guilty of abuse of authority under its

[1] Cash, Appellant, 6 Mich. 193. The case of Powers *v.* Bergen, 6 N. Y. 358, is perhaps to be referred to another principle than that of encroachment upon judicial authority. That was a case where the legislature, by special act, had undertaken to authorize the sale of property, not for the purpose of satisfying liens upon it, or of meeting or in any way providing for the necessities or wants of the owners, but solely, after paying expenses, for the investment of the proceeds. It appears from that case that the executors under the will of the former owner held the lands in trust for a daughter of the testator during her natural life, with a vested remainder in fee in her two children. The special act assumed to empower them to sell and convey the complete fee, and apply the proceeds, *first*, to the payment of their commissions, costs, and expenses; *second*, to the discharge of assessments, liens, charges, and incumbrances on the land, of which, however, none were shown to exist; and, *third*, to invest the proceeds and pay over the income, after deducting taxes and charges, to the daughter during her life, and after her decease to convey, assign, or pay over the same to the persons who would be entitled under the will. The court regarded this as an unauthorized interference with private property upon no necessity, and altogether void, as depriving the owners of their property contrary to the "law of the land." At the same time the authority of those cases, where it has been held that the legislature, acting as the guardian and protector of those who are disabled to act for themselves by reason of infancy, lunacy, or other like cause, may constitutionally pass either general or private laws, under which an effectual disposition of their property might be made, was not questioned. The court cite, with apparent approval, the cases, among others, of Rice *v.* Parkman, 16 Mass. 326; Cochran *v.* Van Surlay, 20 Wend. 365; and Wilkinson *v.* Leland, 2 Pet. 657. The case of Ervine's Appeal, 16 Penn. St. 256, was similar, in the principles involved, to Powers *v.* Bergen, and was decided in the same way. See also Kneass's Appeal, 31 Penn. St. 87, and compare with Ker *v.* Kitchen, 17 Penn. St. 438; Martin's Appeal, 23 Penn. St. 437; Tharp *v.* Fleming, 1 Houston, 592.

charter, so as justly to subject it to forfeiture,[1] and whether a widow is entitled to dower in a specified parcel of land,[2] are judicial questions which cannot be decided by the legislature. In these cases there are necessarily adverse parties; the questions that would arise are essentially judicial, and over which the courts possess jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without a due consideration of the proper boundaries which mark the separation of legislative from judicial duties.[3]

* We have elsewhere referred to a number of cases where [* 107] statutes have been held unobjectionable which validated legal proceedings, notwithstanding irregularities apparent in them.[4] These statutes may as properly be made applicable to judicial as to ministerial proceedings; and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet if they are only in aid of judicial proceed-

[1] State *v.* Noyes, 47 Me. 189; Campbell *v.* Union Bank, 6 How. (Miss.) 661; Canal Co. *v.* Railroad Co. 4 G. & J. 122; Regents of University *v.* Williams, 9 G. & J. 365. In Miners Bank of Dubuque *v.* United States, 1 Morris, 482, a clause in a charter authorizing the legislature to repeal it for any abuse or misuser of corporate privileges was held to refer the question of abuse to the legislative judgment. The appointment of a receiver by the legislature for an insolvent bank was sustained in Carey *v.* Giles, 9 Geo. 253.

[2] Edwards *v.* Pope, 3 Scam. 465.

[3] The injustice and dangerous character of legislation of this description are well stated by the Supreme Court of Pennsylvania: "When, in the exercise of proper legislative powers, general laws are enacted which bear, or may bear, on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation. But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and, in the language of the Chief Justice in Greenough *v.* Greenough, in 11 Penn. St. 494, 'confesses itself too weak to stand against the antagonism of the legislature and the bar,' one independent co-ordinate branch of the government will become the subservient handmaid of the other, and a quiet, insidious revolution will be effected in the administration of the government, whilst its form on paper remains the same." Ervine's Appeal, 16 Penn. St. 268.

[4] See *post*, pp. 371–381.

ings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so, it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and, for the same reason, it would be incompetent for it, by retrospective legislation, to make valid proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable: *first*, as an exercise of judicial power, since, the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and, *second*, because, in all judicial proceedings, notice to parties and an opportunity to defend are essential, — both of which they would be deprived of in such a case.[1] And for like reasons a statute validating

[1] In McDaniel *v.* Correll, 19 Ill. 226, it appeared that a statute had been passed to make valid certain legal proceedings by which an alleged will was adjudged void, and which were had against non-resident defendants, over whom the courts had obtained no jurisdiction. The court say: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding, than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree in this case the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants by the will are taken from them and given to others, according to our statute of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies which before belonged to the legatees have now ceased to be theirs, and this result has been brought about

proceedings *had before an intruder into a judicial office, [*108] before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject-matter, would also be void.[1]

by the legislative act alone. The effect of the act upon them is precisely the same as if it had declared in direct terms that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs-at-law of the testator, according to our law of descents. This it will not be pretended that they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law."

[1] In Denny *v.* Mattoon, 2 Allen, 361, a judge in insolvency had made certain orders in a case pending in another jurisdiction, and which the courts subsequently declared to be void. The legislature then passed an act declaring that they "are hereby confirmed, and the same shall be taken and deemed good and valid in law, to all intents and purposes whatsoever." On the question of the validity of this act the court say: "The precise question is, whether it can be held to operate so as to confer a jurisdiction over parties and proceedings which it has been judicially determined does not exist, and give validity to acts and processes which have been adjudged void. The statement of this question seems to us to suggest the obvious and decisive objection to any construction of the statute which would lead to such a conclusion. It would be a direct exercise by the legislature of a power in its nature clearly judicial, from the use of which it is expressly prohibited by the thirtieth article of the Declaration of Rights. The line which marks and separates judicial from legislative duties and functions is often indistinct and uncertain, and it is sometimes difficult to decide within which of the two classes a particular subject falls. All statutes of a declaratory nature, which are designed to interpret or give a meaning to previous enactments, or to confirm the rights of parties either under their own contracts or growing out of the proceedings of courts or public bodies, which lack legal validity, involve in a certain sense the exercise of a judicial power. They operate upon subjects which might properly come within the cognizance of the courts and form the basis of judicial consideration and judgment. But they may, nevertheless, be supported as being within the legitimate sphere of legislative action, on the ground that they do not declare or determine, but only confirm rights; that they give effect to the acts of parties according to their intent; that they furnish new and more efficacious remedies, or create a more beneficial interest or tenure, or, by supplying defects and curing informalities in the proceedings of courts, or of public officers acting within the scope of their authority, they give effect to acts to which there was the express or implied assent of the parties interested. Statutes which are intended to accomplish such purposes do not necessarily invade the province, or directly interfere with the action of judicial tribunals. But if we adopt the broadest and most comprehensive view of the power of the legislature, we must place some limit beyond which the authority of the legislature cannot go without trenching on the clear and well-defined boundaries of judicial power." "Although it may be difficult, if not impossible, to lay down any general rule which may serve to determine, in all cases, whether the limits of constitutional

[* 109] *Legislative Divorces.*

There is another class of cases in which it would seem that action ought to be referred exclusively to the judicial tribunals, but in respect to which the prevailing doctrine seems to be, [* 110] that the legislature * has complete control unless specially restrained by the State constitution. The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the Colonial and State legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases. Now it is clear that "the question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be

restraint are overstepped by the exercise by one branch of the government of powers exclusively delegated to another, it certainly is practicable to apply to each case as it arises some test by which to ascertain whether this fundamental principle is violated. If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of the courts of justice to apply established principles to cases within their jurisdiction, and to enforce their jurisdiction by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held, that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right to a review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action. Taylor *v.* Place, 4 R. I. 324, 337; Lewis *v.* Webb, 3 Me. 326; Dechastellux *v.* Fairchild, 15 Penn. St. 18. *A fortiori*, an act of the legislature cannot set aside or amend final judgments or decrees." The court further consider the general subject at length, and adjudge the particular enactment under consideration void, both as an exercise of judicial authority, and also because, in declaring valid the void proceedings in insolvency against the debtor, under which assignees had been appointed, it took away from the debtor his property, "not by due process of law or the law of the land, but by an arbitrary exercise of legislative will."

confined exclusively to the judicial tribunals, under the limitations to be prescribed by law;"[1] and so strong is the general conviction of this fact, that the people in framing their constitutions, in a majority of the States, have positively forbidden any such special laws.[2]

[1] 2 Kent, 106. See Levins *v.* Sleator, 2 Greene (Iowa), 607.

[2] The following are constitutional provisions: — *Alabama:* Divorces from the bonds of matrimony shall not be granted but in the cases by law provided for, and by suit in chancery; but decrees in chancery for divorce shall be final, unless appealed from in the manner prescribed by law, within three months from the date of the enrolment thereof. *Arkansas:* The General Assembly shall not have power to pass any bill of divorce, but may prescribe by law the manner in which such cases may be investigated in the courts of justice, and divorces granted. *California:* No divorce shall be granted by the legislature. The provision is the same or similar in Iowa, Indiana, Maryland, Michigan, Minnesota, Nevada, Nebraska, Oregon, New Jersey, Texas, and Wisconsin. *Florida:* Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law. *Georgia:* The Superior Court shall have exclusive jurisdiction in all cases of divorce, both total and partial. *Illinois:* The General Assembly shall not pass . . . special laws . . . for granting divorces. *Kansas:* And power to grant divorces is vested in the District Courts subject to regulations by law. *Kentucky:* The General Assembly shall have no power to grant divorces, . . . but by general laws shall confer such powers on the courts of justice. *Louisiana:* The legislature may enact general laws regulating the . . . granting of divorce; but no special laws shall be enacted relating to particular or individual cases. *Massachusetts:* All causes of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council, until the legislature shall by law make other provision. *Mississippi:* Divorces from the bonds of matrimony shall not be granted but in cases provided for by law, and by suit in chancery. *New Hampshire:* All causes of marriage, divorce, and alimony . . . shall be heard and tried by the Superior Court, until the legislature shall by law make other provision. *New York:* No law shall be passed abridging the right of the people peaceably to assemble and petition the government, or any department thereof, nor shall any divorce be granted otherwise than by due judicial proceedings. *North Carolina:* The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any particular case. *Ohio:* The General Assembly shall grant no divorce, nor exercise any judicial power, not herein expressly conferred. *Pennsylvania:* The legislature shall not have power to enact laws annulling the contract of marriage in any case where by law the courts of this Commonwealth are, or hereafter may be, empowered to decree a divorce. *Tennessee:* The legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law; but such laws shall be general and uniform in their operation throughout the State. *Virginia:* The legislature shall confer on the courts the power to grant divorces, . . . but shall not, by special legislation, grant relief in such

[*111] *Of the judicial decisions on the subject of legislative power over divorces there seem to be three classes of cases. The doctrine of the first class seems to be this: The granting of a divorce may be either a legislative or a judicial act, according as the legislature shall refer its consideration to the courts, or reserve it to itself. The legislature has the same full control over the *status* of husband and wife which it possesses over the other domestic relations, and may permit or prohibit it according to its own views of what is for the interest of the parties or the good of the public. In dissolving the relation, it proceeds upon such reasons as to it seem sufficient; and if inquiry is made into the facts of the past, it is no more than is needful when any change of the law is contemplated, with a view to the establishment of more salutary rules for the future. The inquiry, therefore, is not judicial in its nature, and it is not essential that there be any particular finding of misconduct or unfitness in the parties. As in other cases of legislative action, the reasons or the motives of the legislature cannot be inquired into; the relation which the law permitted before is now forbidden, and the parties are absolved from the obligations growing out of that relation which continued so long as the relation existed, but which necessarily cease with its termination. Marriage is not a contract, but a *status;* the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties [*112] of *rights contrary to the law of the land, but, as in other cases within the scope of the legislative authority, the legislative will must be regarded as sufficient reason for the rule which it promulgates.[1]

cases, or in any other case of which the courts or other tribunals may have jurisdiction. *Missouri:* The legislature shall not pass special laws divorcing any named parties. Under the Constitution of Michigan it was held that, as the legislature was prohibited from granting divorces, they could pass no special act authorizing the courts to divorce for a cause which was not a legal cause for divorce under the general laws. Teft *v.* Teft, 3 Mich. 67. See also Clark *v.* Clark, 10 N. H. 387.

[1] The leading case on this subject is Starr *v.* Pease, 8 Conn. 541. On the question whether a divorce is necessarily a judicial act, the court say: "A further objection is urged against this act; viz., that, by the new constitution of 1818, there is an entire separation of the legislative and judicial departments, and that the legislature can now pass no act or resolution not clearly warranted by that constitution; that the constitution is a grant of power, and not a limitation of

*The second class of cases to which we have alluded [*113] hold that divorce is a judicial act in those cases upon which the general laws confer on the courts power to adjudicate;

powers already possessed; and, in short, that there is no reserved power in the legislature since the adoption of this constitution. Precisely the opposite of this is true. From the settlement of the State there have been certain fundamental rules by which power has been exercised. These rules were embodied in an instrument called by some a constitution, by others a charter. All agree that it was the first constitution ever made in Connecticut, and made, too, by the people themselves. It gave very extensive powers to the legislature, and left too much (for it left every thing almost) to their will. The constitution of 1818 proposed to, and in fact did, limit that will. It adopted certain general principles by a preamble called a Declaration of Rights; provided for the election and appointment of certain organs of the government, such as the legislative, executive, and judicial departments; and imposed upon them certain restraints. It found the State sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the Constitution of the United States, nor opposed to the sound maxims of legislation; and it left them in the same condition, except so far as limitations were provided. There is now and has been a law in force on the subject of divorces. The law was passed a hundred and thirty years ago. It provides for divorces *a vinculo matrimonii* in four cases; viz., adultery, fraudulent contract, wilful desertion, and seven years' absence unheard of. The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the Parliament of Great Britain, and passed special acts of divorce *a vinculo matrimonii;* and at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law upon this subject; nor into the expediency of such frequent interference of the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the Constitution of the United States or by that of this State. In view of the appalling consequences of declaring the general law of the State, or the repeated acts of our legislature, unconstitutional and void, consequences easily perceived, but not easily expressed, — such as bastardizing the issue and subjecting the parties to punishment for adultery, — the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void." Per *Daggett*, J., *Hosmer*, Ch. J., and *Bissell*, J., concurring. *Peters*, J., dissented. Upon the same subject, see Crane *v.* Meginnis, 1 G. & J. 463; Wright *v.* Wright, 2 Md. 429; Gaines *v.* Gaines, 9 B. Monr. 295; Cabell *v.* Cabell, 1 Met. (Ky.) 319; Dickson *v.* Dickson, 1 Yerg. 110; Melizet's Appeal, 17 Penn. St. 449; Cronise *v.* Cronise, 54 Penn. St. 255; Adams *v.* Palmer, 51 Me. 480; Townsend *v.* Griffin, 4 Harr. 440; Noel *v.* Ewing, 9 Ind. 37; and the examination of the whole subject by Mr. Bishop, in his work on Marriage and Divorce.

and that consequently in those cases the legislature cannot pass special laws, but its full control over the relation of marriage will leave it at liberty to grant divorces in other cases, for such causes as shall appear to its wisdom to justify them.[1]

A third class of cases deny altogether the authority of these special legislative enactments, and declare the act of divorce to be in its nature judicial, and not properly within the province of the legislative power.[2] The most of these decisions, however, lay more or less stress upon clauses in the constitutions other than those which in general terms separate the legislative and judicial functions, and some of them would perhaps have been differently decided but for those other clauses. But it is safe to say, that the general sentiment in the legal profession is against the rightfulness of special legislative divorces; and it is believed that, if the question could originally have been considered by the courts, unembarrassed by any considerations of long acquiescence, and of the serious consequences which must result from affirming their unlawfulness, after so many had been granted and new relations formed, it is highly probable that these enactments would have been held to be usurpations of judicial authority, and we should have been spared the necessity for the special constitutional provisions which have since been introduced. Fortunately, these provisions render the question now discussed of little practical importance; at the same time that they refer the [* 114] decision * upon applications for divorce to those tribunals which must proceed upon inquiry, and cannot condemn without a hearing.[3]

The force of a legislative divorce must in any case be confined

[1] Levins *v.* Sleator, 2 Greene (Iowa), 604; Opinions of Judges, 16 Me. 479; Adams *v.* Palmer, 51 Me. 480. See also Townsend *v.* Griffin, 4 Harr. 440. In a well-reasoned case in Kentucky, it was held that a legislative divorce, obtained on the application of one of the parties while suit for divorce was pending in a court of competent jurisdiction, would not affect the rights to property of the other, growing out of the relation. Gaines *v.* Gaines, 9 B. Monr. 295.

[2] Brigham *v.* Miller, 17 Ohio, 445; Clark *v.* Clark, 10 N. H. 380; Ponder *v.* Graham, 4 Flor. 23; State *v.* Fry, 4 Mo. 120; Bryson *v.* Campbell, 12 Mo. 498; Bryson *v.* Bryson, 17 Mo. 590. See also Jones *v.* Jones, 12 Penn. St. 353, 354.

[3] If marriage is a natural right, then it would seem that any particular marriage that parties might lawfully form they must have a lawful right to continue in, unless by misbehavior they subject themselves to a forfeiture of the right. And if the legislature can annul the relation in one case, without any finding

to a dissolution of the relation; it can only be justified on the ground that it merely lays down a rule of conduct for the parties to observe towards each other for the future. It cannot inquire into the past, with a view to punish the parties for their offences against the marriage relation, except so far as the divorce itself can be regarded as a punishment. It cannot order the payment of alimony, for that would be a judgment;[1] it cannot adjudge upon conflicting claims to property between the parties, but it must leave all questions of this character to the courts. Those rights of property which depend upon the continued existence of the relation will be terminated by the dissolution, but only as in any other case rights in the future may be incidentally affected by a change in the law.[2]

Legislative Encroachments upon Executive Power.

If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the performance of * many duties which they may provide for by law, [*115] they may refer either to the chief executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty. What can be definitely said on this subject is this: That such powers as are specially conferred by the constitution upon the governor, or upon any specified officer, the legislature cannot authorize to be performed

that a breach of the marriage contract has been committed, then it would seem that they might annul it in every case, and even prohibit all parties from entering into the same relation in the future. The recognition of a full and complete control of the relation in the legislature, to be exercised at its will, leads inevitably to this conclusion; so that, under the "rightful powers of legislation" which our constitutions confer upon the legislative department, a relation essential to organized civil society might be abrogated entirely. Single legislative divorces are but single steps towards this barbarism which the application of the same principle to every individual case, by a general law, would necessarily bring upon us. See what is said by the Supreme Court of Missouri in Bryson *v.* Bryson, 17 Mo. 593, 594.

[1] Crane *v.* Meginnis, 1 G. & J. 463.

[2] Starr *v.* Pease, 8 Conn. 545.

by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.[1] But other powers or duties the executive cannot exercise or assume except by legislative authority, and the power which in its discretion it confers it may also withhold or confer in other directions.[2] Whether in those cases where power is given by the constitution to the governor, the legislature have the same authority to make rules for the exercise of the power, that they have to make rules to govern the proceedings in the courts, may perhaps [*116] be a question.[3] It would seem * that this must depend

[1] Attorney-General *v.* Brown, 1 Wis. 522. "Whatever power or duty is expressly given to, or imposed upon, the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case where the subject is committed to the *discretion* of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise." Under the Constitution of Ohio, which forbids the exercise of any appointing power by the legislature, except as therein authorized, it was held that the legislature could not, by law, constitute certain designated persons a State board, with power to appoint commissioners of the State House, and directors of the penitentiary, and to remove such directors for cause. State *v.* Kennon, 7 Ohio, N. S. 546. And see Davis *v.* State, 7 Md. 161.

[2] "In deciding this question [as to the authority of the governor], recurrence must be had to the constitution. That furnishes the only rule by which the court can be governed. That is the charter of the governor's authority. All the powers delegated to him by, or in accordance with that instrument, he is entitled to exercise, and no others. The constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the constitution." Field *v.* People, 2 Scam. 80.

[3] Whether the legislature can constitutionally remit a fine, when the pardoning power is vested in the governor by the constitution, has been made a question; and the cases of Haley *v.* Clarke, 26 Ala. 439, and People *v.* Bircham, 12 Cal. 50, are opposed to each other upon the point. If the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they would have to release any other debtor to the State from his obligation. In Morgan *v.* Buffington, 21 Mo. 549, it was held that the State Auditor was not obliged to accept as conclusive the certificate from the Speaker of the House as to the sum due a member of the House for attendance upon it, but that he might lawfully inquire whether the amount had been actually earned by attendance or not. The legislative rule, therefore, cannot go to the extent of compelling an executive officer to do something else than his duty, under any pretence of regulation. The power to pardon offenders is vested by the several State constitutions in the governor. It is not, however, a power which neces-

generally upon the nature of the power, and upon the question whether the constitution, in conferring it, has furnished a sufficient rule for its exercise. If complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but when the governor is made commander-in-chief of the military forces of the State, his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation upon the power of the legislature to prescribe rules for the executive department, that they must not be such as, under pretence of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. Those matters which the constitution specifically confides to him the legislature cannot directly or indirectly take from his control.

Delegating Legislative Power.

One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone * the laws must be made until the constitution [*117] itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute

sarily inheres in the executive. State *v.* Dunning, 9 Ind. 22. And several of the State constitutions have provided that it shall be exercised under such regulations as shall be prescribed by law. There are provisions more or less broad to this purport in those of Kansas, Florida, Alabama, Arkansas, Texas, Mississippi, Oregon, Indiana, Iowa, and Virginia. In State *v.* Dunning, 9 Ind. 20, an act of the legislature requiring the applicant for the remission of a fine or forfeiture to forward to the governor, with his application, the opinion of certain county officers as to the propriety of the remission, was sustained as an act within the power conferred by the constitution upon the legislature to prescribe regulations in these cases. And see Branham *v.* Lange, 16 Ind. 500. The power to reprieve is not included in the power to pardon. *Ex parte* Howard, 17 N. H. 545.

the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[1]

But it is not always essential that a legislative act should be a completed statute which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event.[2] Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option. A private act of incorporation cannot be forced upon the corporators; they may refuse the franchise if they so choose.[3] In these cases the leg- [* 118] islative * act is regarded as complete when it has passed through the constitutional formalities necessary to perfected legislation, notwithstanding its actually going into operation

[1] "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government: —

"*First.* They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.

"*Secondly.* These laws also ought to be designed for no other end ultimately but the good of the people.

"*Thirdly.* They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

"*Fourthly.* The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." Locke on Civil Government, § 142.

That legislative power cannot be delegated, see Thorne *v.* Cramer, 15 Barb. 112; Bradley *v.* Baxter, *ib.* 122; Barto *v.* Himrod, 8 N. Y. 483; People *v.* Stout, 23 Barb. 349; Rice *v.* Foster, 4 Harr. 479; Santo *v.* State, 2 Iowa, 165; Geebrick *v.* State, 5 Iowa, 491; State *v.* Beneke, 9 Iowa, 203; People *v.* Collins, 3 Mich. 243; Railroad Co. *v.* Commissioners of Clinton County, 1 Ohio, N. S. 77; Parker *v.* Commonwealth, 6 Penn. St. 507; Commonwealth *v.* McWilliams, 11 Penn. St. 61; Maize *v.* State, 4 Ind. 342; Meshmeier *v.* State, 11 Ind. 482; State *v.* Parker, 26 Vt. 362; State *v.* Swisher, 17 Texas, 441; State *v.* Copeland, 3 R. I. 33; State *v.* Wilcox, 45 Mo. 458.

[2] Brig Aurora *v.* United States, 7 Cranch, 382; Bull *v.* Read, 13 Grat. 78; State *v.* Parker, 26 Vt. 357; Peck *v.* Weddell, 17 Ohio, N. S. 271; State *v.* Kirkley, 29 Md. 85.

[3] Angell and Ames on Corp. § 81.

as law may depend upon its subsequent acceptance. We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power is not to be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. As municipal organizations are mere auxiliaries of the State government in the important business of municipal rule, the legislature may create them at will from its own views of propriety or necessity, and without consulting the parties interested; and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporators on that subject.[1]

Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to contract to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decision should be conclusive, unless, for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual.[2]

[1] City of Patterson *v.* Society, &c., 4 Zab. 385; Cheany *v.* Hooser, 9 B. Monr. 330; Berlin *v.* Gorham, 34 N. H. 266. The question of a levee tax may lawfully be referred to the voters of the district of territory over which it is proposed to spread the tax, regardless of municipal divisions. Alcorn *v.* Hamer, 38 Miss. 652. And see in general, Angell and Ames on Corp. § 31 and note; also *post*, pp. 190–192.

[2] Bull *v.* Read, 13 Grat. 78; Corning *v.* Greene, 23 Barb. 33; Morford *v.* Unger, 8 Iowa, 82; City of Patterson *v.* Society, &c., 4 Zab. 385; Gorham *v.* Springfield, 21 Me. 58; Commonwealth *v.* Judges of Quarter Sessions, 8 Penn.

[* 119] * For the like reasons the question whether a county or township shall be divided and a new one formed,[1] or two townships or school districts formerly one be reunited,[2] or a county seat located at a particular place, or after its location removed elsewhere,[3] or the municipality contract particular debts, or engage in a particular improvement,[4] is always a question which may

St. 391; Commonwealth *v.* Painter, 10 Penn. St. 214; Call *v.* Chadbourne, 46 Me. 206; State *v.* Scott, 17 Mo. 521; State *v.* Wilcox, 45 Mo. 458; Hobart *v.* Supervisors, &c., 17 Cal. 23; Bank of Chenango *v.* Brown, 26 N. Y. 467; Steward *v.* Jefferson, 3 Harr. 335; Burgess *v.* Pue, 2 Gill, 11. The right to refer to the people of several municipalities the question of their consolidation was disputed in Smith *v.* McCarthy, 56 Penn. St. 359, but sustained by the court.

[1] State *v.* Reynolds, 5 Gilm. 1.

[2] Commonwealth *v.* Judges, &c., 8 Penn. St. 391; Call *v.* Chadbourne, 46 Me. 206.

[3] Commonwealth *v.* Painter, 10 Penn. St. 214.

[4] The following are cases in which municipal subscriptions to works of internal improvement, under statutes empowering them to be made, have been sustained: Goddin *v.* Crump, 8 Leigh, 120; Bridgeport *v.* Housatonic Railroad Co. 15 Conn. 475; Thomas *v.* Leland, 24 Wend. 65; Clarke *v.* Rochester, 24 Barb. 446; Benson *v.* Mayor, &c., of Albany, 24 Barb. 248; Corning *v.* Greene, 23 Barb. 33; Grant *v.* Courter, 24 Barb. 232; Starin *v.* Genoa, 29 Barb. 442, and 23 N. Y. 439; Bank of Rome *v.* Village of Rome, 18 N. Y. 38; Prettyman *v.* Supervisors, &c., 19 Ill. 406; Robertson *v.* Rockford, 21 Ill. 451; Johnson *v.* Stack, 24 Ill. 75; Perkins *v.* Perkins, *ib.* 208; Bushnell *v.* Beloit, 10 Wis. 195; Clark *v.* Janesville, *ib.* 136; Stein *v.* Mobile, 24 Ala. 591; Mayor of Wetumpka *v.* Winter, 29 Ala. 651; Pattison *v.* Yuba, 13 Cal. 175; Blanding *v.* Burr, *ib.* 343; Hobart *v.* Supervisors, &c., 17 Cal. 23; Dubuque County *v.* Railroad Co. 4 Greene (Iowa), 1; State *v.* Bissell, *ib.* 328; Clapp *v.* Cedar County, 5 Iowa, 15; Gaines *v.* Robb, 8 Iowa, 193; McMillen *v.* Boyles, 6 Iowa, 304; Taylor *v.* Newberne, 2 Jones Eq. 141; Caldwell *v.* Justices of Burke, 4 Jones Eq. 323; Louisville, &c., Railroad Co. *v.* Davidson, 1 Sneed, 637; Nichol *v.* Mayor of Nashville, 9 Humph. 252; Railroad Co. *v.* Commissioners of Clinton Co. 1 Ohio, N. S. 77; Trustees of Paris *v.* Cherry, 8 Ohio, N. S. 564; Cass *v.* Dillon, 2 Ohio, N. S. 607; State *v.* Commissioners of Clinton Co. 6 Ohio, N. S. 280; State *v.* Van Horne, 7 Ohio, N. S. 327; State *v.* Trustees of Union, 8 Ohio, N. S. 394; Trustees, &c. *v.* Shoemaker, 12 Ohio, N. S. 624; State *v.* Commissioners of Hancock, 12 Ohio, N. S. 596; Powers *v.* Dougherty Co. 23 Geo. 65; San Antonio *v.* Jones, 28 Texas, 19; Commonwealth *v.* McWilliams, 11 Penn. St. 61; Sharpless *v.* Mayor, &c., 21 Penn. St. 147; Moers *v.* Reading, *ib.* 188; Talbot *v.* Dent, 9 B. Monr. 526; Slack *v.* Railroad Co. 13 B. Monr. 1; City of St. Louis *v.* Alexander, 23 Mo. 483; City of Aurora *v.* West, 9 Ind. 74; Cotton *v.* Commissioners of Leon, 6 Flor. 610; Copes *v.* Charleston, 10 Rich. 491; Commissioners of Knox County *v.* Aspinwall, 21 How. 539, and 24 How. 326; Same *v.* Wallace, 21 How. 547; Zabriske *v.* Railroad Co. 23 How. 381;

with propriety be referred to the voters of the municipality for decision.

The question then arises, whether that which may be done in * reference to any municipal organization within [* 120] the State may not also be done in reference to the State at large? May not any law framed for the State at large be made conditional on an acceptance by the people at large, declared through the ballot-box? If it is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it not quite as clearly be within the power of the legislature to refer to the people at large, from whom all power is derived, the decision upon any proposed statute affecting the whole State? And can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned, and where perhaps there are questions of policy and propriety involved which no authority can decide so satisfactorily and so conclusively as the principal to whom they are referred.

If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the State, any more than there is to refer it to any other authority. The prevailing doctrine in the courts appears to be, that, except in those cases where, by the constitution, the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration. "The exercise of this power by the people in other cases is not expressly and in terms prohibited by the constitution, but it is forbidden by necessary and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with

Amey *v.* Mayor, &c., 24 How. 365; Gelpecke *v.* Dubuque, 1 Wal. 175; Thompson *v.* Lee County, 3 Wal. 327; Rogers *v.* Burlington, *ib.* 654; Butler *v.* Dunham, 27 Ill. 474; Gibbons *v.* Mobile & Great Northern Railroad Co. 36 Ala. 410; St. Joseph, &c., Railroad Co. *v.* Buchanan Co. Court, 39 Mo. 485; State *v.* Linn Co. Court, 44 Mo. 504. In several of them the power to authorize the municipalities to decide upon such subscriptions has been contested as a delegation of legislative authority, but the courts — even those which hold the subscriptions void on other grounds — do not look upon these cases as being obnoxious to the constitutional principle referred to in the text.

the power of general legislation. They possess the entire power, with the exception above stated. The people reserved no part of it to themselves [with that exception], and can therefore exercise it in no other case." It is therefore held that the legislature have no power to submit a proposed law to the people, nor have the people power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. The government of the State is democratic, but it is a representative democracy, and in passing general laws the people act only through their representatives in the legislature.[1]

[* 121] * Nor, it seems, can such legislation be sustained as legislation of a conditional character, whose force is to depend upon the happening of some future event, or upon some future change of circumstances. " The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law ; an event on which the expediency of the law in the opinion of the law-makers depends. On this question of expediency, the legislature must exercise its own judgment definitively and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the

[1] Per *Ruggles*, Ch. J., in Barto *v.* Himrod, 8 N. Y. 489. It is worthy of consideration, however, whether there is any thing in the reference of a statute to the people for acceptance or rejection which is inconsistent with the representative system of government. To refer it to the people to frame and agree upon a statute for themselves would be equally impracticable and inconsistent with the representative system ; but to take the opinion of the people upon a bill already framed by representatives and submitted to them, is not only practicable, but is in precise accordance with the mode in which the constitution of the State is adopted, and with the action which is taken in many other cases. The representative in these cases has fulfilled precisely those functions which the people as a democracy could not fulfil ; and where the case has reached a stage when the body of the people can act without confusion, the representative has stepped aside to allow their opinion to be expressed. The legislature is not attempting in such a case to delegate its authority to a new agency, but the trustee, vested with a large discretionary authority, is taking the opinion of the principal upon the necessity, policy, or propriety of an act which is to govern the principal himself.

constitution imposes upon them." But it was held that in the case of the submission of a proposed free-school law to the people, no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the School Act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was to take effect was nothing else than the vote of the people on the identical question which the constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a * contingency, [* 122] because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised.[1]

[1] Per *Ruggles*, Ch. J., in Barto *v.* Himrod, 8 N. Y. 490. And see Santo *v.* State, 2 Iowa, 165; State *v.* Beneke, 9 Iowa, 203; State *v.* Swisher, 17 Texas, 441; State *v.* Field, 17 Mo. 529; Bank of Chenango *v.* Brown, 26 N. Y. 470; People *v.* Stout, 23 Barb. 349; State *v.* Wilcox, 45 Mo. 458. But upon this point there is great force in what is said by *Redfield*, Ch. J. in State *v.* Parker, 26 Vt. 357: "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. And to us the contingency, upon which the present statute was to be suspended until another legislature should meet and have opportunity of reconsidering it, was not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute; for at the very threshold of inquiry into the expediency of such a law lies the other and more important inquiry, Are the people prepared for such a law? Can it be successfully enforced? These questions being answered in the affirmative, he must be a bold man who would even vote against the law; and something more must he be who would, after it had been passed with that assurance, be willing to embarrass its operation or rejoice at its defeat.

"After a full examination of the arguments by which it is attempted to be sustained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare that I am fully convinced — although at first, without much examination, somewhat inclined to the same opinion — that the opinion is the result of false analogies, and so founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice, — rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases;

[* 123] * The same reasons which preclude the original enactment of a law from being referred to the people would render it equally incompetent to refer to their decision the question, whether an existing law should be repealed. If the one is "a plain surrender to the people of the law-making power," so also is the other.[1] It would seem, however, that if a legislative act is, by its terms, to take effect in any contingency, it is not unconstitutional to make the *time* when it shall take effect depend upon the event of a popular vote being for or against it, — the time of its going into operation being postponed to a later day in the latter contingency.[2] It would also seem that if the question of the acceptance or rejection of a municipal charter can be referred to the voters of the locality specially interested, it would be equally competent to refer to them the question whether a State law establishing a particular police regulation should be of force in such locality or not. Municipal charters refer most questions of local

for . . . one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the people of these States, and in others by the lords of the treasury, or the boards of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies. It is, in fact, the only possible mode of meeting them, unless Congress is kept constantly in session. The same is true of acts of Congress by which power is vested in the President to levy troops or draw money from the public treasury, upon the contingency of a declaration or an act of war committed by some foreign state, empire, kingdom, prince, or potentate. If these illustrations are not sufficient to show the fallacy of the argument, more would not avail." See also State *v.* Noyes, 10 Fost. 292; Bull *v.* Read, 13 Grat. 78; Johnson *v.* Rich, 9 Barb. 680; State *v.* Reynolds, 5 Gilm. 1; Robinson *v.* Bidwell, 22 Cal. 349.

[1] Geebrick *v.* State, 5 Iowa, 491; Rice *v.* Foster, 4 Harr. 492; Parker *v.* Commonwealth, 6 Penn. St. 507.

[2] State *v.* Parker, 26 Vt. 357. The act under consideration in that case was, by its terms, to take effect on the second Tuesday of March after its passage, unless the people, to whose votes it was submitted, should declare against it, in which case it should take effect in the following December. The case was distinguished from Barto *v.* Himrod, 8 N. Y. 483, and the act sustained. At the same time the court express their dissent from the reasoning upon which the New York case rests. In People *v.* Collins, 3 Mich. 343, the court was equally divided in a case similar to that in Vermont, except that in the Michigan case the law, which was passed and submitted to the people in 1853, was not to go into effect until 1870, if the vote of the people was against it.

government, including police regulations, to the local authorities; on the supposition that they are better able to decide for themselves upon the needs, as well as the sentiments, of their constituents, than the legislature possibly can be, and are therefore more competent to judge what local regulations are important, and also how far the local sentiment will assist in their enforcement. The same reasons would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing them less extensive powers of local government than a municipal charter would confer; and the fact that the rule of law on that subject might be different in different * localities, according as the people accepted or [*124] rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority.[1] It is not to be denied, however, that there is considerable authority against the right of legislative delegation in these cases.

The legislature of Delaware, in 1847, passed an act to authorize the citizens of the several counties of the State to decide by ballot whether the license to retail intoxicating liquors should be permitted. By this act a general election was to be held: and if a

[1] In New Hampshire an act was passed declaring bowling-alleys, situate within twenty-five rods of a dwelling-house, nuisances; but the statute was to be in force only in those towns in which it should be adopted in town meeting. In State *v.* Noyes, 10 Fost. 293, this act was held to be constitutional. "Assuming," say the court, "that the legislature has the right to confer the power of local regulation upon cities and towns, that is, the power to pass ordinances and by-laws, in such terms and with such provisions, in the classes of cases to which the power extends, as they may think proper, it seems to us hardly possible seriously to contend that the legislature may not confer the power to adopt within such municipality a law drawn up and framed by themselves. If they may pass a law authorizing towns to make ordinances to punish the keeping of billiard-rooms, bowling-alleys, and other places of gambling, they may surely pass laws to punish the same acts, subject to be adopted by the town before they can be of force in it." And it seems to us difficult to answer this reasoning, if it be confined to such laws as fall within the proper province of local government, and which are therefore usually referred to the judgment of the municipal authorities or their constituency. A similar question arose in Smith *v.* Village of Adrian, 1 Mich. 495, but was not decided. In Bank of Chenango *v.* Brown, 26 N. Y. 467, it was held competent to authorize the electors of an incorporated village to determine for themselves what sections of the general act for the incorporation of villages should apply to their village.

majority of votes in any county should be cast against license, it should not thereafter be lawful for any person to retail intoxicating liquors within such county; but if the majority should be cast in favor of license, then licenses might be granted in the county so voting, in the manner and under the regulations in said act prescribed. The Court of Errors and Appeals of that State held this act void, as an attempted delegation of the trust to make laws, and upon the same reasons which support the cases before cited, where acts have been held void which referred to the people of the State for approval a law of general application.[1] The same decision was made near the same time by the Supreme
[* 125] * Court of Pennsylvania,[2] followed afterwards in an elaborate opinion by the Supreme Court of Iowa.[3]

By statute in Indiana it was enacted that no person should retail spirituous liquors, except for sacramental, mechanical, chemical, medicinal, or culinary purposes, without the consent of the majority of the legal voters of the proper township who might cast their votes for license at the April election, nor without filing with the county auditor a bond as therein provided; upon the filing of which the auditor was to issue to the person filing the same a license to retail spirituous liquors, which was to be good for one year from the day of the election. This act was held void upon similar reasons to those above quoted.[4] This case follows the decisions in Pennsylvania and Delaware,[5] and it has since been followed by another decision of the Supreme Court of that State, except that while in the first case only that portion of the statute which provided for submission to the people was held void, in the later case that unconstitutional provision was held to affect the whole statute with infirmity, and render the whole invalid.[6]

Irrepealable Laws.

Similar reasons to those which forbid the legislative department of the State from delegating its authority will also forbid its pass-

[1] Rice *v.* Foster, 4 Harr. 479.

[2] Parker *v.* Commonwealth, 6 Penn. St. 507.

[3] Geebrick *v.* State, 5 Iowa, 495.

[4] Maize *v.* State, 4 Ind. 342.

[5] Parker *v.* Commonwealth, 6 Penn. St. 507; Rice *v.* Foster, 4 Harr. 479. See also State *v.* Field, 17 Mo. 529; Commonwealth *v.* McWilliams, 11 Penn. St. 61; State *v.* Copeland, 3 R. I. 33.

[6] Meshmeier *v.* State, 11 Ind. 484.

ing any irrepealable law. The constitution, in conferring the legislative authority, has prescribed to its exercise any limitations which the people saw fit to impose; and no other power than the people can superadd other limitations. To say that the legislature may pass irrepealable laws, is to say that it may alter the very constitution from which it derives its authority; since in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors, and the process might be repeated until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision, that the * leg- [*126] islative power shall be vested in two houses, would be to a greater or less degree rendered ineffectual.[1]

"Acts of Parliament," says Blackstone, "derogatory to the power of subsequent Parliaments, bind not; so the statute 11 Henry VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of Parliament or otherwise, is held to be good only as to common prosecutions for high treason, but it will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, and always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent Parliament. And upon the same principle, Cicero, in his letters to Atticus, treats with a proper contempt those restraining clauses which endeavor to tie up the hands of succeeding legislatures. 'When

[1] "Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has a right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract. If in any line of legislation, a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors; whether it would be wise to do so, is a matter for legislative discretion." Bloomer *v.* Stolley, 5 McLean, 161. See this subject considered in Wall *v.* State, 23 Ind. 150. In Kellogg *v.* Oshkosh, 14 Wis. 623, it was held that one legislature could not bind a future one to a particular mode of repeal.

you repeal the law itself,' says he, 'you at the same time repeal the prohibitory clause which guards against such repeal.'"[1]

Although this reasoning does not in all its particulars apply to the American legislatures, the principle applicable in each case is the same. There is a modification of the principle, however, by an important provision of the Constitution of the United States, forbidding the States from passing any laws impairing the obligation of contracts. Legislative acts are sometimes in substance contracts between the State and the party who is to derive some right under them, and they are not the less under the protection of the clause quoted because of having assumed this form. Charters of incorporation, except those of a municipal character, — and which as we have already seen are mere agencies of [*127] government, — * are held to be contracts between the State and the corporators, and not subject to modification or change by the act of the State alone, except as may be authorized by the terms of the charters themselves.[2] And it now seems to be settled, by the decisions of the Supreme Court of the United States, that a State, by contract to that effect, based upon a consideration, may exempt the property of an individual or corporation from taxation for any specified period or permanently. And it is also settled, by the same decisions, that where a charter containing an exemption from taxes, or an agreement that the taxes shall be to a specified amount only, is accepted by the corporators, the exemption is presumed to be upon sufficient consideration, and consequently binding upon the State.[3]

[1] 1 Bl. Com. 90.

[2] Dartmouth College *v.* Woodward, 4 Wheat. 518; Planters Bank *v.* Sharp, 6 How. 301.

[3] Gordon *v.* Appeal Tax Court, 3 How. 133; New Jersey *v.* Wilson, 7 Cranch, 164; Piqua Branch Bank *v.* Knoop, 16 How. 369; Ohio Life Ins. and Trust Co. *v.* Debolt, 16 How. 416, 432; Dodge *v.* Woolsey, 18 How. 331; Mechanics and Traders Bank *v.* Debolt, 18 How. 381; Jefferson Branch Bank *v.* Skelly, 1 Black, 436. See also Hunsaker *v.* Wright, 30 Ill. 146; Spooner *v.* McConnell, 1 McLean, 347. The right of a State legislature to grant away the right of taxation, which is one of the essential attributes of sovereignty, has been strenuously denied. Debolt *v.* Ohio Life Ins. and Trust Co. 1 Ohio, N. S. 563; Mechanics and Traders Bank *v.* Debolt, *ib.* 591; Brewster *v.* Hough, 10 N. H. 143; Mott *v.* Pennsylvania Railroad Co. 30 Penn. St. 9. And see Thorpe *v.* Rutland and B. Railroad Co. 27 Vt. 146. In Brick Presbyterian Church *v.* Mayor, &c., of New York, 5 Cow. 538, it was held that a municipal corporation had no power,

Territorial Limitation to State Legislative Authority.

The legislative authority of every State must spend its force * within the territorial limits of the State. The [* 128] legislature of one State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State. It can have no authority upon the high seas beyond State lines, because there is the point of contact with other nations, and all international questions belong to the national government.[1] It cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offences at all, must be offences against the sovereignty within whose limits they have been done.[2] But if the consequences of an unlawful act committed outside the State have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such State.[3]

as a party, to make a contract which should control or embarrass its discharge of legislative duties. And see *post*, p. 206. In Coats *v.* Mayor, &c., of New York, 7 Cow. 585, it was decided that though a municipal corporation grant lands for cemetery purposes, and covenant for their quiet enjoyment, it will not thereby be estopped afterwards to forbid the use of the land, by by-law, for that purpose, when such use becomes or is likely to become a nuisance. See also, on the same subject, Morgan *v.* Smith, 4 Minn. 104; Hamrick *v.* Rouse, 17 Geo. 56, where it was held that the legislature could not bind its successors not to remove a county seat; Bass *v.* Fontleroy, 11 Texas, 698; Shaw *v.* Macon, 21 Geo. 280; Regents of University *v.* Williams, 9 G. & J. 390; Mott *v.* Pennsylvania Railroad Co. 30 Penn. St. 9. In Bank of Republic *v.* Hamilton, 21 Ill. 53, it was held that, in construing a statute, it will not be intended that the legislature designed to abandon its right as to taxation. This subject is considered further, post, pp. 280–284.

[1] 1 Bish. Cr. Law, § 120.

[2] State *v.* Knight, 2 Hayw. 109; People *v.* Merrill, 2 Park. Cr. R. 590; Adams *v.* People, 1 N. Y. 173; Tyler *v.* People, 8 Mich. 320; Morrissey *v.* People, 11 Mich. 327; Bromley *v.* People, 7 Mich. 472; State *v.* Main, 16 Wis. 398.

[3] In Tyler *v.* People, 8 Mich. 320, it was held constitutional to punish in Michigan a homicide committed by a mortal blow in Canadian waters, from which death resulted in the State. In Morrissey *v.* People, 11 Mich. 327, the court was divided on the question whether the State could lawfully provide for the punishment of persons who, having committed larceny abroad, brought the stolen

Other Limitations of Legislative Authority.

Besides the limitations of legislative authority to which we have referred, others exist which do not seem to call for special remark. Some of these are prescribed by constitutions,[1] but [* 129] * others spring from the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience. The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except perhaps where its action is clearly evasive, and where, under pretence of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.

property within the State. And see Bromley *v.* People, 7 Mich. 472; State *v.* Main, 16 Wis. 398.

[1] The restrictions upon State legislative authority are much more extensive in some constitutions than in others. The Constitution of Missouri has the following provision: "The General Assembly shall not pass special laws divorcing any named parties, or declaring any named person of age, or authorizing any named minor to sell, lease, or encumber his or her property, or providing for the sale of the real estate of any named minor or other person laboring under legal disability, by any executor, administrator, guardian, trustee, or other person, or establishing, locating, altering the course, or effecting the construction of roads, or the building or repairing of bridges, or establishing, altering, or vacating any street, avenue, or alley in any city or town, or extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or giving effect to informal or invalid wills or deeds, or legalizing, except as against the State, the unauthorized or invalid acts of any officer, or granting to any individual or company the right to lay down railroad tracks in the streets of any city or town, or exempting any property of any named person or corporation from taxation. The General

Assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable." Constitution of Missouri, art. 4, § 27. We should suppose that so stringent a provision would, in some of these cases, lead to the passage of general laws of doubtful utility in order to remedy the hardships of particular cases. As to when a general law can be made applicable, see Thomas *v.* Board of Commissioners, 5 Ind. 4; State *v.* Squires, 26 Iowa, 340; Johnson *v.* Railroad Co. 23 Ill. 202. In State *v.* Hitchcock, 1 Kansas, 178, it was held that the constitutional provision, that "in all cases where a general law can be made applicable, no special law shall be enacted," left a discretion with the legislature to determine the cases in which special laws should be passed. See to the same effect, Gentile *v.* State, 29 Ind. 409, overruling Thomas *v.* Board of Commissioners, *supra*. A constitutional provision that requires all laws of a general nature to have uniform operation throughout the State, is complied with in a statute applicable to all cities of a certain class having less than one hundred thousand inhabitants, though in fact there be but one city in the State of that class. Welker *v.* Potter, 18 Ohio, N. S. 85. See further, Bourland *v.* Hildreth, 26 Cal. 162; Brooks *v.* Hyde, 37 Cal. 366; McAurich *v.* Mississippi, &c., R.R. Co. 20 Iowa, 338; Rice *v.* State, 3 Kansas, 141; Jackson *v.* Shawl, 29 Cal. 267; Gentile *v.* State, 29 Ind. 409; State *v.* Parkinson, 5 Nev. 15.

[*351] *CHAPTER XI.

OF THE PROTECTION TO PROPERTY BY "THE LAW OF THE LAND."

THE protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the twenty-ninth chapter of Magna Charta, "which alone," says Sir William Blackstone, "would have merited the title that it bears of the *Great* Charter."[1] The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words it

[1] 4 Bl. Com. 424. The chapter, as it stood in the original charter of John, was: "Ne corpus liberi hominis capiatur nec imprisonetur nec disseisietur nec utlagetur nec exuletur nec aliquo modo destruatur nec rex eat vel mittat super eum vi nisi per judicium parium suorum vel per legem terre." No freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land. In the charter of Henry III. it was varied slightly, as follows: "Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ." See Blackstone's Charters. The Petition of Right — 1 Car. I. c. 1 — prayed, among other things, "that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent, by act of Parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command, without any charge." The Bill of Rights — 1 Wm. and Mary, § 2, c. 2 — was confined to an enumeration and condemnation of the illegal acts of the preceding reign; but the Great Charter of Henry III. was then, and is still, in force.

is to be found in each of the State constitutions;[1] and though verbal differences *appear in the different pro- [*352]

[1] The following are the constitutional provisions in the several States: — *Alabama:* "That, in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, or be deprived of his life, liberty, or property, but by due process of law." Art. 1, § 8. — *Arkansas:* "That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 2, § 10. — *California:* Like that of Alabama, substituting "process of law" for "course of law." Art. 1, § 8. — *Connecticut:* Same as Alabama. Art. 1, § 9. — *Delaware:* Like that of Alabama, substituting for "course of law," "the judgment of his peers, or the law of the land." Art. 1, § 7. — *Florida:* "That no person shall be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." Art. 1, § 9. — *Georgia:* "No person shall be deprived of life, liberty, or property, except by due process of law." Art. 1, § 2. — *Illinois* and *Iowa:* "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1, § 9. — *Kentucky:* "Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." Art. 13, § 12. — *Maine:* "Nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers, or the law of the land." Art. 1, § 6. — *Maryland:* "That no man ought to be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, § 23. — *Massachusetts:* "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, Art. 12. — *Michigan:* "No person shall . . . be deprived of life, liberty, or property, without due process of law." Art. 6, § 32. — *Minnesota:* "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Art. 1, § 2. — *Mississippi:* "Nor can he be deprived of his life, liberty, or property, but by due course of law." Art. 1, § 10. — *Missouri:* Same as Delaware. Art. 1, § 18. — *Nevada:* "Nor be deprived of life, liberty, or property, without due process of law." Art. 1, § 8. — *New Hampshire:* Same as Massachusetts. Bill of Rights, § 17. — *New York:* Same as Nevada. Art. 1, § 6. — *North Carolina:* "That no person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, § 17. — *Pennsylvania:* Like Delaware. Art. 9, § 9. — *Rhode Island:* Like Delaware. Art. 1, § 10. — *South Carolina:* "No person shall be arrested, imprisoned, despoiled, or dispossessed of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life,

visions, no change in language, it is thought, has in any [*353] case been made with a view to essential *change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process [or course] of law" is sometimes used, sometimes "the law of the land," and in some cases both; but the meaning is the same in every case.[1] And, by the fourteenth amendment the guaranty is now incorporated in the Constitution of the United States.[2]

If now we shall ascertain the meaning of the phrases "due process of law" and "the law of the land" in the several constitutional provisions which we have referred to, when they have in view the protection of rights in property, we shall be able, perhaps, to indicate the rule, by which may be determined the cases in which legislative action is objected to, as not being "the law of the land;" or judicial, or ministerial action is contested as not being "due process of law," within the meaning of these terms as the Constitution employs them.

If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various, that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the

liberty, or estate, but by the judgment of his peers, or the law of the land." Art. 1, § 14. — *Tennessee:* "That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 1, § 8. — *Texas:* "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Art. 1, § 16. — *West Virginia:* "No person, in time of peace, shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 6. Under each of the remaining Constitutions, equivalent protection to that which these provisions give, is believed to be afforded by fundamental principles recognized and enforced by the courts.

[1] 2 Inst. 50; Bouv. Law Dic. "Due process of Law," "Law of the land"; State *v.* Simons, 2 Spears, 767; Vanzant *v.* Waddell, 2 Yerg. 260; Wally's Heirs *v.* Kennedy, *ib.* 554; Greene *v.* Briggs, 1 Curt. 311; Murray's Lessee *v.* Hoboken Land Co. 18 How. 276, per *Curtis*, J.; Parsons *v.* Russell, 11 Mich. 129, per *Manning*, J.; Ervine's Appeal, 16 Penn. St. 256; Banning *v.* Taylor, 24 Penn. St. 292; State *v.* Staten, 6 Cold. 244.

[2] See *ante*, p. 11.

cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the *general rules which govern society. [*354] Every thing which may pass under the form of an enactment is not therefore to be considered the law of the land." [1]

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" [2] But there are

[1] Dartmouth College *v.* Woodward, 4 Wheat. 519; Works of Webster, Vol. V. p. 487. And he proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

[2] Per *Bronson*, J., in Taylor *v.* Porter, 4 Hill, 140. See also Jones *v.* Perry, 10 Yerg. 59; Ervine's Appeal, 16 Penn. St. 256; Arrowsmith *v.* Burlingim,

many cases in which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called; and we have already seen that special legislative acts designed to accomplish the like end have also been held [*355] valid in * some cases. The necessity for "general rules," therefore, does not preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in court.[1]

4 McLean, 498; Lane *v.* Dorman, 3 Scam. 238; Reed *v.* Wright, 2 Greene, (Iowa) 15; Woodcock *v.* Bennett, 1 Cow. 740; Kinney *v.* Beverley, 2 H. & M. 536. "Those terms, 'law of the land,' do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life, without crime? Yet all this he may suffer if an act of the assembly simply denouncing those penalties upon particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution; for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and devesting the rights of property, it has been repeatedly held in this State, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for those purposes." Hoke *v.* Henderson, 4 Dev. 15. Mr. Broom says: "It is indeed an essential principle of the law of England, 'that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no more industry, no more justice, no more valor; for who will labor? who will hazard his person in the day of battle for that which is not his own?' The Bankers' Case, by *Turnor*, 10. And therefore our customary law is not more solicitous about any thing than 'to preserve the property of the subject from the inundation of the prerogative.' *Ibid.*" Broom's Const. Law, p. 228.

[1] See Wynehamer *v.* People, 13 N. Y. 432, per *Selden*, J. In James *v.* Reynolds, 2 Texas, 251, Chief Justice *Hemphill* says: "The terms 'law of the land' . . . are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." And see Vanzant *v.* Waddell, 2 Yerg. 269, per *Peck*, J.;

On the other hand we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as unknown to the law of the land. Mr. Justice *Edwards* has said in one case: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."[1] And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following, from an opinion by Mr. Justice *Johnson* of the Supreme Court of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, — that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[2]

Hard *v.* Nearing, 44 Barb. 472. Nevertheless there are many cases, as we have shown, *ante*, pp. 97, 109, in which private laws may be passed in entire accord with the general public rules which govern the State; and we shall refer to more cases further on.

[1] Westervelt *v.* Gregg, 12 N. Y. 209. See also State *v.* Staten, 6 Cold. 233.

[2] Bank of Columbia *v.* Okely, 4 Wheat. 235. "What is meant by 'the law of the land'? In this State, taking as our guide Zylstra's Case, 1 Bay, 384; White *v.* Kendrick, 1 Brev. 471; State *v.* Coleman and Maxy, 1 McMull. 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to be considered amenable for all time to come." Per *O'Neill*, J., in State *v.* Simons, 2 Speers, 767. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied, and which protected private rights, were not departed from.

[* 356] * The principles, then, upon which the process is based are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may change from time to time, but only with due regard to the landmarks established for the protection of the citizen. When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession;[1] but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[2]

Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department in every instance must show authority of law [* 357] for its action, and occasion does not often arise * for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally

[1] Vanzant *v.* Waddell, 2 Yerg. 260; Lenz *v.* Charlton, 23 Wis. 478.

[2] See Wynehamer *v.* People, 13 N. Y. 432, per *Selden*, J. In State *v.* Allen, 2 McCord, 56, the court, in speaking of process for the collection of taxes, say: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" And see Hard *v.* Nearing, 44 Barb. 472; Sears *v.* Cottrell, 5 Mich. 251; Gibson *v.* Mason, 5 Nev. 302.

authorize interference, and in others may interpose by direct action. Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions devesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs of the government. No reason of general public policy will be sufficient, it seems, to validate such transfers when they operate upon existing vested rights.[1]

Nevertheless in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even devest legal titles in favor of substantial equities where the legal and equitable rights do not chance to concur in the same persons.

[1] Taylor *v.* Porter, 4 Hill, 140; Osborn *v.* Hart, 24 Wis. 91. In Matter of Albany Street, 11 Wend.149, it is intimated that the clause in the Constitution of New York, withholding private property from public use except upon compensation made, of itself implies that it is not to be taken *in invitum* for individual use. And see Matter of John and Cherry Streets, 19 Wend. 676. A different opinion seems to have been held by the Supreme Court of Pennsylvania, when they decided in Harvey *v.* Thomas, 10 Watts, 63, that the legislature might authorize the laying out of private ways over the lands of unwilling parties, to connect the coal-beds with the works of public improvement, the constitution not in terms prohibiting it. See note to p. 531, *post.*

The chief restriction upon this class of legislation is, [* 358] that vested rights must not be disturbed;* but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm."[1]

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.[2]

And it may be well at this point to examine in the light of the reported cases the question, What is a vested right in the constitutional sense? and when we have solved that question, we may be the better able to judge under what circumstances one may be justified in resisting a change in the general laws of the State affecting his interests, and how far special legislation may control his rights without coming under legal condemnation. In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or

[1] Arg. Nightingale *v.* Bridges, Show. 138. See also Case of Alton Woods, 1 Rep. 45 *a*; Alcock *v.* Cook, 5 Bing. 340; Bowman *v.* Middleton, 1 Bay, 282; *ante*, p. 37 and note, p. 175 and note.

[2] The evidences of a man's rights — the deeds, bills of sale, promissory notes, and the like — are protected equally with his lands and chattels, or rights and franchises of any kind; and the certificate of registration and right to vote may be properly included in the category. State *v.* Staten, 6 Cold. 243. See Davies *v.* McKeeby, 5 Nev. 369.

less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular State of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense. In many cases the courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with "the law of the land;" and the right of one man is devested by way of enforcing a higher and better right in another. Of these cases we do not propose to speak: constitutional questions cannot well arise concerning them, unless they are attended by circumstances of irregularity which are supposed to take them out of the general rule. All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become devested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order. What we desire to reach in this connection is the true meaning of the term "vested rights" when employed for the purpose of indicating the interests of which one cannot be deprived by the mere force of legislative enactment, or by any other than the * recognized modes of transferring title [* 359] against the consent of the owner, to which we have alluded.

Interests in Expectancy.

And it would seem that a right cannot be regarded as a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. Acts of the legislature, as has been well said by Mr. Justice *Woodbury*, cannot be regarded as

opposed to undamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee."[1] And Chancellor *Kent*, in speaking of retrospective statutes, says that while such a statute, "affecting and changing vested rights, is very generally regarded in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon vested rights."[2]

And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the [* 360] statute of descents. But this promise is no * more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession; a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to

[1] Merrill *v.* Sherburne, 1 N. H. 213.

[2] 1 Kent, Com. 455.

be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise.[1]

If this be so, the nature of estates must, to a certain extent, be subject to legislative control and modification.[2] In this country estates tail have been very generally changed into estates in fee-simple, by statutes the validity of which is not disputed.[3] Such statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not therefore open to objection by him.[4] But no other person in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases.[5]

The cases of rights in property to result from the marriage relation must be referred to the same principle. At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away.[6] But other interests *were merely in expectancy. He [*361] could have a right as tenant by the curtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right,

[1] *In re* Lawrence, 1 Redfield, Sur. Rep. 310.

[2] Smith on Stat. and Const. Construction, 412.

[3] De Mill *v.* Lockwood, 3 Blatch. 56.

[4] On the same ground it has been held in Massachusetts that statutes converting existing estates in joint tenancy into estates in common were unobjectionable. They did not impair vested rights, but rendered the tenure more beneficial. Holbrook *v.* Finney, 4 Mass. 567; Miller *v.* Miller, 16 Mass. 59; Anable *v.* Patch, 3 Pick. 363; Burghardt *v.* Turner, 12 Pick. 534. Moreover, such statutes do no more than either tenant at the common law has a right to do, by conveying his interest to a stranger. See Bombaugh *v.* Bombaugh, 11 S. & R. 192; Wildes *v.* Vanvoorhis, 16 Gray, 147.

[5] See 1 Washb. Real Pr. 81–84 and notes. The exception to this statement, if any, must be the case of tenant in tail after possibility of issue extinct; where the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested.

[6] Westervelt *v.* Gregg, 12 N. Y. 208.

no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely, — that is to say, until it becomes initiate, — the legislature must have full right to modify or even to abolish it.[1] And the same rule will apply to the case of dower; though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or any thing more than a mere expectancy, at any time before it is consummated by the husband's death.[2] In neither of these cases does the marriage alone give a vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife: it is subject to any changes in the law made before his right becomes vested by the acquisition.[3]

Change of Remedies.

Again: *the right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself.[4] As a general rule every State has complete control over the remedies which it offers to suitors in its courts.[5] It may abolish one class of courts and create another. It may give a new and additional remedy for a

[1] Hathorn *v.* Lyon, 2 Mich. 93; Tong *v.* Marvin, 15 Mich. 60. And see the cases cited in the next note.

[2] Barbour *v.* Barbour, 46 Me. 9; Lucas *v.* Sawyer, 17 Iowa, 517; Noel *v.* Ewing, 9 Ind. 57; Moore *v.* Mayor, &c., of New York, 4 Sandf. 456, and 8 N. Y. 110; Pratt *v.* Tefft, 14 Mich. 191; Reeve, Dom. Rel. 103, note. A doubt as to this doctrine is intimated in Dunn *v.* Sargeant, 101 Mass. 340.

[3] Westervelt *v.* Gregg, 12 N. Y. 208; Norris *v.* Beyea, 13 N. Y. 273; Kelly *v.* McCarthy, 3 Bradf. 7. And see Plumb *v.* Sawyer, 21 Conn. 351; Clark *v.* McCreary, 12 S. & M. 347; Jackson *v.* Lyon, 9 Cow. 664; *ante*, 287–292. If, however, the wife has a right to personal property subject to a contingency, the husband's contingent interest therein cannot be taken away by subsequent legislation. Dunn *v.* Sargeant, 101 Mass. 336.

[4] See *ante*, p. 290, and cases cited.

[5] Rosier *v.* Hale, 10 Iowa, 470; Smith *v.* Bryan, 34 Ill. 377; Lord *v.* Chadbourne, 42 Me. 429; Rockwell *v.* Hubbell's Adm'rs, 2 Doug. (Mich.) 197; Cusic *v.* Douglas, 3 Kansas, 123; Holloway *v.* Sherman, 12 Iowa, 282; McCormick *v.* Rusch, 15 Iowa, 127.

right already in existence.[1] And it may abolish old remedies and *substitute new. If a statute providing a remedy [*362] is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide;[2] and if it be amended instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.[3] And any rule or regulation in regard to the remedy which does not, under pretence of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.[4]

But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away.[5] Nor can a party by his misconduct so

[1] Hope *v.* Jackson, 2 Yerg. 125; Foster *v.* Essex Bank, 16 Mass. 245; Paschall *v.* Whitsett, 11 Ala. 472; Commonwealth *v.* Commissioners, &c., 6 Pick. 508; Whipple *v.* Farrar, 3 Mich. 436; United States *v.* Samperyac, 1 Hemp. 118; Sutherland *v.* De Leon, 1 Texas, 250; Anonymous, 2 Stew. 228. See also Lewis *v.* McElvain, 16 Ohio, 347; Trustees, &c., *v.* McCaughey, 2 Ohio, N. S. 152; Hepburn *v.* Curts, 7 Watts, 300; Schenley *v.* Commonwealth, 36 Penn. St. 29; Bacon *v.* Callender, 6 Mass. 303; Brackett *v.* Norcross, 1 Greenl. 92; Ralston *v.* Lothain, 18 Ind. 303; White School House *v.* Post, 31 Conn. 241.

[2] Bank of Hamilton *v.* Dudley, 2 Pet. 492; Ludlow *v.* Jackson, 3 Ohio, 553; Eaton *v.* United States, 5 Cranch, 281; Schooner Rachel *v.* United States, 6 Cranch, 329.

[3] See cases cited in the last note. Also Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 21 N. Y. 99; State *v.* Daley, 29 Conn. 272; Rathbun *v.* Wheeler, 29 Ind. 601; State *v.* Norwood, 12 Md. 195; Bristol *v.* Supervisors, &c., 20 Mich. 95; Sumner *v.* Miller, 64 N. C. 688.

[4] See *ante*, pp. 287–292.

[5] Dash *v.* Van Kleek, 7 Johns. 477; Streubel *v.* Milwaukee and M. R.R. Co. 12 Wis. 67; Clark *v.* Clark, 10 N. H. 386; Westervelt *v.* Gregg, 12 N. Y. 211; Thornton *v.* Turner, 11 Minn. 339; Ward *v.* Brainerd, 1 Aik. 121; Keith *v.* Ware, 2 Vt. 174; Lyman *v.* Mower, *ib.* 517; Kendall *v.* Dodge, 3 Vt. 360; State *v.* Auditor, &c., 33 Mo. 287; Griffin *v.* Wilcox, 21 Ind. 370; Norris *v.* Doniphan, 4 Met. (Ky.) 385; Terrill *v.* Rankin, 3 Bush, 453. An equitable title to lands, of which the legal title is in the State, is under the same constitutional protection that the legal title would be. Wright *v.* Hawkins, 28 Texas, 452. Where an individual is allowed to recover a sum as a penalty, the right may be taken away at any time before judgment. Oriental Bank *v.* Freeze,

forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law.[1] Even Congress, it has been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested [* 363] by them of all redress in the courts.[2] * And if the legis-

6 Shep. 109; Engle *v.* Shurtz, 1 Mich. 150; Confiscation Cases, 7 Wal. 454; Washburn *v.* Franklin, 35 Barb. 599; Welch *v.* Wadsworth, 30 Conn. 149; O'Kelly *v.* Athens Manuf. Co. 36 Geo. 51; *post*, 383. See also Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9; *post*, 375–376.

[1] Griffin *v.* Mixon, 38 Miss. 434. See next note. Also Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant's Cas. 406. But no constitutional principle is violated by a statute which allows judgment to be entered up against a defendant who has been served with process, unless within a certain number of days he files an affidavit of merits. Hunt *v.* Lucas, 97 Mass. 404.

[2] Griffin *v.* Wilcox, 21 Ind. 370. In this case the act of Congress of March 3, 1863, which provided "that any order of the president or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress," was held to be unconstitutional. The same decision was made in Johnson *v.* Jones, 44 Ill. 142. It was said in the first of these cases that "this act was passed to deprive the citizens of all redress for illegal arrests and imprisonments; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments." And it may be added that those acts which are justified by military or martial law are equally legal with those justified by the common law. So in Hubbard *v.* Brainerd, 35 Conn. 563, it was decided that Congress could not take away a vested right to sue for and recover back an illegal tax which had been paid under protest to a collector of the national revenue. See also Bryan *v.* Walker, 64 N. C. 146. The case of Norris *v.* Doniphan, 4 Met. (Ky.) 385, may properly be cited in this connection. It was there held that the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," in so far as it undertook to authorize the confiscation of the property of citizens as a punishment for treason and other crimes, by proceedings *in rem* in any district in which the property might be, without presentment and indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt only as would be proof of any fact in admiralty or revenue cases, was unconstitutional and void, and therefore that Congress had no power to prohibit the State courts from giving the owners of property seized

lature cannot confiscate property or rights, neither can it authorize individuals to assume at their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners.[1] And a statute

the relief they would be entitled to under the State laws. A statute which makes a constitutional right to vote depend upon an impossible condition is void. Davies *v.* McKeeby, 5 Nev. 369. See further, State *v.* Staten, 6 Cold. 243; Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant, 406.

[1] The log-driving and booming corporations, which were authorized to be formed under a general law in Michigan, were empowered, whenever logs or lumber were put into navigable streams without adequate force and means provided for preventing obstructions, to take charge of the same, and cause it to be run, driven, boomed, &c., at the owner's expense, and it gave them a lien on the same to satisfy all just and reasonable charges, with power to sell the property for those charges and for the expenses of sale, on notice, either served personally on the owner, or posted as therein provided. In Ames *v.* Port Huron Log-Driving and Booming Co. 11 Mich. 147, it was held that the power which this law assumed to confer was in the nature of a public office; and *Campbell*, J., says: "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parcelled out by the Constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property. And it is plain that the exercise of such a power is an act in its nature public, and not private. The case, however, involves more than the assumption of control. The corporation, or rather its various agents, must of necessity determine when the case arises justifying interference; and having assumed possession, it assesses its own charges; and having assessed them, proceeds to sell the property seized to pay them, with the added expense of such sale. These proceedings are all *ex parte*, and are all proceedings *in invitum*. Their validity must therefore be determined by the rules applicable to such cases. Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be devested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and the facts. When his property is wanted *in specie*, for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question; and all judicial functions are required by the Constitution to

[* 364] * which authorizes a party to seize the property of another, without process or warrant, and to sell it without notification to the owner, for the punishment of a private trespass, and to enforce a penalty against the owner, can find no justification in the Constitution.[1]

Limitation Laws.

Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or [* 365] laches. * If one who is dispossessed " be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect (*nam leges vigilantibus, non dormientibus sub-*

be exercised by courts of justice, or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination."

[1] A statute of New York authorized any person to take into his custody and possession any animal which might be trespassing upon his lands, and give notice of the seizure to a justice or commissioner of highways of the town, who should proceed to sell the animal after posting notice. From the proceeds of the sale, the officer was to retain his fees, pay the person taking up the animal fifty cents, and also compensation for keeping it, and the balance to the owner, if he should claim it within a year. In Rockwell *v.* Nearing, 35 N. Y. 307, 308, *Porter*, J., says of this statute: " The legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by persons other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to the owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution." And he distinguishes these proceedings from those in distraining cattle *damage feasant*, which are always remedial, and under which the party was authorized to detain the property in pledge for the payment of his damages. See also opinion by *Morgan*, J., in same case, pp. 314–317, and the opinions of the several judges in Wynehamer *v.* People, 13 N. Y. 395, 419, 434, and 468.

veniunt), and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would sooner have been sued."[1] Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose.[2] Every government is under obligation to its citizens to afford them all needful legal remedies;[3] but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.[4]

When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title.[5] It is vested as completely and perfectly, and is as safe from legislative interference as it would have

[1] 3 Bl. Com. 188; Broom, Legal Maxims, 857.

[2] Such a statute was formerly construed with strictness, and the defence under it was looked upon as unconscionable, and not favored; but Mr. Justice *Story* has well said, it has often been matter of regret in modern times that the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against State demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. Bell *v.* Morrison, 1 Pet. 360. See Leffingwell *v.* Warren, 2 Black, 599.

[3] Call *v.* Hagger, 8 Mass. 430.

[4] Beal *v.* Nason, 2 Shep. 344; Bell *v.* Morrison, 1 Pet. 360; Stearns *v.* Gittings, 23 Ill. 387; State *v.* Jones, 21 Md. 437.

[5] Brent *v.* Chapman, 5 Cranch, 358; Newby's Adm'rs *v.* Blakey, 3 H. & M. 57; Parish *v.* Eager, 15 Wis. 532; Baggs' Appeal, 43 Penn. St. 512; Leffingwell *v.* Warren, 2 Black, 599. See cases cited in next note.

been if it had been perfected in the owner by grant, or any species of assurance.[1]

All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law.[2] Where they [* 366] relate to * property, it seems not to be essential that the adverse claimant should be in actual possession;[3] but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.[4]

[1] See Knox *v.* Cleveland, 13 Wis. 249; Sprecker *v.* Wakelee, 11 Wis. 432; Hill *v.* Kricke, 11 Wis. 442; Pleasants *v.* Rohrer, 17 Wis. 557; Morton *v.* Sharkey, McCahon (Kan.) 113; McKinney *v.* Springer, 8 Blackf. 506; Stipp *v.* Brown, 2 Ind. 647; Wires *v.* Farr, 25 Vt. 41; Davis *v.* Minor, 1 How. (Miss.) 183; Holden *v.* James, 11 Mass. 396; Lewis *v.* Webb, 3 Greenl. 326; Woart *v.* Winnick, 3 N. H. 473; Martin *v.* Martin, 35 Ala. 560; Briggs *v.* Hubbard, 19 Vt. 86; Thompson *v.* Caldwell, 3 Lit. 137; Wright *v.* Oakley, 5 Met. 400; Couch *v.* McKee, 1 Eng. 495; Atkinson *v.* Dunlap, 50 Me. 111. But the statute of limitations may be suspended for a period as to demands not already barred. Wardlaw *v.* Buzzard, 15 Rich. 158.

[2] Stearns *v.* Gittings, 23 Ill. 389, per *Walker*, J.; Sturgis *v.* Crowninshield, 4 Wheat. 207, per *Marshall*, Ch. J.; Pearce *v.* Patton, 7 B. Monr. 162; Griffin *v.* McKenzie, 7 Geo. 163.

[3] Stearns *v.* Gittings, 23 Ill. 389; Hill *v.* Kricke, 11 Wis. 442.

[4] Groesbeck *v.* Seeley, 13 Mich. 329. In Case *v.* Dean, 16 Mich. 12, it was held that this statute could not be enforced as a limitation law in favor of the party in possession, inasmuch as it did not proceed on the idea of limiting the time for bringing suit, but by a conclusive rule of evidence sought to pass over the property to the claimant under the statutory sale in all cases, irrespective of possession. See also Baker *v.* Kelley, 11 Minn. 480. The case of Leffingwell *v.* Warren, 2 Black, 599, is *contra*. That case purports to be based on Hill *v.* Kricke, 11 Wis. 442; but there the holder of the original title was not in possession; and what was decided was only that it was not necessary for the holder of the tax title to be in possession in order to claim the benefit of the

All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so, it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;[1] though what shall be considered a reasonable time must be settled by the judgment of the legislature, into the wisdom of * whose decision in estab- [* 367] lishing the period of legal bar it does not pertain to the jurisdiction of the courts to inquire.[2]

Alterations in the Rules of Evidence.

It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter

statute; ejectment against a claimant being permitted by law when the lands were unoccupied. This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of laches in not asserting claims to property, when he already possesses and enjoys the property? The old maxim is, "That which was originally void cannot by mere lapse of time be made valid;" and if a void claim by force of an act of limitation can ripen into a conclusive title as against the owner in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed.

[1] So held of a statute which took effect some months after its passage, and which, in its operation upon certain classes of cases, would have extinguished adverse claims unless asserted by suit before the act took effect. Price *v.* Hopkin, 13 Mich. 318. See also Call *v.* Hagger, 8 Mass. 423; Proprietors, &c. *v.* Laboree, 2 Greenl. 294; Society, &c. *v.* Wheeler, 2 Gall. 141; Blackford *v.* Peltier, 1 Blackf. 36; Thornton *v.* Turner, 11 Minn. 339; Osborn *v.* Jaines, 17 Wis. 573; Morton *v.* Sharkey, McCahon, (Kan.) 113; Berry *v.* Ramsdell, 4 Met. (Ky.) 296. In the last case cited it was held that a statute which only allowed thirty days in which to bring action on an existing demand was unreasonable and void. And see what is said in Auld *v.* Butcher, 2 Kansas, 135.

[2] Stearns *v.* Gittings, 23 Ill. 387; Call *v.* Hagger, 8 Mass. 430; Smith *v.* Morrison, 22 Pick. 430; Price *v.* Hopkin, 13 Mich. 318; De Moss *v.* Newton, 31 Ind. 219. But see Berry *v.* Ramsdell, cited in preceding note.

into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature;[1] and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties to suits to testify, might lawfully apply to existing causes of action.[2] So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract;[3] and a statute making the protest of a promissory note evidence of the facts therein stated.[4] These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination, as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice.[5]

[*368] *A strong instance in illustration of legislative control over evidence will be found in the laws of some of the States in regard to conveyances of lands upon sales to satisfy delinquent taxes. Independent of special statutory rule on the subject, such conveyances would not be evidence of title. They are executed under a statutory power; and it devolves upon the claimant under them to show that the successive steps which under the statute lead to such conveyance have been taken. But it cannot be doubted that

[1] Kendall *v.* Kingston, 5 Mass. 533; Ogden *v.* Saunders, 12 Wheat. 349, per *Marshall*, Ch. J.; Fales *v.* Wadsworth, 23 Me. 533; Karney *v.* Paisley, 13 Iowa, 89; Commonwealth *v.* Williams, 6 Gray, 1; Hickox *v.* Tallman, 38 Barb. 608. See *ante*, p. 288 and note 2.

[2] Rich *v.* Flanders, 39 N. H. 323. A very full and satisfactory examination of the whole subject will be found in this case.

[3] Gibbs *v.* Gale, 7 Md. 76.

[4] Fales *v.* Wadsworth, 23 Me. 553.

[5] Per *Marshall*, Ch. J., in Ogden *v.* Saunders, 12 Wheat. 249; Webb *v.* Den, 17 How. 577; Delaplaine *v.* Cook, 7 Wis. 54; Kendall *v.* Kingston, 5 Mass. 534; Fowler *v.* Chatterton, 6 Bing. 258.

this rule may be so changed as to make a tax deed *prima facie* evidence that all the proceedings have been regular, and that the purchaser has acquired under them a complete title.[1] The burden of proof is thereby changed from one party to the other; the legal presumption which the statute creates in favor of the purchaser being sufficient, in connection with the deed, to establish his case, unless it is overcome by countervailing testimony. Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void.[2] But they devest no title, and are not even retrospective in character. They merely establish what the legislature regards as a reasonable and just rule for the presentation by the parties of their rights before the courts in the future.

But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial;[3] and there * can be no [* 369] trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property;

[1] Hand *v.* Ballou, 12 N. Y. 543; Forbes *v.* Halsey, 26 N. Y. 53; Delaplaine *v.* Cook, 7 Wis. 54; Allen *v.* Armstrong, 16 Iowa, 508; Adams *v.* Beale, 19 Iowa, 61; Amberg *v.* Rogers, 9 Mich. 332; Lumsden *v.* Cross, 10 Wis. 289; Lacey *v.* Davis, 4 Mich. 140; Wright *v.* Dunham, 13 Mich. 414. The rule once established may be abolished, even as to existing deeds. Hickox *v.* Tallman, 38 Barb. 608.

[2] See Webb *v.* Den, 17 How. 577.

[3] Tift *v.* Griffin, 5 Geo. 185; Lenz *v.* Charlton, 23 Wis. 482; Conway *v.* Cable, 37 Ill. 89; *post*, 382–3 and notes.

witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.[1] And a statute which should make the certificate or opinion of an officer conclusive evidence of the illegality of an existing contract would be equally nugatory;[2] though perhaps if parties should enter into a contract in view of such a statute then existing, its provisions might properly be regarded as assented to and incorporated in their contract, and therefore binding upon them.[2]

[1] Groesbeck *v.* Seeley, 13 Mich. 329; Case *v.* Dean, 16 Mich. 13; White *v.* Flynn, 23 Ind. 46; Corbin *v.* Hill, 21 Iowa, 70. And see the well-reasoned case of McCready *v.* Sexton in the Supreme Court of Iowa, reported in Western Jurist, Vol. IV. p. 284. Also Wright *v.* Cradlebaugh, 3 Nev. 349. As to how far the legislature may make the tax-deed conclusive evidence that mere irregularities have not intervened in the proceedings, see Smith *v.* Cleveland, 17 Wis. 556; Allen *v.* Armstrong, 16 Iowa, 508. Undoubtedly the legislature may dispense with mere matters of form in the proceedings as well after they have taken place as before; but this is quite a different thing from making tax-deeds conclusive on points material to the interest of the property owner. See further, Wantlan *v.* White, 19 Ind. 470; People *v.* Mitchell, 45 Barb. 212; McCready *v.* Sexton, *supra*. It is not competent for the legislature to compel an owner of land to redeem it from a void tax-sale as a condition on which he shall be allowed to assert his title against it. Conway *v.* Cable, 37 Ill. 82; Hart *v.* Henderson, 17 Mich. 218. But it seems that if the tax purchaser has paid taxes and made improvements, the payment for these may be made a condition precedent to a suit in ejectment against him. Pope *v.* Macon, 23 Ark. 644. The case of Wright *v.* Cradlebaugh, 3 Nev. 349, is valuable in this connection. "We apprehend," says *Beatty*, Ch. J., "that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a good defence to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of the right of setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being encumbered with those of B. . . . Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the Constitution, would be a protection to him or his property."

[2] See *post*, p. 403, note.

Retrospective Laws.

Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected.[1] In both cases the demand is gone, and to restore it would be to create a new contract for the parties, — a thing quite beyond the power of legislation. So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment.[2] But there are many cases in which, by existing laws, defences based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defence if it possesses the power to do so.

* In regard to these cases, we think investigation of the [* 370] authorities will show that *a party has no vested right in a defence based upon an informality not affecting his substantial equities.* And this brings us to a particular examination of a class of statutes which is constantly coming under the consideration of the courts, and which are known as *retrospective laws*, by reason of their reaching back to and giving some different legal effect to some previous transaction to that which it had under the law when it took place.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden,

[1] *Ante*, p. 365, note 5, and cases cited.

[2] In Medford *v.* Learned, 16 Mass. 215, it was held that where a pauper had received support from the parish, to which by law he was entitled, a subsequent legislative act could not make him liable by suit to refund the cost of the support.

eo nomine by the State constitution, and provided further that no other objection exists to them than their retrospective character.[1] Nevertheless legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.[2] And some of the States have deemed it just and wise to forbid such laws altogether by their constitutions.[3]

[*371] *A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds unless expressly forbidden. Of this class are

[1] Thornton *v.* McGrath, 1 Duvall, 349; State *v.* Squires, 26 Iowa, 340; Beach *v.* Walker, 6 Conn. 197; Schenley *v.* Commonwealth, 36 Penn. St. 57.

[2] Dash *v.* Vankleek, 7 Johns. 477; Norris *v.* Beyea, 13 N. Y. 273; Plumb *v.* Sawyer, 21 Conn. 351; Whitman *v.* Hapgood, 13 Mass. 464; Medford *v.* Learned, 16 Mass. 215; Ray *v.* Gage, 36 Barb. 447; Watkins *v.* Haight, 18 Johns. 138; Garrett *v.* Beaumont, 24 Miss. 377; Briggs *v.* Hubbard, 19 Vt. 86; Perkins *v.* Perkins, 7 Conn. 558; Hastings *v.* Lane, 3 Shep. 134; Guard *v.* Rowan, 2 Scam. 499; Sayre *v.* Wisner, 8 Wend. 661; Quackenbos *v.* Danks, 1 Denio, 128; Garrett *v.* Doe, 1 Scam. 335; Thompson *v.* Alexander, 11 Ill. 54; State *v.* Barbee, 3 Ind. 258; Allbyer *v.* State, 10 Ohio, N. S. 588; State *v.* Atwood, 11 Wis. 422; Bartruff *v.* Remey, 15 Iowa, 257; Tyson *v.* School Directors, 51 Penn. St. 9; Atkinson *v.* Dunlop, 50 Me. 111; *Ex parte* Graham, 13 Rich. 277; Hubbard *v.* Brainerd, 35 Conn. 576; Conway *v.* Cable, 37 Ill. 82; Clark *v.* Baltimore, 29 Md. 277; Williams *v.* Johnson, 30 Md. 500; State *v.* The Auditor, 41 Mo. 25.

[3] See the provision in the Constitution of New Hampshire, considered in Woart *v.* Winnick, 3 N. H. 481; Clark *v.* Clark, 10 N. H. 386; and Rich *v.* Flanders, 39 N. H. 304; and that in the Constitution of Texas, in De Cordova *v.* Galveston, 4 Texas, 470. The Constitution of Ohio provides that "the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; provided, however, that the General Assembly may, by general laws, authorize the courts to carry into effect the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this State, and upon such terms as shall be just and equitable." Under this clause it was held competent for the General Assembly to pass an act authorizing the courts to correct mistakes in deeds of married women previously executed, whereby they were rendered ineffectual. Goshorn *v.* Purcell, 11 Ohio, N. S. 641. Under a provision in the Constitution of Tennessee that no retrospective law shall be passed, it has been held that a law authorizing a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases which arose before its passage, was not a retrospective law within the meaning of this clause. Fisher's Negroes *v.* Dobbs, 6 Yerg. 119.

the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon;[1] irregularities in the organization or elections of corporations;[2] irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause;[3] irregular proceedings in courts, &c.

The rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.

A few of the decided cases will illustrate this principle. In Kearney *v.* Taylor[4] a sale of real estate belonging to infant tenants in common had been made by order of court in a partition suit, and the land bid off by a company of persons, who proposed subdividing and selling it in parcels. The sale was confirmed in their names, but by mutual arrangement the deed was made to one only, for convenience in selling and conveying. This deed failed to convey the title, because not following the sale. The legislature afterwards passed an act providing that, on proof being made to the satisfaction of the court or jury before which such deed was offered in evidence that the land was sold fairly and without fraud, * and the deed executed in good faith and for [*372] a sufficient consideration, and with the consent of the persons reported as purchasers, the deed should have the same

[1] Butler *v.* Toledo, 5 Ohio, N. S. 225; Strauch *v.* Shoemaker, 1 W. & S. 175; McCoy *v.* Michew, 7 W. & S. 390; Montgomery *v.* Meredith, 17 Penn. St. 42; Dunden *v.* Snodgrass, 18 Penn. St. 151; Williston *v.* Colkett, 9 Penn. St. 38; Boardman *v.* Beckwith, 18 Iowa, 292. And see Walter *v.* Bacon, 8 Mass. 472; Locke *v.* Dane, 9 Mass. 360; Patterson *v.* Philbrook, 9 Mass. 153; Trustees *v.* McCaughy, 2 Ohio, N. S. 152.

[2] Syracuse Bank *v.* Davis, 16 Barb. 188; Mitchell *v.* Deeds, 49 Ill. 416.

[3] See Menges *v.* Wertman, 1 Penn. St. 218; Yost's Report, 17 Penn. St. 524; Bennett *v.* Fisher, 26 Iowa, 497; Allen *v.* Archer, 49 Me. 346.

[4] 15 How. 494.

effect as though it had been made to the purchasers. That this act was unobjectionable in principle was not denied; and it cannot be doubted that a prior statute, authorizing the deed to be made to one for the benefit of all and with their assent, would have been open to no valid objection.[1]

In certain Connecticut cases it was insisted that sales made of real estate on execution were void, because the officer had included in the amount due several small items of fees not allowed by law. It appeared, however, that after the sales were made, the legislature had passed an act providing that no levy should be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, should be valid and effectual to transmit the title of the real estate levied upon. The liability of the officer for receiving more than his legal fees was at the same time left unaffected. In the leading case the court say: "The law, undoubtedly, is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable, and for necessary services in the performance of his duty; of consequence they are eminently just; and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced."[2]

In another Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not empowered to perform that ceremony by the State law, and that the marriages were therefore invalid. The legislature had afterwards passed an act declaring all such marriages valid, and the court sustained the act. It was assailed as an exercise of the judicial power; but this it clearly was not, as it purported to settle no controversies, and merely sought to give effect to the desire of

[1] See Davis *v.* State Bank, 7 Ind. 316, and Lucas *v.* Tucker, 17 Ind. 41, for decisions under statutes curing irregular sales by guardians and executors. In many of the States general laws will be found providing that such sales shall not be defeated by certain specified defects and irregularities.

[2] Beach *v.* Walker, 6 Conn. 197; Booth *v.* Booth, 7 Conn. 350. And see Mather *v.* Chapman, 6 Conn. 54; Norton *v.* Pettibone, 7 Conn. 319; Welch *v.* Wadsworth, 30 Conn. 149; Smith *v.* Merchand's Ex'rs, 7 S. & R. 260; Underwood *v.* Lilly, 10 S. & R. 97; Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Penn. St. 218; Weister *v.* Hade, 52 Penn. St. 474; Ahl *v.* Gleim, 52 Penn. St. 432; Selsby *v.* Redlon, 19 Wis. 17; Parmelee *v.* Lawrence, 48 Ill. 331.

the parties, which they had ineffectually attempted to carry out by means of the ceremony which proved insufficient. And while it was not claimed that the act was void in so far as it made effectual the legal relation *of matrimony between the [* 373] parties, it was nevertheless insisted that rights of property dependent upon that relation could not be affected by it, inasmuch as, in order to give such rights, it must operate retrospectively. The court in disposing of the case are understood to express the opinion that, if the legislature possesses the power to validate an imperfect marriage, still more clearly does it have power to affect incidental rights. "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy, or contract marriage with any other persons at pleasure. It is a strong exercise of power to compel two persons to marry without their consent, and a palpable perversion of strict legal right. At the same time the retrospective law thus far directly operating on vested rights is admitted to be unquestionably valid, because manifestly just."[1]

It is not to be inferred from this language that the court understood the legislature to possess power to select individual members of the community, and force them into a relation of marriage with each other against their will. That complete control which the legislature is supposed to possess over the domestic relations can hardly extend so far. The legislature may perhaps divorce parties, with or without cause, according to its own view of justice or public policy; but for the legislature to marry parties against their consent, we conceive to be decidedly against "the law of the land." The learned court must be understood as speaking here with exclusive reference to the case at bar, in which the legislature, by the retrospective act, were merely removing a formal impediment to that marriage which the parties had assented to, and which they had attempted to form. Such an act, unless special circumstances conspired to make it otherwise, would certainly be "manifestly just," and therefore might well be held "unquestionably valid." And if the marriage was rendered valid, the legal incidents would follow of course. In a Pennsylvania case the validity of certain grading and paving assessments was involved, and it was argued that they were invalid for the reason

[1] Goshen *v.* Stonington, 4 Conn. 224, per *Hosmer*, J.

that the city ordinance under which they had been made was inoperative because not recorded as required by law. But the legislature had passed an act to validate this ordinance, and had declared therein that the omission to record the ordinance should not affect or impair the lien of the assessments against the lot owners. In passing upon the validity of this act the court express the following views: "Whenever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In Hepburn *v.* Curts,[1] it was said, 'The legislature, provided it does not violate the constitutional provisions, may pass retro- [* 374] spective laws, * such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.' What more has been done in this case? . . . While [the ordinance] was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered to become of no effect by the failure to record it. Notwithstanding this the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is at most but a formal defect in the remedy provided — an oversight. That such defects may be cured by retroactive legislation need not be argued."[2]

On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power.

By statute of Ohio, all bonds, notes, bills, or contracts negotiable

[1] 7 Watts, 300.

[2] Schenley *v.* Commonwealth, 36 Penn. St. 29, 57. See also State *v.* Newark, 3 Dutch. 185; Den *v.* Downam, 1 Green (N. J.), 135; People *v.* Seymour, 16 Cal. 332; Grim *v.* Weisenburg School District, 57 Penn. St. 433; State *v.* Union, 33 N. J. 355. The legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one. Mitchell *v.* Deeds, 49 Ill. 416.

or payable at any unauthorized bank, or made for the purpose of being discounted at any such bank, were declared to be void. While this statute was in force a note was made for the purpose of being discounted at one of these institutions, and was actually discounted by it. Afterwards the legislature passed an act, reciting that many persons were indebted to such bank, by bonds, bills, notes, &c., and that owing, among other things, to doubts of its right to recover its debts, it was unable to meet its own obligations, and had ceased business, and for the purpose of winding up its affairs had made an assignment to a trustee; therefore the said act authorized the said trustee to bring suits on the said bonds, bills, notes, &c., and declared it should not be lawful for the defendants in such suits "to plead, set up, or insist upon, in defence, that the notes, bonds, bills, or other written evidences of such indebtedness are void on account of being contracts against or in violation of any statute *law of this State, or on account of their [*375] being contrary to public policy." This law was sustained as a law "that contracts may be enforced," and as in furtherance of equity and good morals.[1] The original invalidity was only because of the statute, and that statute was founded upon reasons of public policy which had either ceased to be of force, or which the legislature regarded as overborne by countervailing reasons. Under these circumstances it was reasonable and just that the makers of such paper should be precluded from relying upon such invalidity.[2]

[1] Lewis *v.* McElvain, 16 Ohio, 347.

[2] Trustees *v.* McCaughy, 2 Ohio, N. S. 155; Johnson *v.* Bentley, 16 Ohio, 97. See also Syracuse Bank *v.* Davis, 16 Barb. 188. By statute, notes issued by unincorporated banking associations were declared void. This statute was afterwards repealed, and action was brought against bankers on notes previously issued. Objection being taken that the legislature could not validate the void contracts, the judge says: "I will consider this case on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihilated. The object of the [original] act was not to vest any right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers they were violators of the law, and objects not of protection but of punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the legislature pardon the crime, without consulting those who committed it? . . . How can the defendants

By a statute of Connecticut, where loans of money were made, and a bonus was paid by the borrower over and beyond the interest and bonus permitted by law, the demand was subject to a deduction from the principal of all the interest and bonus paid. A construction appears to have been put upon this statute by business men which was different from that afterwards given by the courts; and a large number of contracts of loan were in consequence subject to the deduction. The legislature then passed a "healing act," which provided that such loans theretofore made should not be held, by reason of the taking of such bonus, to be usurious, illegal, or in any respect void; but that, if otherwise legal, they were thereby confirmed, and declared to be valid, as to [*376] principal, interest, and * bonus. The case of Goshen *v.* Stonington [1] was regarded as sufficient authority in support of this act; and the principle to be derived from that case was stated to be "that where a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained." [2]

After the courts of the State of Pennsylvania had decided that the relation of landlord and tenant could not exist in that State under a Connecticut title, a statute was passed which provided that the relation of landlord and tenant "shall exist and be held as fully and effectually between Connecticut settlers and Pennsylva-

say there was no contract, when the plaintiff produces their written engagement for the performance of a duty, binding in conscience if not in law? Although the contract, for reasons of policy, was so far void that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained; and it would be going very far to say that the legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction." Hess *v.* Werts, 4 S. & R. 361. See also Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Penn. St. 218; Boyce *v.* Sinclair, 3 Bush, 264.

[1] 4 Conn. 224. See *ante*, p. 272-3.

[2] Savings Bank *v.* Allen, 28 Conn. 97. See also Savings Bank *v.* Bates, 8 Conn. 505; Andrews *v.* Russell, 7 Blackf. 474; Grimes *v.* Doe, 8 Blackf. 371; Thompson *v.* Morgan, 6 Minn. 292; Parmelee *v.* Lawrence, 48 Ill. 331. In Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9, a statute forbidding the interposition of the defence of usury was treated as a statute repealing a penalty. See further, Wilson *v.* Hardesty, 1 Md. Ch. 66; Welch *v.* Wadsworth, 30 Conn. 149; Wood *v.* Kennedy, 19 Ind. 68; Washburn *v.* Franklin, 35 Barb. 599.

nia claimants as between other citizens of this commonwealth, on the trial of any case now pending or hereafter to be brought within this commonwealth, any law or usage to the contrary notwithstanding." In a suit which was pending and had been once tried before the statute was passed, the statute was sustained by the Supreme Court of that State, and afterwards by the Supreme Court of the United States, into which last-mentioned court it had been removed on the allegation that it violated the obligation of contracts. As its purpose and effect was to remove from contracts which the parties had made a legal impediment to their enforcement, there would seem to be no doubt, in the light of the other authorities we have referred to, that the conclusion reached was the only just and proper one.[1]

In the State of Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, by reason of the omission on the part of the officer taking the acknowledgment to state in his certificate that, before and at the time of the grantor making the acknowledgment, he made the contents known to her by reading or otherwise. An act was afterwards passed which provided that "any deed heretofore executed pursuant to
* law, by husband and wife, shall be received in evidence in [* 377]
any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." This statute, though with some hesitation at first, was held to be unobjectionable. The deeds with the defective acknowledgments were regarded by the legislature and by the court as being sufficient for the purpose of conveying at least the grantor's equitable estate; and if sufficient for this purpose, no vested rights would be disturbed, or wrong be done, by making them receivable in evidence as conveyances.[2]

[1] Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380. And see Watson *v.* Mercer, 8 Pet. 88; Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Payne *v.* Treadwell, 16 Cal. 220; Maxey *v.* Wise, 25 Ind. 1.

[2] Chestnut *v.* Shane's Lessee, 16 Ohio, 599, overruling Connell *v.* Connell, 6 Ohio, 358; Good *v.* Zercher, 12 Ohio, 364; Meddock *v.* Williams, 12 Ohio, 377; and Silliman *v.* Cummins, 13 Ohio, 116. Of the dissenting opinion in the last case, which the court approve in 16 Ohio, 609–10, they say: "That opinion stands upon the ground that the act operates only upon that class of deeds where enough had been done to show that a court of chancery ought, in each case, to

Other cases go much farther than this, and hold that, although the deed was originally ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties by giving it effect.[1] At first sight these cases might seem to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property * without an opportunity for trial, inasmuch as they proceeded upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of devesting him of it, and passing it over to the grantee.[2] Apparently, therefore, there would seem to be some force to the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away

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render a decree for a conveyance, assuming that the certificate was not such as the law required. And where the title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation." See also Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Journeay *v.* Gibson, 56 Penn. St. 57. But the legislature, it has been declared, has no power to legalize and make valid the deed of an insane person. Routsong *v.* Wolf, 35 Mo. 174.

[1] Lessee of Walton *v.* Bailey, 1 Binn. 477; Underwood *v.* Lilly, 10 S. & R. 101; Barnet *v.* Barnet, 15 S. & R. 72; Tate *v.* Stooltzfoos, 16 S. & R. 35; Watson *v.* Mercer, 8 Pet. 88; Carpenter *v.* Pennsylvania, 17 How. 456; Davis *v.* State Bank, 7 Ind. 316; Goshorn *v.* Purcell, 11 Ohio, N. S. 641. In the last case the court say: "The act of the married woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of the mistake; and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of justice." Similar language is employed in the Pennsylvania cases. See further, Deutzel *v.* Waldie, 30 Cal. 138.

[2] This view has been taken in some similar cases. See Russell *v.* Rumsey, 35 Ill. 362; Alabama, &c., Ins. Co. *v.* Boykin, 38 Ala. 510; Orton *v.* Noonan, 23 Wis. 102; Dade *v.* Medcalf, 9 Penn. St. 108.

in such a case is *the right in the party to avoid his contract*, — a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.[1] As the point is put by Chief Justice *Parker* of Massachusetts, a party cannot have a vested right to do wrong;[2] or, as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."[3]

The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he had when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should * preclude his acquiring an [* 379] equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to devest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests.[4]

[1] In Gibson *v.* Hibbard, 13 Mich. 215, a check, void at the time it was given, for want of a revenue stamp, was held valid after being stamped as permitted by a subsequent act of Congress. A similar ruling was made in Harris *v.* Rutledge, 19 Iowa, 389. The case of State *v.* Norwood, 12 Md. 195, is still stronger. The curative statute was passed after judgment had been rendered against the right claimed under the defective instrument, and it was held that it must be applied by the appellate court.

[2] Foster *v.* Essex Bank, 16 Mass. 245.

[3] State *v.* Newark, 3 Dutch. 197.

[4] Brinton *v.* Seevers, 12 Iowa, 389; Southard *v.* Central R.R. Co. 2 Dutch.

If, however, a grantor undertakes to convey more than he possesses, or contrary to the conditions or qualifications which, for the benefit of others, are imposed upon his title, so that the defect in his conveyance consists not in any want of due formality, nor in any disability imposed by law, it is not in the power of the legislature to validate it retrospectively, and we may add, also, that it would not have been competent to authorize it in advance. In such case the rights of others intervene, and they are entitled to protection on the same grounds, though for still stronger reasons, which exist in the case of the *bona fide* purchasers above referred to.[1]

22; Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177; Norman *v.* Heist, 5 W. & S. 171; Greenough *v.* Greenough, 11 Penn. St. 494; McCarthy *v.* Hoffman, 23 Penn. St. 508. The legislature cannot validate an invalid trust in a will, by act passed after the death of the testator, and after title vested in the heirs. Hilliard *v.* Miller, 10 Penn. St. 338. See Snyder *v.* Bull, 17 Penn. St. 58; McCarthy *v.* Hoffman, 23 Penn. St. 507; Bolton *v.* Johns, 5 Penn. St. 145; State *v.* Warren, 28 Md. 338. The cases here cited must not be understood as establishing any different principle from that laid down in Goshen *v.* Stonington, 4 Conn. 209, where it was held competent to validate a marriage, notwithstanding the rights of third parties would be incidentally affected. Rights of third parties are liable to be incidentally affected more or less in any case in which a defective contract is made good; but this is no more than might happen in enforcing a contract or decreeing a divorce. Such incidental injuries give no right to complain. See *post*, p. 384. Also Tallman *v.* Janesville, 17 Wis. 71.

[1] In Shouk *v.* Brown, 61 Penn. St. 327, the facts were that a married woman held property under a devise, with an express restraint upon her power to alienate. She nevertheless gave a deed of the same, and a legislative act was afterwards obtained to validate this deed. Held void. *Agnew*, J.: "Many cases have been cited to prove that this legislation is merely confirmatory and valid, beginning with Barnet *v.* Barnet, 15 S. & R. 72, and ending with Journeay *v.* Gibson, 56 Penn. St. 57. The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature interferes to do justice. But the case before us is different. [The grantor] had neither

We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized, the case falls within the principle above laid down, and the right of the legislature to confirm it must be recognized.[1] This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law, and the authority given was conferred by statute retrospectively.[2]

It has not been regarded as a matter of importance in these cases, whether the enabling act was before or after the corporation had entered into the contract in question; and if the legislature possesses that complete control over the subject of taxation by

the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift, which the donor imposed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the legislature to enforce. Her heirs have a right to say . . . 'the legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.' The true principle on which retrospective laws are supported was stated long ago by *Duncan*, J., in Underwood *v.* Lilly, 10 S. & R. 101; to wit, where they impair no contract, or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted."

[1] See Shaw *v.* Norfolk R.R. Corp. 5 Gray, 179, in which it was held that the legislature might validate an unauthorized assignment of a franchise. Also May *v.* Holdridge, 23 Wis. 93, and cases cited, in which statutes authorizing the reassessment of irregular taxes were sustained. In this case, *Paine*, J., says: "This rule must of course be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement, and provide for a reassessment of the tax to pay for it." And see Brewster *v.* Syracuse, 19 N. Y. 116; Kunkle *v.* Franklin, 13 Minn. 127; Boyce *v.* Sinclair, 3 Bush, 264.

[2] See, among other cases, McMillan *v.* Boyles, 6 Iowa, 330; Gould *v.* Sterling, 23 N. Y. 457; Thompson *v.* Lee County, 3 Wal. 327; Bridgeport *v.* Housatonic R.R. Co. 15 Conn. 475; Board of Commissioners *v.* Bright, 18 Ind. 93; Gibbons *v.* Mobile, &c., R.R. Co. 36 Ala. 410.

municipal corporations which has been declared in many cases, it is difficult to perceive how such a corporation can successfully contest the validity of a special statute, which only sanc- [* 380] tions a contract previously made by the * corporation, and which, though at the time *ultra vires*, was nevertheless for a public object, and compels its performance through an exercise of the power of taxation.[1]

[1] In Hasbrouck *v.* Milwaukee, 13 Wis. 37, it appeared that the city of Milwaukee had been authorized to contract for the construction of a harbor, at an expense not to exceed $100,000. A contract was entered into by the city providing for a larger expenditure; and a special legislative act was afterwards obtained to ratify it. The court held that the subsequent legislative ratification was not sufficient, *proprio vigore*, and without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the city. The court say, per *Dixon*, Ch. J.: "The question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city as well as of the legislature, in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to devest settled rights of property, and to take the property of one individual or corporation and transfer it to another." This reasoning, it seems to us, would have required a different decision in many of the cases which we have heretofore cited. The cases of Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143; Brewster *v.* Syracuse, 19 N. Y. 116; and Thomas *v.* Leland, 24 Wend. 65, especially go much further than is necessary to sustain legislation of the character we are now considering. See also Bartholomew *v.* Harwinton, 33 Conn. 408; People *v.* Mitchell, 35 N. Y. 551; Barbour *v.* Camden, 51 Me. 608. In Brewster *v.* Syracuse, parties had constructed a sewer for the city at a stipulated price, which had been fully paid to them. The charter of the city forbade the payment of extra compensation to contractors in any case. The legislature afterwards passed an act empowering the Common Council of Syracuse to assess, collect, and pay over the further sum of $600 in addition to the contract price; and this act was held constitutional. In Thomas *v.* Leland, certain parties had given bond to the State, conditioned to pay into the treasury a certain sum of money as an inducement to the State to connect the Chenango Canal with the Erie at Utica, instead of at Whitestown as originally contemplated, — the sum mentioned being the increased expense in consequence of the change. Afterwards the legislature, deeming the debt thus contracted by individuals unreasonably partial and onerous, passed an act, the object of which was

*Nor is it important in any of the cases to which we [*381] have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision;[1] and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.[2] It has been held that a statute allowing amendments to indictments in criminal cases might constitutionally be applied to pending suits;[3] and even in those States in which retrospective laws are forbidden, a cause must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced.[4] And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered.[5]

to levy the amount on the owners of real estate in Utica. This act seemed to the court unobjectionable. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had before been given securing the same money can detract from its validity. Should an individual volunteer to secure a sum of money, in itself properly leviable by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?" Here, it will be perceived, the corporation was compelled to assume an obligation which it had not even attempted to incur, but which private persons, for considerations which seemed to them sufficient, had taken upon their own shoulders. And while we think the case of Hasbrouck *v.* Milwaukee is not in harmony with the current of authority on this point, we also think the case of Thomas *v.* Leland may be considered as going to the opposite extreme.

[1] Bacon *v.* Callender, 6 Mass. 309; Butler *v.* Palmer, 1 Hill, 324; Cowgill *v.* Long, 15 Ill. 203; Miller *v.* Graham, 17 Ohio, N. S. 1; State *v.* Squires, 26 Iowa, 340.

[2] Watson *v.* Mercer, 8 Pet. 88; Mather *v.* Chapman, 6 Conn. 54; Bristol *v.* Supervisors, &c., 20 Mich. 93; Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380.

[3] State *v.* Manning, 11 Texas, 402.

[4] Rich *v.* Flanders, 39 N. H. 304.

[5] State *v.* Norwood, 12 Md. 195. In Eaton *v.* United States, 5 Cranch, 281, a vessel had been condemned in admiralty, and pending an appeal the act

But the healing statute must in all cases be confined to validating acts which the legislature might previously have
[* 382] authorized. *It cannot make good retrospectively acts or contracts which it had no power to permit or sanction in advance.[1] There lies before us at this time a volume of statutes of one of the States, in which are contained acts declaring certain tax-rolls valid and effectual, notwithstanding the following irregularities and imperfections: a failure in the supervisor to carry out separately, opposite each parcel of land on the roll, the taxes charged upon such parcel, as required by law; a failure in the supervisor to sign the certificate attached to the roll; a failure in the voters of the township to designate, as required by law, in a certain vote by which they had assumed the payment of bounty moneys, whether they should be raised by tax or loan; corrections made in the roll by the supervisor after it had been delivered to the collector; the including by the supervisor of a sum to be raised for township purposes without the previous vote of the township, as required by law; adding to the roll a sum to be raised which could not lawfully be levied by taxation without legislative authority; the failure of the supervisor to make out the roll within the time required by law; and the accidental omission of a parcel of land which should have been embraced by the roll. In each of these cases except the last, the act required by law, and which failed to be performed, might by previous legislation have been dispensed with; and perhaps in the last case there might be question

under which the condemnation was declared was repealed. The court held that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some special provision of statute was made for that purpose. See also Schooner Rachel *v.* United States, 6 Cranch, 329; Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 100; Norris *v.* Crocker, 13 How. 129; Insurance Co. *v.* Ritchie, 5 Wal. 541; *Ex parte* McCardle, 7 Wal. 506; Engle *v.* Shurtz, 1 Mich. 150. In the McCardle case the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending. Per *Chase*, Ch. J.: "Jurisdiction is power to declare the law; and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. This is not less clear upon authority than upon principle."

[1] See *ante*, 379, and note 1.

whether the roll was rendered invalid by the omission referred to, and if it was, whether the subsequent act could legalize it.[1] But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good. If, for instance, a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be beyond the reach of curative legislation.[2] And if persons or property should be assessed for taxation * in a district which did not include [* 383] them, the assessment would not only be invalid, but a healing statute would be ineffectual to charge them with the burden. In such a case there would be a fatal want of jurisdiction;[3] and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.[4]

[1] See Weeks *v.* Milwaukee, 10 Wis. 242; Dean *v.* Gleason, 16 Wis. 1; *post*, 515, note.

[2] See Billings *v.* Detten, 15 Ill. 218; Conway *v.* Cable, 37 Ill. 82; and Thames Manufacturing Co. *v.* Lathrop, 7 Conn. 550, for cases where curative statutes were held not effectual to reach defects in tax proceedings. As to what defects may or may not be cured by subsequent legislation, see Allen *v.* Armstrong, 16 Iowa, 508, Smith *v.* Cleveland, 17 Wis. 556, and Abbott *v.* Lindenbower, 42 Mo. 162. In Tallman *v.* Janesville, 17 Wis. 71, the constitutional authority of the legislature to cause an irregular tax to be reassessed in a subsequent year, where the rights of *bona fide* purchasers had intervened, was disputed; but the court sustained the authority as "a salutary and highly beneficial feature of our systems of taxation," and "not to be abandoned because in some instances it produces individual hardships." Certainly *bona fide* purchasers, as between themselves and the State, must take their purchases subject to all public burdens justly resting upon them. The case of Conway *v.* Cable is instructive. It was there held among other things, — and very justly as we think, — that the legislature could not make good a tax sale effected by fraudulent combination between the officers and the purchasers. In Miller *v.* Graham, 17 Ohio, N. S. 1, a statute validating certain ditch assessments was sustained, notwithstanding the defects covered by it were not mere irregularities; but that statute gave the parties an opportunity to be heard as to these defects.

[3] See Wells *v.* Weston, 22 Mo. 385; People *v.* Supervisors of Chenango, 11 N. Y. 563; Hughey's Lessee *v.* Howell, 2 Ohio, 231; Covington *v.* Southgate, 15 B. Monr. 491; Morford *v.* Unger, 8 Iowa, 82; *post*, 499, 500.

[4] So held in McDaniel *v.* Correll, 19 Ill. 228, where a statute came under consideration which assumed to make valid certain proceedings in court which were void for want of jurisdiction of the persons concerned. See also Denny *v.* Mattoon, 2 Allen, 361; Nelson *v.* Rountree, 23 Wis. 367. Walpole *v.* Elliott,

Statutory Privileges and Exemptions.

The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned, — exemptions from the performance of public duty upon juries, or in the militia, and the like; exemptions of property or person from assessment for the purposes of taxation; exemptions of property from being seized on attachment, or execution, or for the payment of taxes; exemption from highway labor, and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require. The State demands the performance of military duty by those persons only who are within certain specified ages; but if, in the opinion of the legislature, the public exigencies should demand military service from all other persons capable of bearing arms, the privilege of exemption might be recalled, without violation of any constitutional principle. The fact that a party had passed the legal age under an existing law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require them.[1] In like manner, exemptions from taxation are always subject to recall, when they have been granted merely as a privilege, and not for a consideration received by the public; as in the case of exemption of buildings for religious or educational purposes, and the like.[2] So, also, are exemptions of property from execution.[3] So, a license to carry on a particular trade for a specified period, may be recalled before the period has elapsed.[4] So, as before stated, a penalty given by

18 Ind. 259, is distinguishable from these cases. In that case there was not a failure of jurisdiction, but an irregular exercise of it.

[1] Commonwealth *v.* Bird, 12 Mass. 443; Swindle *v.* Brooks, 34 Geo. 67; Mayer, *Ex parte*, 27 Texas, 715. And see Dale *v.* The Governor, 3 Stew. 387.

[2] See *ante*, 280, 281, and notes. All the cases concede the right in the legislature to recall an exemption from taxation, when not resting upon contract. The subject was considered in People *v.* Roper, 35 N. Y. 629, in which it was decided that a limited immunity from taxation, tendered to the members of voluntary military companies, might be recalled at any time. It was held not to be a contract, but "only an expression of the legislative will for the time being, in a matter of mere municipal regulation."

[3] Bull *v.* Conroe, 13 Wis. 238.

[4] Of this there can be no question unless a fee was paid for the license; and

statute may be taken away by statute at any time before judgment is recovered.[1] So an offered bounty may be recalled, except as to so much as was actually earned while the offer was a continuing one; * and the fact that [*384] a party has purchased property or incurred expenses in preparation for earning the bounty cannot preclude the recall.[2] A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon the faith of the sovereign grantor.[3] A statutory right to have cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed.[4] A mill-dam act, which confers upon the person erecting a dam the right to maintain it, and flow the lands of private owners on paying such compensation as should be assessed for the injury done, may be repealed even as to dams previously erected.[5] These illustrations must suffice under the present head.

Consequential Injuries.

It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper

well-considered cases hold that it may be even then. See Adams *v.* Hackett, 5 Gray, 597; Metropolitan Board of Excise *v.* Barrie, 34 N. Y. 657; *ante*, p. 283, note.

[1] Oriental Bank *v.* Freeze, 6 Shep. 109. The statute authorized the plaintiff, suing for a breach of a prison bond, to recover the amount of his judgment and costs. This was regarded by the court as in the nature of a penalty; and it was therefore held competent for the legislature, even after breach, to so modify the law as to limit the plaintiff's recovery to his actual damages. See *ante*, p. 362, note 5, and cases cited.

[2] East Saginaw Salt Manuf. Co. *v.* East Saginaw City, 19 Mich. 271. But as to so much of the bounty as was actually earned before the change in the law, the party earning it has a vested right which cannot be taken away. People *v.* State Auditors, 9 Mich. 327.

[3] Per *Smith*, J., in Pratt *v.* Brown, 3 Wis. 611.

[4] *Ex parte* McCardle, 7 Wal. 506.

[5] Pratt *v.* Brown, 3 Wis. 603. But if the party maintaining the dam had paid to the other party a compensation assessed under the statute, it might be otherwise.

exercise of rights by others.[1] This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed: but in neither case can the parties, whose interests would be injuriously affected, enjoin the act, or claim compensation from the public.[2] The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the Constitution will present no impediment.[3] The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has pre-
[* 385] cluded itself from such new grant, the incidental injury *can constitute no obstacle.[4] But indeed it seems idle to

[1] For the doctrine *damnum absque injuria*, see Broom's Maxims, 185; Sedgwick on Damages, 30, 112.

[2] See *ante*, p. 208, and cases cited in note 2.

[3] Goshen *v.* Richmond, 4 Allen, 460; Bridgewater *v.* Plymouth, 97 Mass. 390.

[4] The State of Massachusetts granted to a corporation the right to construct a toll-bridge across the Charles River, under a charter which was to continue for forty years, afterwards extended to seventy, at the end of which period the bridge was to become the property of the commonwealth. During the term the corporation was to pay 200*l.* annually to Harvard College. Forty-two years after the bridge was opened for passengers, the State incorporated a company for the purpose of erecting another bridge over the same river, a short distance only from the first, and which would accommodate the same passengers. The necessary effect would be to decrease greatly the value of the first franchise, if not to render it altogether worthless. But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury. Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, and 11 Pet. 420. See also Turnpike Co. *v.* State, 3 Wal. 210; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; English *v.* New Haven, &c., Co. 32 Conn. 240; Binghampton Bridge Case, 27 N. Y. 87, and 3 Wal. 51.

specify instances, inasmuch, as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

We have now endeavored to indicate what are and what are not to be regarded as vested rights, and to classify the cases in which individual interests, in possession or expectancy, are protected against being devested by the direct interposition of legislative authority. Some other cases may now be considered, in which legislation has endeavored to control parties as to the manner in which they should make use of their property, or has permitted claims to be created against it through the action of other parties against the will of the owners. We do not allude now to the control which the State may possess through an exercise of the police power, — a power which is merely one of regulation with a view to the best interests and the most complete enjoyment of rights by all, — but to that which, under a claim of State policy, and without any reference to wrongful act or omission by the owner, would exercise a supervision over his enjoyment of undoubted rights, or which, in some cases, would compel him to recognize and satisfy demands upon his property which have been created without his assent.

In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government.[1] But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not

[1] Montesq. Sp. of the Laws, B. 7. Such laws, though common in some countries, have never been numerous in England. See references to the legislation of this character, 4 Bl. Com. 170. Some of these statutes prescribed the number of courses permissible at dinner or other meal, while others were directed to restraining extravagance in dress. See Hallam, Mid. Ages, c. 9, pt. II.; and as to Roman sumptuary laws, Encyc. Metrop. Vol. X. p. 110. Adam Smith said of such laws, "It is the highest impertinence and presumption in kings and ministers to pretend to watch over the economy of private people, and to restrain their expense, either by sumptuary laws, or by prohibiting the importation of foreign luxuries." Wealth of Nations, B. 2, c. 3. As to prohibitory liquor laws, see *post*, 581–584.

been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the State of Kentucky an act was at one time passed to compel the owners of wild lands to make certain improvements upon them within a specified time, and declared them forfeited to the State in case the statute was not complied with. It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to
[* 386] * the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property, if he failed to improve it according to a standard which the legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion, and if defensible on principle, then a law which should authorize the officer to enter a man's dwelling and seize and confiscate his furniture if it fell below, or his food if it exceeded an established legal standard, would be equally so. But in a free country such laws when mentioned are condemned instinctively.[1]

But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought on grounds of strict equity to constitute a charge upon the land improved. If they have been made in good faith, and under a reasonable expectation on the part of the person making them, that he was to reap the benefit of them, and if the owner has stood by and suffered them to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures made, and perhaps no sufficient reason why provision should not be made by law for their recovery.

[1] The Kentucky statute referred to was declared unconstitutional in Gaines *v.* Buford, 1 Dana, 499. See also Violett *v.* Violett, 2 Dana, 326.

Accordingly in the several States statutes will be found which undertake to provide for these equitable claims. These statutes are commonly known as *betterment laws;* and as an illustration of the whole class, we give the substance of that adopted in Vermont. It provided that after recovery in ejectment, where he or those through whom he claimed had purchased or taken a lease of the land, supposing at the time that the title purchased was good, or the lease valid to convey and secure the title and interest therein expressed, the defendant should be entitled to recover of the plaintiff the full value of the improvements made by him or by those through whom he claimed, to be assessed by jury, and to be enforced against the land, and not otherwise. The value was ascertained by estimating the increased value of the land in consequence of the improvements; but the plaintiff at his election might have the value of the land without the improvements assessed, and the defendant should purchase the same at that price within four years, or lose the benefit of his claim for improvements. But the benefit of the law was not given to one who had entered on land * by virtue of a contract with the owner, unless it [* 387] should appear that the owner had failed to fulfil such contract on his part.[1]

This statute, and similar ones which preceded it, have been adjudged constitutional by the Supreme Court of Vermont, and have frequently been enforced. In an early case the court explained the principle of these statutes as follows: "The action for betterments, as they are now termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the defendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been had no labor been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken from the civil law, where ample provision was made for reimbursing the *bona fide* possessor the expense of his improvements, if he was removed from his possession by the legal owner. It gives to the possessor not the expense which he has laid out on the land, but the amount

[1] Revised Statutes of Vermont of 1839, p. 216.

which he has increased the value of the land by his betterments thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it, and the value if no improvement had been made. If the owner take the land together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration." [1]

[* 388] * The last circumstance stated in this opinion — the negligence of the owner in asserting his claim — is evidently deemed important in some States, whose statutes only allow a recovery for improvements by one who has been in possession a certain number of years. But a later Vermont case dismisses it from consideration as a necessary ground on which to base the right of recovery. "The right of the occupant to recover the value of his improvements," say the court, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity; viz., that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money; is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements, without compensation to him who made them. This principle of natural justice has been very widely, we may say universally, recognized." [2]

[1] Brown *v.* Storm, 4 Vt. 37. This class of legislation was also elaborately examined and defended by *Trumbull*, J., in Ross *v.* Irving, 14 Ill. 171, and in some of the other cases referred to in the succeeding note. See also Bright *v.* Boyd, 1 Story, 478; s. c. 2 Story, 607.

[2] Whitney *v.* Richardson, 31 Vt. 306. For other cases in which similar laws

* Betterment laws, then, recognize the existence of an [* 389] equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed in *statu quo*, and the statute accomplishes justice as near as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property

have been held constitutional, see Armstrong *v.* Jackson, 1 Blackf. 374; Fowler *v.* Halbert, 4 Bibb, 54; Withington *v.* Corey, 2 N. H. 115; Bacon *v.* Callender, 6 Mass. 303; Pacquette *v.* Pickness, 19 Wis. 219; Childs *v.* Shower, 18 Iowa, 261; Scott *v.* Mather, 14 Texas, 235; Saunders *v.* Wilson, 19 Texas, 194; Brackett *v.* Norcross, 1 Greenl. 92; Hunt's Lessee *v.* McMahan, 5 Ohio, 132; Longworth *v.* Worthington, 6 Ohio, 10. See further, Jones *v.* Carter, 12 Mass. 314; Dothage *v.* Stuart, 35 Mo. 251; Fenwick *v.* Gill, 38 Mo. 510; Howard *v.* Zeyer, 18 La. An. 407; Pope *v.* Macon, 23 Ark. 644; Marlow *v.* Adams, 24 Ark. 109; Ormond *v.* Martin, 37 Ala. 598; Love *v.* Shartzer, 31 Cal. 487. For a contrary ruling, see Nelson *v.* Allen, 1 Yerg. 376. Mr. Justice *Story* held in Society, &c. *v.* Wheeler, 2 Gall. 105, that such a law could not constitutionally be made to apply to improvements made before its passage; but this decision was made under the New Hampshire Constitution, which forbade retrospective laws. The principles of equity upon which such legislation is sustained would seem not to depend upon the time when the improvements were made. See Davis's Lessee *v.* Powell, 13 Ohio, 308. In Childs *v.* Shower, 18 Iowa, 261, it was held that the legislature could not constitutionally make the value of the improvements a personal charge against the owner of the land, and authorize a personal judgment against him. The same ruling was had in McCoy *v.* Grandy, 3 Ohio, N. S. 463. A statute had been passed authorizing the occupying claimant at his option, after judgment rendered against him for the recovery of the land, to demand payment from the successful claimant of the full value of his lasting and valuable improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. The court say: "The occupying claimant act, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, goes to the utmost stretch of the legislative power touching this subject. And the statute . . . providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the Constitution."

which adjusts the equities of the parties as near as possible according to natural justice.[1]

Unequal and Partial Legislation.

In the course of our discussion of this subject it has been seen that some statutes are void though general in their scope, while others are valid though establishing rules for single cases only. An enactment may therefore be the law of the land without being a general law. And this being so, it may be important to consider in what cases constitutional principles will require a statute to be general in its operation, and in what cases, on the other hand, it may be valid without being general. We speak now in reference to general constitutional principles, and not to any peculiar rules which may have become established by special provisions in the constitutions of individual States.

The cases relating to municipal corporations stand upon peculiar grounds from the fact that those corporations are mere agencies of government, and as such are subject to complete legislative control. Statutes authorizing the sale of property of minors and other persons under disability are also exceptional, in that they are applied for by the parties representing the interests of the owners, and are remedial in their character. Such statutes are supported by the presumption that the parties in interest would consent if capable of doing so, and in law are to be con-
[* 390] sidered as assenting in * the person of the guardians or trustees of their rights. And perhaps in any other case, if a party petitions for legislation and avails himself of it, he may justly be held estopped from disputing its validity;[2] so that the

[1] In Harris *v.* Inhabitants of Marblehead, 10 Gray, 44, it was held that the betterment law did not apply to a town which had appropriated private property for the purposes of a school-house, and erected the house thereon. The law, it was said, did not apply "where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house, or any other building erected upon it." But as a matter of constitutional authority, we see no reason to doubt that the legislature might extend such a law even to the cases of this description.

[2] This doctrine was applied in Ferguson *v.* Landram, 5 Bush, 230, to parties who had obtained a statute for the levy of a tax to refund bounty moneys, which statute was held void as to other persons.

great bulk of private legislation which is adopted from year to year, may at once be dismissed from this discussion.

Laws public in their objects may, unless express constitutional provision forbids,[1] be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers of one class a specific lien for their wages, when it would be impracticable or impolitic to do the same by persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.

But a statute would not be constitutional which should proscribe

[1] See *ante*, p. 128, note 1, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State; all that is required is that it shall apply equally to all persons within the territorial limits described in the act. State *v.* County Commissioners of Baltimore, 29 Md. 516.

a class or a party for opinion's sake,[1] or which should
[* 391] select particular *individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt.[2]

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.[3]

[1] The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indorser or supporter of the Helper book, shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introduing into legislation the principle of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question." Baltimore *v.* State, 15 Md. 468. See also p. 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of those facts of general notoriety, which, like the names of political parties, are a part of the public history of the times.

[2] Lin Sing *v.* Washburn, 20 Cal. 534. There is no reason, however, why the law should not take notice of peculiar views held by some classes of people, which unfit them for certain public duties, and excuse them from the performance of such duties; as Quakers are excused from military duty, and persons denying the right to inflict capital punishment are excluded from juries in capital cases. These, however, are in the nature of exemptions, and they rest upon considerations of obvious necessity.

[3] The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. Holden *v.* James, 11 Mass. 396; Davison *v.* Johonnot, 7 Met. 393. The general exemption laws cannot be varied for particular cases or localities. Bull *v.* Conroe, 13 Wis. 238, 244. The legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law. Teft *v.* Teft, 3 Mich. 67. The authority in emergencies to suspend the civil laws in a part of the State only, by a declaration of martial law, we do not call in question by any thing here stated.

Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriæ* may grant authority to the guardians or trustees of incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the discharge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied * in all similar cases, [* 392] would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."[1] This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.[2]

[1] Locke on Civil Government, § 142.

[2] In Lewis *v.* Webb, 3 Greenl. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." See also Durham *v.* Lewiston, 4 Greenl. 140; Holden *v.* James, 11 Mass. 396; Piquet, Appellant, 5 Pick. 64; Budd *v.* State, 3 Humph. 483; Wally's Heirs *v.* Kennedy, 2 Yerg. 554. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitu-

Special courts cannot be created for the trial of the rights and obligations of particular parties;[1] and those cases in which legislative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend general laws in [* 393] special * cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, — like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their "pursuit of happiness;"[2] and those who should claim a right to do so ought to be able to

tional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law by another; whereas the like general law affecting the whole community equally could not have been passed."

[1] As, for instance, the debtors of a particular bank. Bank of the State *v.* Cooper, 2 Yerg. 599.

[2] Burlamaqui (Politic Law, c. 3, § 15) defines *natural liberty* as the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men. See 1 Bl. Com. 125. Lieber says: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." Civil Liberty and Self-Government.

show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.

Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.[1] The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be leaned against as probably not contemplated or designed. It has been held that a statute requiring attorneys to render services in suits for poor persons without fee or reward, was to be confined strictly to the cases therein prescribed; and if by its terms it
* expressly covered civil cases only, it could not be ex- [* 394]
tended to embrace defences of criminal prosecutions.[2]
So where a constitutional provision confined the elective franchise to "*white* male citizens," and it appeared that the legislation of the State had always treated of negroes, mulattoes, and *other colored persons* in contradistinction to white, it was held that although quadroons, being a recognized class of colored persons, must be excluded, yet that the rule of exclusion would not be carried further.[3] So a statute making parties witnesses against them-

[1] In the Case of Monopolies, Darcy *v.* Allain, 11 Rep. 84, the grant of an exclusive privilege of making playing cards was adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; *for the end* of all these monopolies is for the private gain of the patentees." On this ground it has been denied that the State can exercise the power of taxation on behalf of corporations who undertake to make or to improve the thoroughfares of trade and travel for their own benefit. The State, it is said, can no more tax the community to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build and own railroads in consideration of expected incidental benefits, than it can make them to the men who build stores or manufactories in consideration of similar expected benefits. People *v.* Township Board of Salem, 20 Mich.; s. c. 9 Am. Law Reg. N. S. 487; Garrard Co. Court *v.* Kentucky River Nav. Co. in Court of Appeals of Kentucky, 1870.

[2] Webb *v.* Baird, 6 Ind. 13.

[3] People *v.* Dean, 14 Mich. 406. See Bailey *v.* Fiske, 34 Me. 77. The decisions in Ohio were still more liberal, and ranked as white persons all who had

selves cannot be construed to compel them to disclose facts which would subject them to criminal punishment.[1] And a statute which authorizes summary process in favor of a bank against debtors who have by express contract made their obligations payable at such bank, being in derogation of the ordinary principles of private right, must be subject to strict construction.[2] These cases are only illustrations of a rule of general acceptance.[3]

There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all; and if it is important that they should exist, the proper State authority must be left to select the grantees. Of this class are grants of the franchise to be a corporation. Such grants, however, which confer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators.[4] The just pre-
[*395] sumption in *every such case is, that the State has granted in express terms all that it designed to grant at all. "When a State," says the Supreme Court of Pennsylvania, "means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. . . . In the construction

a preponderance of white blood. Gray *v.* State, 4 Ohio, 354; Jeffies *v.* Ankeny, 11 Ohio, 372; Thacker *v.* Hawk, *ib.* 376; Anderson *v.* Millikin, 9 Ohio, N. S. 406. But see Van Camp *v.* Board of Education, 9 Ohio, N. S. 406. Happily all such questions are now disposed of by constitutional amendments.

[1] Broadbent *v.* State, 7 Md. 416. See Knowles *v.* People, 15 Mich. 408.

[2] Bank of Columbia *v.* Okely, 4 Wheat. 241.

[3] See 1 Bl. Com. 89, and note.

[4] Providence Bank *v.* Billings, 4 Pet. 514; Charles River Bridge *v.* Warren Bridge, 11 Pet. 544; Perrine *v.* Chesapeake and Delaware Canal Co. 9 How. 172; Richmond, &c., R.R. Co. *v.* Louisa R.R. Co. 13 How. 71; Bradley *v.* N. Y. & N. H. R.R. Co. 21 Conn. 294; Parker *v.* Sunbury & Erie R.R. Co. 19 Penn. St. 211; Wales *v.* Stetson, 2 Mass. 143; Chenango Bridge Co. *v.* Binghamton Bridge Co. 27 N. Y. 87, and 3 Wal. 51; State *v.* Krebs, 64 N. C. 604.

of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending [its privileges], let the legislature see to it, but remember that nothing but plain English words will do it."[1]

*And this rule is not confined to the grant of a corpo- [*396] rate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate. "Private statutes," says *Parsons*, Ch. J., "made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results

[1] Pennsylvania R.R. Co. *v.* Canal Commissioners, 21 Penn. St. 22. And see Commonwealth *v.* Pittsburg, &c., R.R. Co. 24 Penn. St. 159; Chenango Bridge Co. *v.* Binghamton Bridge Co. 27 N. Y. 93, per *Wright*, J.; Baltimore *v.* Baltimore, &c., R.R. Co. 21 Md. 50. We quote from the Supreme Court of Connecticut in Bradley *v.* N. Y. & N. H. R.R. Co. 21 Conn. 306: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted; the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled. Acts of the former kind, being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that their interests might be promoted at the sacrifice or to the injury of those of others whose interests should be equally regarded. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others."

from express words or from necessary implication."[1] And the grant of ferry rights, or the right to erect a toll-bridge, and the like, is not only to be construed strictly against the grantees, but it will not be held to exclude the grant of a similar and competing privilege to others, unless the terms of the grant render such construction imperative.[2]

[*397] *The Constitution of the United States contains provisions which are important in this connection. One of these is, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States,[3] and all persons born or naturalized in the United States, and subject to its jurisdiction, are declared to be citizens thereof, and of the State wherein they reside.[4] The States are also forbidden

[1] Coolidge *v.* Williams, 4 Mass. 140. See also Dyer *v.* Tuscaloosa Bridge Co. 2 Port. (Ala.) 296; Grant *v.* Leach, 20 La. An. 329. In Sprague *v.* Birdsall, 2 Cow. 419, it was held that one embarking upon the Cayuga Lake six miles from the bridge of the Cayuga Bridge Co., and crossing the lake in an oblique direction so as to land within sixty rods of the bridge, was not liable to pay toll under a provision in the charter of said company which made it unlawful for any person to cross within three miles of the bridge without paying toll. In another case arising under the same charter, which authorized the company to build a bridge across the lake *or* the outlet thereof, and to rebuild in case it should be destroyed or carried away by the ice, and prohibited all other persons from erecting a bridge within three miles of the place where a bridge should be erected by the company, it was held, after the company had erected a bridge across the lake and it had been carried away by the ice, that they had no authority afterwards to rebuild across the *outlet* of the lake, two miles from the place where the first bridge was built, and that the restricted limits were to be measured from the place where the first bridge was erected. Cayuga Bridge Co. *v.* Magee, 2 Paige, 116; Same Case, 6 Wend. 85. In Chapin *v.* The Paper Works, 30 Conn. 461, it was held that statutes giving a preference to certain creditors over others should be construed with reasonable strictness, as the law favored equality. In People *v.* Lambier, 5 Denio, 9, it appeared that an act of the legislature had authorized a proprietor of lands lying in the East River, which is an arm of the sea, to construct wharves and bulkheads in the river, in front of his land, and there was at the time a public highway through the land, terminating at the river. Held, that the proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the street was, by operation of law, extended from the former terminus over the newly made land to the water.

[2] Mills *v.* St. Clair County, 8 How. 569; Mohawk Bridge Co. *v.* Utica & S. R.R. Co. 6 Paige, 554; Chenango Bridge Co. *v.* Binghamton Bridge Co. 27 N. Y. 87; Same Case, 3 Wal. 51.

[3] Const. of United States, art 4, § 2. See *ante*, pp. 15, 16.

[4] Const. of United States, 14th Amendment.

to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, or to deprive any person of life, liberty, or property, without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws.[1] Although the precise meaning of "privileges and immunities" is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.[2] To this extent, at least, discriminations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made — as they usually are — to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident.[3] The protection by due process of law has already been considered. It was not within the power of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws, the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.

[1] Const. of United States, 14th Amendment.

[2] Corfield *v.* Coryell, 4 Wash. 380; Campbell *v.* Morris, 3 H. & McH. 554; Crandall *v.* State, 10 Conn. 343; Oliver *v.* Washington Mills, 11 Allen, 281.

[3] Campbell *v.* Morris, 3 H. & McH. 554; State *v.* Medbury, 3 R. I. 141. And see generally the cases cited, *ante*, p. 16, note.

Judicial Proceedings.

Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, is as often made in regard to judicial proceedings as in any other cases. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of the judicial authority are much better defined than those of the legislative, and each case can generally be brought to a definite and well-settled test.

The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction [*398] is, *first*, of * the subject-matter; and, *second*, of the persons whose rights are to be passed upon.[1]

A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be devested by means of them.

And on this point there is an important maxim of the law, that is to say, that consent will not confer jurisdiction:[2] by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its judgment by the law. The law creates courts, and with reference to considerations of general public policy defines and limits their

[1] Bouvier defines jurisdiction thus: "Jurisdiction is a power constitutionally conferred upon a court, a single judge, or a magistrate, to take cognizance and decide causes according to law, and to carry their sentence into execution. The tract of land within which a court, judge, or magistrate has jurisdiction is called his *territory;* and his power in relation to his territory is called his *territorial jurisdiction.*" 3 Bouv. Inst. 71.

[2] Coffin *v.* Tracy, 3 Caines, 129; Blin *v.* Campbell, 14 Johns. 432; Cuyler *v.* Rochester, 12 Wend. 165; Dudley *v.* Mayhew, 3 N. Y. 9; Preston *v.* Boston, 12 Pick. 7; Chapman *v.* Morgan, 2 Greene (Iowa), 374; Thompson *v.* Steamboat Morton, 2 Ohio, N. S. 26; Gilliland *v.* Administrator of Sellers, *ib.* 223; Dicks *v.* Hatch, 10 Iowa, 380; Overstreet *v.* Brown, 4 McCord, 79; Green *v.* Collins, 6 Ired. 139; Bostwick *v.* Perkins, 4 Geo. 47; Georgia R.R. &c. *v.* Harris, 5 Geo. 527; State *v.* Bonney, 34 Me. 223; Little *v.* Fitts, 33 Ala. 343; Ginn *v.* Rogers, 4 Gilm. 131; Neill *v.* Keese, 5 Texas, 23; Ames *v.* Boland, 1 Minn. 365; Brady *v.* Richardson, 18 Ind. 1; White *v.* Buchanan, 6 Cold. 32.

jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no *waiver of rights by [*399] laches in a case where consent would be altogether nugatory.[1]

In regard to private controversies, the law always encourages arrangements;[2] and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award; and a mere neglect by either party to object the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented

[1] Bostwick *v.* Perkins, 4 Geo. 47; Hill *v.* People, 16 Mich. 351; White *v.* Buchanan, 6 Cold. 32.

[2] Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Coyner *v.* Lynde, 10 Ind. 282.

or not. Those cases in which it has been held that the constitutional right of trial by jury cannot be waived are strongly illustrative of the legal view of this subject.[1]

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purposes of the hearing.[2]

Sometimes jurisdiction of the subject-matter will depend upon considerations of locality, either of the thing in dispute or of the parties. At law certain actions are local, and others are [* 400] transitory. * The first can only be tried where the property is which is the subject of the controversy, or in respect to which the controversy has arisen. The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different States or countries.[3] The question of jurisdiction in these cases is sometimes determined by the common law, and sometimes is matter of statutory regulation. But there is a class of cases in respect to which the courts of the several States of the Union are constantly being called upon to exercise authority, and in which, while the jurisdiction is conceded to rest on considerations of locality, there has not, unfortunately, at all times been entire harmony of decision as to what shall confer jurisdiction. We refer now to suits for divorce from the bonds of matrimony.

The courts of one State or country have no general authority to grant divorce, unless for some reason they have control over the particular marriage contract which is sought to be annulled. But

[1] Brown *v.* State, 8 Blackf. 561; Work *v.* Ohio, 2 Ohio, N. S. 296; Cancemi *v.* People, 18 N. Y. 128; Smith *v.* People, 9 Mich. 193; Hill *v.* People, 16 Mich. 351. See also State *v.* Turner, 1 Wright, 20.

[2] Winchester *v.* Ayres, 4 Greene (Iowa), 104.

[3] See a case where a judgment of a United States court was treated as of no force, because the court had not jurisdiction in respect to the plaintiff. Vose *v.* Morton, 4 Cush. 27. As to third persons, a judgment against an individual may sometimes be treated as void, when he was not suable in that court or in that manner, notwithstanding he may have so submitted himself to the jurisdiction as to be personally bound. See Georgia R.R. &c. *v.* Harris, 5 Geo. 527; Hinchman *v.* Town, 10 Mich. 508.

what circumstance gives such control? Is it the fact that the marriage was entered into in such country or State? Or that the alleged breach of the marriage bond was within that jurisdiction? Or that the parties resided within it either at the time of the marriage or at the time of the offence? Or that the parties now reside in such State or country, though both marriage and offence may have taken place elsewhere? Or must marriage, offence, and residence, all or any two of them, combine to confer the authority? These are questions which have frequently demanded the thoughtful attention of the courts, who have sought to establish a rule at once sound in principle, and that shall protect as far as possible the rights of the parties, one or the other of whom, unfortunately, under the operation of any rule which can be established, it will frequently be found has been the victim of gross injustice.

We conceive the true rule to be that the actual, *bona fide* residence of either husband or wife within a State will give to that *State authority to determine the *status* of [*401] such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offence; and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.[1]

[1] There are a number of cases in which this subject has been considered. In Inhabitants of Hanover *v.* Turner, 14 Mass. 227, instructions to a jury were sustained, that if they were satisfied the husband, who had been a citizen of Massachusetts, removed to Vermont merely for the purpose of procuring a divorce, and that the pretended cause for divorce arose, if it ever did arise, in Massachusetts, and that the wife was never within the jurisdiction of the court of Vermont, then and in such case the decree of divorce which the husband had obtained in Vermont must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage between the parties. See also Vischer *v.* Vischer, 12 Barb. 640; and McGiffert *v.* McGiffert, 31 Barb. 69. In Chase *v.* Chase, 6 Gray, 157, the same ruling was had as to a foreign divorce, notwithstanding the wife appeared in and defended the foreign suit. In Clark

[* 402] * But to render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or

v. Clark, 8 N. H. 21, the court refused a divorce on the ground that the alleged cause of divorce (adultery), though committed within the State, was so committed while the parties had their domicile abroad. This decision was followed in Greenlaw *v.* Greenlaw, 12 N. H. 200. The court say: "If the defendant never had any domicile in this State, the libellant could not come here, bringing with her a cause of divorce over which this court had jurisdiction. If at the time of the [alleged offence] the domicile of the parties was in Maine, and the facts furnished no cause for a divorce there, she could not come here and allege those matters which had already occurred, as a ground for a divorce under the laws of this State. Should she under such circumstances obtain a decree of divorce here, it must be regarded as a mere nullity elsewhere." In Frary *v.* Frary, 10 N. H. 61, importance was attached to the fact that the *marriage* took place in New Hampshire, and it was held that the court had jurisdiction of the wife's application for a divorce, notwithstanding the offence was committed in Vermont, but during the time of the wife's residence in New Hampshire. See also Kimball *v.* Kimball, 13 N. H. 225; Bachelder *v.* Bachelder, 14 N. H. 380; Payson *v.* Payson, 34 N. H. 518; Hopkins *v.* Hopkins, 35 N. H. 474. In Wilcox *v.* Wilcox, 10 Ind. 436, it was held that the residence of the libellant at the time of the application for a divorce was sufficient to confer jurisdiction, and a decree dismissing the bill because the cause for divorce arose out of the State was reversed. And see Tolen *v.* Tolen, 2 Blackf. 407. See also Jackson *v.* Jackson, 1 Johns. 424; Barber *v.* Root, 10 Mass. 263; Borden *v.* Fitch, 15 Johns. 121; Bradshaw *v.* Heath, 13 Wend. 407. In any of these cases the question of actual residence will be open to inquiry wherever it becomes important, notwithstanding the record of proceedings is in due form, and contains the affidavit of residence required by the practice. Leith *v.* Leith, 39 N. H. 20. And see McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317. The Pennsylvania cases agree with those of New Hampshire, in holding that a divorce should not be granted unless the cause alleged occurred while the complainant had domicile within the State. Dorsey *v.* Dorsey, 7 Watts, 349; Hollister *v.* Hollister, 6 Penn. St. 449; McDermott's Appeal, 8 W. & S. 251. And they hold also that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the common domicile of both. Calvin *v.* Reed, 35 Penn. St. 375. For cases supporting to a greater or less extent the doctrine stated in the text, see Harding *v.* Alden, 9 Greenl. 140; Ditson *v.* Ditson, 4 R. I. 87; Pawling *v.* Bird's Ex'rs, 13 Johns. 192; Kerr *v.* Kerr, 41 N. Y. 272; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Cooper *v.* Cooper, 7 Ohio, 594; Mansfield *v.* McIntyre, 10 Ohio, 28; Smith *v.* Smith, 4 Greene (Iowa), 266; Yates *v.* Yates, 2 Beasley, 280; Maguire *v.* Maguire, 7 Dana, 181; Waltz *v.* Waltz, 18 Ind. 449; Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Gleason *v.* Gleason, 4 Wis. 64; Hare *v.* Hare, 15 Texas, 355. And see Story, Confl. Laws, § 230 *a*; Bishop on Mar. and Div. 727 *et seq.*; *ib.* (4th ed.) Vol. II. § 155 *et seq.* A number of the cases cited hold that the wife

the parties interested, be subjected to the process of the court. Certain cases are said to proceed *in rem*, because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without * specially noticing the interested parties; [*403] while in other cases the parties themselves are brought before the court by process. Of the first class admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing to which the controversy relates. In cases within this class, notice to all concerned is required to be given either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to render judgment.[1] Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear.[2] Some

may have a domicile separate from the husband, and may therefore be entitled to a divorce, though the husband never resided in the State. These cases proceed upon the theory that, although in general the domicile of the husband is the domicile of the wife, yet that if he be guilty of such act or dereliction of duty in the relation as entitles her to have it partially or wholly dissolved, she is at liberty to establish a separate jurisdictional domicile of her own. Ditson *v.* Ditson, 4 R. I. 87; Harding *v.* Alden, 9 Greenl. 140; Maguire *v.* Maguire, 7 Dana, 181; Hollister *v.* Hollister, 6 Penn. St. 449. The doctrine in New York seems to be, that a divorce obtained in another State, without personal service of process or appearance of the defendant, is absolutely void. Vischer *v.* Vischer, 12 Barb. 640; McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317.

Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of Ditson *v.* Ditson, *supra*, which reviews and comments upon a number of the cases cited, and particularly upon the Massachusetts cases of Barber *v.* Root, 10 Mass. 265; Inhabitants of Hanover *v.* Turner, 14 Mass. 227; Harteau *v.* Harteau, 14 Pick. 181; and Lyon *v.* Lyon, 2 Gray, 367. The divorce of one party divorces both. Cooper *v.* Cooper, 7 Ohio, 594. And will leave both at liberty to enter into new marriage relations, unless the local statute expressly forbids the guilty party from contracting a second marriage. See Commonwealth *v.* Putnam, 1 Pick. 136; Baker *v.* People, 2 Hill, 325.

[1] Doughty *v.* Hope, 3 Denio, 594. See Matter of Empire City Bank, 18 N. Y. 199; Nations *v.* Johnson, 24 How. 204, 205; Blackwell on Tax Titles, 213.

[2] Jack *v.* Thompson, 41 Miss. 49. As to the right of an attorney to notice of proceedings to disbar him, see notes to pp. 337 and 404. "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence

cases also partake of the nature both of proceedings *in rem* and of personal actions, since, although they proceed by seizing property, they also contemplate the service of process on defendant parties. Of this class are the proceedings by foreign attachment, in which the property of a non-resident or concealed debtor is seized and retained by the officer as security for the satisfaction of any judgment that may be recovered against him, but at the same time process is issued to be served upon the defendant, and which must be served, or some substitute for service had before judgment can be rendered.

In such cases, as well as in divorce suits, it will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless
[* 404] * a substituted service is admissible. A substituted service is provided by statute for many such cases; generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it, if possible, home to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon.[1]

of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." Black *v.* Black, 4 Bradf. Sur. Rep. 205. Where, however, a statute provides for the taking of a certain security, and authorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment. Lewis *v.* Garrett's Adm'r, 6 Miss. 434; People *v.* Van Eps, 4 Wend. 390; Chappee *v.* Thomas, 5 Mich. 53; Gildersleeve *v.* People, 10 Barb. 35; People *v.* Lott, 21 Barb. 130; Pratt *v.* Donovan, 10 Wis. 378; Murray *v.* Hoboken Land Co. 18 How. 272; Philadelphia *v.* Commonwealth, 52 Penn. St. 451.

[1] "It may be admitted that a statute which authorized any debt or damages to be adjudged against a person upon purely *ex parte* proceedings, without pretence

But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings.[1]

Where a party has property in a State, and *resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of [*405]

of notice, or any provision for defending, would be a violation of the constitution, and void; but when the legislature has provided a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceedings illegal." *Denio*, J., in Matter of Empire City Bank, 18 N. Y. 200. See also, per *Morgan*, J., in Rockwell *v.* Nearing, 35 N. Y. 314; Nations *v.* Johnson, 24 How. 195; Beard *v.* Beard, 21 Ind. 321; Mason *v.* Messenger, 17 Iowa, 261.

[1] Pawling *v.* Willson, 13 Johns. 192; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Curtis *v.* Gibbs, 1 Penn. 399; Miller's Ex'r *v.* Miller, 1 Bailey, 242; Cone *v.* Cotton, 2 Blackf. 82; Kilburn *v.* Woodworth, 5 Johns. 37; Robinson *v.* Ward's Ex'r, 8 Johns. 86; Hall *v.* Williams, 6 Pick. 232; Bartlet *v.* Knight, 1 Mass. 401; St. Albans *v.* Bush, 4 Vt. 58; Fenton *v.* Garlick, 8 Johns. 194; Bissell *v.* Briggs, 9 Mass. 462; Denison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 Conn. 380; Hoxie *v.* Wright, 2 Vt. 263; Newell *v.* Newton, 10 Pick. 470; Starbuck *v.* Murray, 5 Wend. 161; Armstrong *v.* Harshaw, 1 Dev. 188; Bradshaw *v.* Heath, 13 Wend. 407; Bates *v.* Delavan, 5 Paige, 299; Webster *v.* Reid, 11 How. 460; Gleason *v.* Dodd, 4 Met. 333; Green *v.* Custard, 23 How. 486. In *Ex parte* Heyfron, 7 How. (Miss.) 127, it was held that an attorney could not be stricken from the rolls without notice of the proceeding, and opportunity to be heard. And see *ante*, p. 337 n. Leaving notice with one's family is not equivalent to personal service. Rape *v.* Heaton, 9 Wis. 329. And see Bimeler *v.* Dawson, 4 Scam. 536.

law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.

The same rule applies in divorce cases. The courts of the State where the complaining party resides have jurisdiction of the subject-matter; and if the other party is a non-resident, they must be authorized to proceed without personal service of process. The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage;[1] and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject could only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there.[2]

[* 406] * But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the State, it would be competent to provide by law for the seizure and appropriation of such property, under the decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of

[1] Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Mansfield *v.* McIntyre, 10 Ohio, 28; Ditson *v.* Ditson, 4 R. I. 97; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Harding *v.* Alden, 9 Greenl. 140; Maguire *v.* Maguire, 7 Dana, 181; Todd *v.* Kerr, 42 Barb. 317. It is immaterial in these cases whether notice was actually brought home to the defendant or not. And see Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369.

[2] This must be so on general principles, as the appointment of guardian for minors is of local force only. See Monell *v.* Dickey, 1 Johns. Ch. 156; Woodworth *v.* Spring, 4 Allen, 321; Potter *v.* Hiscox, 30 Conn. 508; Kraft *v.* Wickey, 4 G. & J. 322. The case of Townsend *v.* Kendall, 4 Minn. 412, appears to be *contra*, but some reliance is placed by the court on the statute of the State which allows the foreign appointment to be recognized for the purposes of a sale of the real estate of a ward.

the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the State.[1]

When the question is raised whether the proceedings of a court may not be void for want of jurisdiction, it will sometimes be important to note the grade of the court and the extent of its authority. Some courts are of general jurisdiction, by which is meant that their authority extends to a great variety of matters; while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to certain specified cases. The want of jurisdiction is equally fatal in the proceedings of each; but different rules prevail in showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process.[2]

*There is also another difference between these two [*407] classes of tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact

[1] See Jackson *v.* Jackson, 1 Johns. 424; Harding *v.* Alden, 9 Greenl. 140; Holmes *v.* Holmes, 4 Barb. 295; Crane *v.* Meginnis, 1 Gill & J. 463; Maguire *v.* Maguire, 7 Dana, 181; Townsend *v.* Griffin, 4 Harr. 440. In Beard *v.* Beard, 21 Ind. 321, *Perkins*, J., after a learned and somewhat elaborate examination of the subject, expresses the opinion that the State may permit a personal judgment for alimony in the case of a resident defendant, on service by publication only, though he conceded that there would be no such power in the case of non-residents.

[2] See Dakin *v.* Hudson, 6 Cow. 221; Cleveland *v.* Rogers, 6 Wend. 438; People *v.* Koeber, 7 Hill, 39; Sheldon *v.* Wright, 1 Seld. 511; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Wall *v.* Trumbull, 16 Mich. 228; Denning *v.* Corwin, 11 Wend. 647; Bridge *v.* Ford, 6 Mass. 641; Smith *v.* Rice, 11 Mass. 511; Barrett *v.* Crane, 16 Vt. 246; Teft *v.* Griffin, 5 Geo. 185; Jennings *v.* Stafford, 1 Ired. 404; Hershaw *v.* Taylor, 3 Jones, 513; Perrine *v.* Farr, 2 Zab. 356; State *v.* Metzger, 26 Mo. 65.

showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect.[1] But in the case of a court of special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record.[2] This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions.[3]

[1] See this subject considered at some length in Wilcox *v.* Kassick, 2 Mich. 165. And see Rape *v.* Heaton, 9 Wis. 329; Bimelar *v.* Dawson, 4 Scam. 536; Webster *v.* Reid, 11 How. 437.

[2] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* Mayor, &c., of N Y. 5 N. Y. 434; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Sears *v.* Terry, 26 Conn. 273; Brown *v.* Foster, 6 R. I. 564; Fawcett *v.* Fowliss, 1 Man. & R. 102. But see Facey *v.* Fuller, 13 Mich. 527, where it was held that the entry in the docket of a justice that the parties appeared and proceeded to trial was conclusive. And see Selin *v.* Snyder, 7 S. & R. 72.

[3] Britain *v.* Kinnard, 1 B. & B. 432. Conviction under the Bumboat Act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the act. *Dallas*, Ch. J.: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that, in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that it was not a boat. I agree, that if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel, still, it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person, place, and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree: but upon the inquiry before the magistrate, does not the person form a question to be decided upon the evidence? Does not the place, does not the

*When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which *it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in [*408] [*409]

subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged; and how could the magistrate decide, but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction; and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally; and if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend every thing against a stinted jurisdiction: that is not the rule now; and nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that magistrates will do what is right." *Richardson*, J., in the same case, states the real point very clearly: "Whether the vessel in question were a boat or no was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession: could the magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged, in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game without being duly qualified to do so: after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present we are not to look at the inconvenience, but at the law; but surely if the magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a mandamus to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged." See also Mather *v.* Hodd, 8 Johns. 44; Mackaboy *v.* Commonwealth, 2 Virg. Cas. 268; *Ex parte* Kellogg, 6 Vt. 509; State *v.* Scott, 1 Bailey, 294; Facey *v.* Fuller, 13 Mich. 527; Wall *v.* Trumbull, 16 Mich. 228; Sheldon *v.* Wright, 5 N. Y. 512.

its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void.[1] An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case;[2] and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it.[3]

We have thus briefly indicated the cases in which judicial action may be treated as void because not in accordance with the [* 410] *law of the land. The design of the present work does not permit an enlarged discussion of the topics which suggest themselves in this connection, and which, however interesting and important, do not specially pertain to the subject of constitutional law.

[1] *Ex parte* Kellogg, 6 Vt. 509; Edgerton *v.* Hart, 8 Vt. 208; Carter *v.* Walker, 2 Ohio, N. S. 339.

[2] "The doing or not doing that in the conduct of a suit at law which, conformably to the practice of the court, ought or ought not to be done." Bouv. Law Dic.

[3] Robinson *v.* West, 1 Sandf. 19; Malone *v.* Clark, 2 Hill, 657; Wood *v.* Randall, 5 Hill, 285; Baker *v.* Kerr, 13 Iowa, 384; Loomis *v.* Wadhams, 8 Gray, 557; Warren *v.* Glynn, 37 N. H. 340. A strong instance of waiver is where, on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Randolph Co. *v.* Ralls, 18 Ill. 29; Wells *v.* Scott, 4 Mich. 347; Tower *v.* Lamb, 6 Mich. 362. In Hoffman *v.* Locke, 19 Penn. St. 57, objection was taken on constitutional grounds to a statute which allowed judgment to be entered up for the plaintiff in certain cases, if the defendant failed to make and file an affidavit of merits; but the court sustained it.

But a party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers.[1] Proceedings in any such case would be void; but they must be carefully distinguished from those cases in which the court has itself acted, though irregularly. Even the denial of jury trial, in cases where that privilege is reserved by the Constitution, does not render the proceedings void, but only makes them liable to be reversed for the error.[2]

There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." [3]

[1] Hall *v.* Marks, 34 Ill. 363; Chandler *v.* Nash, 5 Mich. 409. For the distinction between judicial and ministerial acts, see Flournoy *v.* Jeffersonville, 17 Ind. 173.

[2] The several State constitutions preserve the right of trial by jury, with permission in some for the parties to waive the right in civil cases. Those cases which before the constitution were not triable by jury need not be made so now. Dane Co. *v.* Dunning, 20 Wis. 210; Crandall *v.* James, 6 R. I. 104; Lake Erie, &c., R.R. Co. *v.* Heath, 9 Ind. 558; Backus *v.* Lebanon, 11 N. H. 19; Tabor *v.* Cook, 15 Mich. 322; Stilwell *v.* Kellogg, 14 Wis. 461; Mead *v.* Walker, 17 Wis. 189; Byers *v.* Commonwealth, 42 Penn. St. 89; State *v.* Peterson, 41 Vt. 504; Buffalo, &c., R.R. Co. *v.* Burket, 26 Texas, 588; Sands *v.* Kimbark, 27 N. Y. 147. And where a new tribunal is created without common-law powers, jury trial need not be given. Rhines *v.* Clark, 51 Penn. St. 96; Haines *v.* Levin, *ib.* 412. But the legislature cannot deprive a party of a common-law right, — *e. g.*, a right of navigation, — and compel him to abide the estimate of commissioners upon his damages. Haines *v.* Levin, 51 Penn. St. 412. Where the constitution gives the right, it cannot be made by statute to depend upon any condition. Greene *v.* Briggs, 1 Curt. C. C. 311; Lincoln *v.* Smith, 27 Vt. 328; Norristown, &c., Co. *v.* Burket, 26 Ind. 53. Though it has been held that, if a trial is given in one court without a jury, with a right to appeal and to have a trial by jury in the appellate court, that is sufficient. Beers *v.* Beers, 4 Conn. 535; Stewart *v.* Mayor, &c., 7 Md. 500; Morford *v.* Barnes, 8 Yerg. 444; Jones *v.* Robbins, 8 Gray, 329.

[3] Co. Lit. § 212. We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act

[*411] * This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause.[1] Nor is it essential that the judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named.[2] Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree on this ground, Lord *Campbell* observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and should be set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."[3]

It is matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common

of Parliament void; though they would never find such an intent in the statute, if any other could possibly be made consistent with the words.

[1] Washington Insurance Co. *v.* Price, Hopk. Ch. 2.

[2] Washington Insurance Co. *v.* Price, Hopk. Ch. 2; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759; Pearce *v.* Atwood, 13 Mass. 340; Peck *v.* Freeholders of Essex, Spencer, 457; Commonwealth *v.* McLane, 4 Gray, 427; Dively *v.* Cedar Rapids, 21 Iowa, 565.

[3] Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759.

law, and by express enactment permit one to act judicially when *interested in the controversy. The maxim itself, [*412] it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act;[1] but we prefer the opinion of Chancellor *Sandford* of New York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not intrusted with authority to determine his own rights, or his own wrongs.[2]

It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be, that the interest is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual.[3] And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest.[4] And it is very common, in a certain class of cases, for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the State, which passes the law, or the municipalities which are its component parts and subject to its control, can be regarded as such.

But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people, indeed, when framing their constitution, may establish so great an anomaly, if they see fit;[5] but if the legislature is intrusted with apportioning and providing for the exercise of the judicial power,

[1] Ranger *v.* Great Western R. 5 House of Lords Cases, 88; Stewart *v.* Mechanics and Farmers Bank, 19 Johns. 501.

[2] Washington Insurance Co. *v.* Price, Hopk. Ch. 2.

[3] Commonwealth *v.* Reed, 1 Gray, 475.

[4] Commonwealth *v.* Ryan, 5 Mass. 90; Hill *v.* Wells, 6 Pick. 104; Commonwealth *v.* Emery, 11 Cush. 406.

[5] Matter of Leefe, 2 Barb. Ch. 39.

we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized [* 413] as * being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.[1]

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground.[2] The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.[3]

Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do;[4] but that is the extent of his power.

[1] See Ames *v.* Port Huron Log-Driving and Booming Co. 11 Mich. 139.

[2] Richardson *v.* Welcome, 6 Cush. 332; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 787. And see Sigourney *v.* Sibley, 21 Pick. 106; Oakley *v.* Aspinwall, 3 N. Y. 547.

[3] In Queen *v.* Justices of Hertfordshire, 6 Queen's Bench, 753, it was decided that, if any one of the magistrates hearing a case at sessions was interested, the court was improperly constituted, and an order made in the case should be quashed. It was also decided that it was no answer to the objection, that there was a majority in favor of the decision without reckoning the interested party, nor that the interested party withdrew before the decision, if he appeared to have joined in discussing the matter with the other magistrates. See also the Queen *v.* Justices of Suffolk, 18 Q. B. 416; The Queen *v.* Justices of London, *ib.* 421; Peninsula R.R. Co. *v.* Howard, 20 Mich. 26.

[4] Richardson *v.* Boston, 1 Curtis, C. C. 251; Washington Insurance Co. *v.* Price, Hopk. Ch. 1; Buckingham *v.* Davis, 9 Md. 324; Heydenfeldt *v.* Towns, 27 Ala. 430. If the judge who renders judgment in a cause had previously been attorney in it, the judgment is a nullity. Reams *v.* Kearns, 5 Cold. 217.

Addendum B

THE

AMERICAN LAW REVIEW.

JANUARY-FEBRUARY, 1898.

THE REVISION OF THE CONSTITUTION OF THE UNITED STATES.

It is strange indeed that this subject has not heretofore more powerfully attracted the attention of the electorate of the Union. Our Federal constitution was adopted 110 years ago. In that time every State then existing has, one after another, radically revised its constitution, and most of them more than once. Indeed there is no State that has not revised its constitution except those most lately admitted, and such have been the rapid changes from our growth in population and wealth and the new dangers arising to be guarded against that the constitution of New York imperatively requires that the question of a constitutional convention shall be submitted to the people every twenty years, and permits it oftener than that if the legislature shall think proper.

Even in so conservative a State as North Carolina we have had three constitutional conventions since the war and have besides adopted sundry amendments by the legislative mode prescribed in the constitution. If this is true as to the States, and that we so rapidly outgrow the organic law prescribed but a few years before, for a stronger reason it is true of the Federal constitution which adopted at Philadelphia in September, 1787, for an entirely different people amid vastly different surroundings, is now like the clothing of boyhood worn by the nearly mature

The doctrine of vested rights is an essential part of any system of jurisprudence. Without it there would be no finality to litigation. A vested right is one which has been fixed by operation of law and is therefore not subject to re-examination, but remains in the beneficiary until forfeited by some subsequent act. Where the operation of law out of which it grows is a judicial trial which has ripened into a judgment, and no appeal has been taken within the period prescribed by law, a statute extending the time for appeal deprives the successful litigant of his vested right to the judgment, which is property, and is therefore as invalid as if it undertook to confiscate the property or right which was the subject of the litigation.[1]

Yet even this proposition has been dissented from by the Supreme Court of the United States in a case where a statute of the State of New York which authorized the State court to re-open a proceeding for the assessment of damages for lands taken in the opening of a street was sustained.[2]

A strange misapplication of this doctrine is found in a Tennessee decision [3] where a statute authorizing the Governor of the State to set aside the registration of a county, if he should believe that there had been fraud in making it, was held void, on the ground that the voter had a vested right in the franchise

similar statutes have been enacted in different States without their validity being questioned.

The better doctrine is followed in Wisconsin, where a statute similar to that of Oregon has been upheld. The court said: "The essential fact on which the publication is made to depend is property of the defendant in the State, and not whether it has been attached. * * * There is no magic about the writ (of attachment) which should make it the exclusive remedy. The same legislative power which devised it can devise some other and declare that it shall have the same force and effect. The particular means to be used are always within the control of the legislature, so that the end be not beyond the scope of the legislative power." Jarvis v. Barrett, 14 Wis. 591.

In California the Supreme Court has gone so far as to hold that the publication of a notice of a sitting of a board of equalization for the purpose of correcting the assessment of property for taxation, is not a notice to the owner of the property assessed, and therefore the increase of his assessment is not without due process of law. Patten v. Green, 13 Cal. 327.

[1] Burch v. Jewett, 10 N. Y. 374; Beaupre v. Hoerr, 13 Minn. 366.

[2] Garrison v. City of New York, 21 Wall. (U. S.) 196. The reasoning of Mr. Justice Field will be found curious reading.

[3] State v. Staton, 6 Coldw. (Tenn.) 233.

Addendum C

STATUTES

AND

STATUTORY CONSTRUCTION

INCLUDING

A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL REGULATIONS RELATIVE TO THE FORMS OF LEGISLATION AND TO LEGISLATIVE PROCEDURE

TOGETHER WITH

AN EXPOSITION AT LENGTH OF THE PRINCIPLES OF INTERPRETATION AND COGNATE TOPICS

BY

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CHAPTER XVII.

RETROACTIVE STATUTES.

§ 463. Generally regarded with disfavor.— Retrospective statutes relate to past acts and transactions. Retroactive statutes are those which operate on such acts and transactions and change their legal character or effect. Congress, as well as the states, are expressly forbidden by the federal constitution to pass any *ex post facto* law,[1] and the states are forbidden to pass any law impairing the obligation of contracts.[2] As retrospective laws are generally unjust and in many cases oppressive, they are not looked upon with favor. Statutes not remedial will therefore not be construed to operate retrospectively, even when they are not obnoxious to any constitutional objection, unless the intent that they shall do so is plainly expressed or made to appear.[3] Where the intention

[1] Art. I, secs. 9 and 10.

[2] Id.

[3] Hill v. Nye, 17 Hun, 467; Dash v. Van Kleeck, 7 Johns. 477; McMannis v. Butler, 49 Barb. 176; Railroad v. Murrell, 11 Heisk. 715; Goshen v. Stonington, 4 Conn. 220; Life Ins. Co. v. Ray, 50 Tex. 512; Fultz v. Fox, 9 B. Mon. 499; Taylor v. Rountree, 15 Lea, 725; Buckley, Ex parte, 53 Ala. 42; Barnes v. Mayor, etc. 19 id. 707; Bond v. Munro, 28 Ga. 597; State v. Bradford, 36 id. 422; Allhusen v. Brooking, L. R. 26 Ch. Div. 564; Evans v. Williams, 2 Drew. & Sm. 324; Marsh v. Higgins, 9 C. B. 551; Waugh v. Middleton, 8 Ex. 352; Couch v. McKee, 6 Ark. 484; Graham, Ex parte, 13 Rich. 277; Johnson v. Johnson, 52 Md. 668; Appeal Tax Court v. Western, etc. R. R. Co. 50 id. 274; Blanchard v. Sprague, 3 Sumn. 279; Duval v. Malone, 14 Gratt. 28; Succession of Deyraud, 9 Rob. (La.) 357; Nicholson v. Thompson, 5 id. 367; Guidry v. Rees, 7 La. 278; Gilmore v. Shuter, 2 Lev. 227; Warder v. Arell, 2 Wash. (Va.) 282; Wallace v. Taliaferro, 2 Call, 447; Elliot's Ex'r v. Lyell, 3 id. 268; Green v. Anderson, 39 Miss. 359; Commonwealth v. Hewitt, 2 H. & M. 181; Ryan v. Com-

as to being retrospective is doubtful the statute will be construed as prospective only; but where the language clearly indicates that it was intended to have a retrospective effect, it will be so applied.[1]

§ **464.** A statute should not receive such construction as to make it impair existing rights, create new obligations, impose new duties in respect of past transactions, unless such plainly appear to be the intention of the legislature.[2] In the absence of such plain expression of design, it should be construed as prospective only, although its words are broad enough in their literal extent to comprehend existing cases.[3] A general provision that the statute of limitations shall run against the state will not be construed retrospectively.[4] A statute of limitations which does not purport to include existing cases will be applied only to those which subsequently arise.[5] Although there is no vested right in an office which may not be disturbed by legislative enactment, yet to take away the right thereto the terms of the statute in which the purpose is stated must be clear.[6] A statute provided that every will devising or purporting to devise all the testator's real estate shall be construed to pass all the real estate which he was entitled to devise at the time of his death. It was held to be prospective merely and did not operate on wills previously executed, though the testator died after its enactment. Thus, the power of sale in such a will did not embrace lands acquired after the will was executed. It was enacted expressly in the same statute that it should not affect the construction of any will previously made.[7] A new constitutional provision as to the ad-

monwealth, 80 Va. 385; State v. Judge Bermudez, 12 La. 352; Miller v. Reynolds, 5 Martin (N. S.), 665; Orr v. Rhine, 45 Tex. 345; Crigler v. Alexander, 33 Gratt. 674; State v. Norwood, 12 Md. 195; Quilter v. Mapleson, L. R. 9. Q. B. Div. 672.

[1] State v. Norwood, 12 Md. 195.

[2] Green v. Anderson, 39 Miss. 359.

[3] Crigler v. Alexander, 33 Gratt. 674; Campbell, etc. Co. v. Nonpareil, etc. Co. 75 Va. 291; Moon v. Durden 2 Exch. 22; Dash v. Van Kleeck, 7 John. 477; Wood v. Oakley, 11 Paige, 400; Johnson v. Burrell, 2 Hill, 238; Butler v. Palmer, 1 Hill, 324; Snyder v. Snyder, 3 Barb. 621; Hackley v. Sprague, 10 Wend. 114; McMannis v. Butler, 49 Barb. 176; In re Application of Prot. Ep. P. School, 58 Barb. 161.

[4] State v. Pinckney, 22 S. C. 484.

[5] Pitman v. Bump, 5 Oregon, 17.

[6] People v. Green, 58 N. Y. 295.

[7] Green v. Dikeman, 18 Barb. 535; Parker v. Bogardus, 5 N. Y. 309.

vanced age which should prevent the incumbents of certain judicial offices from retaining them was held prospective; it did not apply to persons in office at the time of its taking effect. An officer was elected under the old constitution by the provisions of which he was eligible; a new constitutional provision took effect on the same day, which was the first day of the official term; he was held in office so as to be within the exemption. It was held also that it was not intended by the new judiciary article to overthrow or disturb what had been lawfully done under and in pursuance of the constitution and laws previously existing.[1] A statute provided for review by a court of assessments on complaints, with power to require the amount erroneously assessed to be deducted. After an application had been made and proof taken, the law was changed. It was held that the new act did not apply to pending cases.[2]

The repeal of a statute giving jurisdiction takes away the right to proceed in pending cases.[3] Section 711 of the Revised Statutes of the United States, which provides that the jurisdiction of the federal courts shall be exclusive of the courts of the several states as to all matters and proceedings in bankruptcy, was held not to affect a creditor's bill filed in a state court before the Revised Statutes were adopted.[4] An act which extended for four years the time in which a magistrate's execution may be levied without renewal was held to be prospective and not to embrace executions which were issued before it was passed.[5] A statute which gave the probate court the power to entertain bills of review of its own decrees and judgments was held to have no retrospective operation so as

[1] People v. Gardner, 59 Barb. 198.

[2] In re Petition of Remsen, 59 Barb. 317; In re Petition of Eager, 58 id. 557; In re Petition of Treacy, 59 id. 525.

[3] Butler v. Palmer, 1 Hill, 324; Assessor v. Osbornes, 9 Wall. 567; McCardle, Ex parte, 7 id. 506; Baltimore, etc. R. R. Co. v. Grant, 98 U. S. 398; South Carolina v. Gaillard, 101 id. 433; North Canal St. Road, 10 Watts, 351; Fenelon's Petition, 7 Pa. St. 173; Hampton v. Commonwealth, 19 id. 329; Uwchlan T. Road, 30 id. 156; Illinois, etc. Canal v. Chicago, 14 Ill. 334; Macnawhoc Plantation v. Thompson, 36 Me. 365; Lamb v. Schottler, 54 Cal. 319; Smith v. Dist. Court, 4 Colo. 235; Hunt v. Jennings, 5 Blackf. 195.

[4] Davis v. Lumpkin, 57 Miss. 506. See Farris v. Houston, 78 Ala. 250; Gholston v. Gholston, 54 Ga. 285; McCool v. Smith, 1 Black, 459.

[5] Briggs v. Cottrell, 4 Strob. 86.

to confer upon it jurisdiction of a bill to review a decree rendered prior to the passage of the act. A statute respecting the title of personal property, requiring the deeds thereof to be recorded in the county where the property is, was held not to apply to conveyances of such property made prior to the passage of the act.[1] The father of an illegitimate child, begotten under a former act, but born under a new act, may be compelled to contribute towards its support by a prosecution under the latter.[2] It results from this conservatism that retrospective laws will be strictly construed.[3]

§ **465. Ex post facto laws.**— An authoritative exposition of *ex post facto* laws was given in an early case by the supreme court of the United States.[4] Chase, J., said: "The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this: That the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it. . . . I do not think it was inserted to secure the citizen in his private rights of either property or contracts. . . . I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition: 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited.

[1] Palmer v. Cross, 1 Sm. & M. 48.

[2] Willets v. Jeffries, 5 Kan. 470.

[3] Hedger v. Rennaker, 3 Met. (Ky.) 255; Couch v. Jeffries, 4 Burr. 2460; Moon v. Durden, 2 Ex. 22; Edmonds v. Lawley, 6 M. & W. 285; McCowan v. Davidson, 43 Ga. 480.

[4] Calder v. Bull, 3 Dall. 386, 390.

Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust and may be oppressive; and it is a good general rule, that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion or of pardon. They are certainly retrospective and literally, both concerning and after the facts committed. But I do not consider any law *ex post facto* within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime." This construction of the constitutional prohibition has been repeatedly affirmed in later cases.[1] It is settled that the term applies only to criminal and penal cases, and was not intended to prevent retrospective legislation affecting civil rights of persons or property.[2]

§ **466.** Any law is an *ex post facto* law within the meaning of the constitution if passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage.[3]

§ **467. Procedure.**— A statute relating to procedure is not for that reason beyond the reach of the constitutional inhibition of *ex post facto* laws. So long as subsequent laws do not

[1] Fletcher v. Peck, 6 Cranch, 138; Wilson v. Ohio, etc. R'y Co. 64 Ill. 542; Cummings v. Missouri, 4 Wall. 326.

[2] Watson v. Mercer, 8 Pet. 88; Fletcher v. Peck, 6 Cranch, 87; Ogden v. Saunders, 12 Wheat. 266; Satterlee v. Matthewson, 2 Pet. 380; McCowan v. Davidson, 43 Ga. 480; Ex parte Garland, 4 Wall. 390; Kring v. Missouri, 107 U. S. 221.

[3] Kring v. Missouri, 107 U. S. 221; Wilson v. Ohio, etc. R'y Co. 64 Ill. 542; United States v. Hall, 2 Wash. 366; Hopt v. Utah, 110 U. S. 574; Medley, In re, 134 id. 160.

have the effect to deprive a defendant of any substantial right which he had touching his defense as the law stood when the offense was committed, nor alter his situation in relation to the offense or its consequences to his disadvantage, they are not *ex post facto* within the meaning of that inhibition.[1] A. was convicted of murder in the first degree, in Missouri, and the judgment of condemnation was affirmed by the supreme court of the state. A previous sentence pronounced on his plea of guilty of murder in the second degree, and subjecting him to imprisonment for twenty-five years, had on his own appeal been reversed. By the law of that state in force when the homicide was committed, this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that by force of its provisions if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime. It was held that as to this case the new law was an *ex post facto* law within the meaning of section 10, article I, of the constitution of the United States, and that he could not be again tried for murder in the first degree. Mr. Justice Miller, delivering the opinion of the court, said: "The constitution of Missouri so changes the rule of evidence that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment; for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction."

In another part of his opinion the learned justice said: "It cannot be sustained, without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as pleading, practice

[1] Id.; Cooley, C. L. 329, 330; Marion v. State, 20 Neb. 233; 29 N. W. Rep. 911.

and evidence. Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto*, because it relates to procedure?" . . . "And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." After reviewing the course of decision upon the associated clause prohibiting state legislation impairing the obligation of contracts, he continues: "Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contiguous and associated words in the constitution relating to retroactive laws on these two subjects be governed by the same rule of construction? And why should a law, equally injurious to rights of the party concerned, be under the same circumstances void in one case and not in the other?"

The point is noticed that when the accused pleaded guilty of murder in the second degree the new constitution was in force, which altered the effect of conviction for the lesser degree of the offense by declaring that it should not be an acquittal of a higher degree. The answer was: "Whether it is *ex post facto* or not relates to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense it is as to that *ex post facto*, though whether of the class forbidden by the constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character."[1] This decision is of the greatest importance in its bearing upon the effect of retrospective laws relating to procedure. Such laws must be tried by the test which is enunciated in that case. Any retroactive law, though relating to procedure, which deprives the prisoner of any substantial

[1] Kring v. Missouri, 107 U. S. 221.

right that he would have by the law as it stood at the time when the imputed offense was committed, or which as to that offense or its consequences alters his situation to his disadvantage, is an *ex post facto* law, within the constitutional prohibition.[1] In two cases which originated in Missouri the supreme court of the United States held that a law which excluded a minister of the gospel from the exercise of his clerical function and a lawyer from practice in the courts unless each would take an oath that he had not engaged in or encouraged armed hostilities against the government of the United States was an *ex post facto* law because it punished, in a manner not before punished by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.[2] A statute which provided that "every surveyor who shall have wilfully and knowingly violated the instructions of the surveyor-general in not marking out the boundaries of lands formerly granted, and which are within surveys by him or them made," should be criminally prosecuted, was held *ex post facto*.[3] A statute which purports to authorize the prosecution, trial and punishment of a person for an offense previously committed, and as to which all prosecution, trial and punishment were, at the time of its passage, already barred according to the pre-existing statute of limitations, is unconstitutional and void.[4] The repeal of a general statute of amnesty is *ex post facto* as to offenses previously committed.[5]

§ **468.** A statute rendering ineligible as a voter or office-holder any person who teaches or practices polygamy or belongs to an association encouraging such practice, or any other crime, and providing for a test oath, is not an *ex post facto* law.[6] A statute which enlarges the class of persons who may be competent as witnesses is not *ex post facto* in its application to offenses previously committed, for it does not attach criminality to any act previously done, and which was inno-

[1] Cooley, C. L. 330.

[2] Cummings v. Missouri, 4 Wall. 277; Garland, Ex parte, id. 333.

[3] State v. Solomons, 3 Hill (S. C.), 96.

[4] Moore v. State, 43 N. J. L. 203. See State v. Sneed, 25 Tex. (Supp.) 66; State v. Keith, 63 N. C. 140; Hartung v. People, 26 N. Y. 167; Yeaton v. United States, 5 Cr. 281; In re Murphy, 1 Woolw. 141.

[5] State v. Keith, 63 N. C. 140.

[6] Wooley v. Watkins (Idaho), 22 Pac. Rep. 102.

cent when done, nor aggravate past crimes, nor increase the punishment therefor; nor does it alter the degree, or lessen the amount or measure of the proof made necessary to conviction for such offenses. Such alterations relate to modes of procedure only which the state may regulate at pleasure, and in which no one can be said to have a vested right. Mr. Justice Harlan, in enunciating this doctrine as the opinion of the court, said: "Alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions, or trials thereafter had, without reference to the date of the commission of the offense charged."[1] It had been previously decided by the same court that "a law changing the place of trial from one county to another county in the same district, or to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment."[2] Statutes are not *ex post facto* which provide on account of past convictions a severer penalty for repetition of like offenses in the future.[3] In such a case the court said: "We entertain no doubt of the constitutionality of this section, which promotes the ends of justice by taking away a purely technical objection, while it leaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defense. Technical and formal objections of this nature are not constitutional rights."[4]

[1] Hopt v. Utah, 110 U. S. 574; Laughlin v. Commonwealth, 13 Bush, 261. See Hart v. State, 40 Ala. 32.

[2] Gut v. State, 9 Wall. 35.

[3] People v. Butler, 3 Cow. 347; Rand v. Commonwealth, 9 Gratt. 738; Ross' Case, 2 Pick. 165.

[4] Commonwealth v. Hall, 97 Mass. 570.

§ 469. Acts for transferring criminal cases to another court,[1] or providing a new tribunal or giving a new jurisdiction to try offenses already committed,[2] do not abridge any right, and are not *ex post facto*. When the offense was committed the jury was by statute judge of the law. This act was repealed before the trial. Such change, as applied to that case, was held not *ex post facto*.[3] Nor are treaties which provide for surrender of persons charged with previous offenses;[4] nor statutes giving additional challenges to the government;[5] statutes reducing the defendant's peremptory challenges,[6] or modifying the grounds of challenge for cause;[7] statutes authorizing amendments to indictments;[8] statutes regulating the framing of indictments with a view to exclude redundancies and reduce them to essential allegations;[9] statutes generally to facilitate the routine of procedure and preclude defendants from taking advantage of mere technicalities which do not prejudice them.[10] Where there has been a legal conviction, but an erroneous judgment thereon, which resulted according to the law in a discharge of the convict on reversal of the judgment, a law enacted subsequent to the commission of the crime, that on such a reversal the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an *ex post facto* law.[11]

In such a case, Shaw, C. J., said, with reference to the provisions of such a statute: "They relate simply to errors in the imposition of sentences, in cases where neither the law nor the

[1] State v. Cooler, 8 S. E. Rep. 692.

[2] Commonwealth v. Phillips, 11 Pick. 28; Wales v. Belcher, 3 id. 508; State v. Sullivan, 14 Rich. L. 281; Ewing's Case, 5 Gratt. 701.

[3] Marion v. State, 20 Neb. 233; 29 N. W. Rep. 911.

[4] In re De Giacomo, 12 Blatchf. 391.

[5] Jones v. State, 1 Ga. 610; Walston v. Commonwealth, 16 B. Mon. 15; Walter v. People, 32 N. Y. 147; Warren v. Commonwealth, 37 Pa. St. 45; State v. Ryan, 13 Minn. 370; State v. Wilson, 48 N. H. 398; Commonwealth v. Dorsey, 103 Mass. 412.

[6] Dowling v. State, 5 Sm. & M. 664; South v. State, 86 Ala. 617.

[7] Stokes v. People, 53 N. Y. 164.

[8] Lasure v. State, 19 Ohio St. 43; State v. Manning, 14 Tex. 402; Sullivan v. Oneida, 61 Ill. 242.

[9] State v. Corson, 59 Me. 137; State v. Learned, 47 id. 426.

[10] Commonwealth v. Hall, 97 Mass. 570; Lasure v. State, 19 Ohio St. 43.

[11] Ratzky v. People, 29 N. Y. 124; Jacquins v. Commonwealth, 9 Cush. 279.

evidence upon which the convictions rest is in any respect impugned, where the original process is right, the facts sufficient and regularly proved, and all the proceedings, up to the sentence, were right, and where the alleged error is in the sentence only. Now is this act retrospective or prospective? It certainly refers, in its terms, to the future, and to writs of error thereafter to be brought. It was competent for the legislature to take away writs of error altogether, in cases where the irregularities are formal and technical only, and to provide that no judgment should be reversed for such cause. It is more favorable to the party to provide that he may come into court upon the terms allowed by this statute than to exclude him altogether. This act operates like the act of limitations. Suppose an act were passed that no writ of error should be taken out after the lapse of a certain period. It is contended that such an act would be unconstitutional on the ground that the right of the convict to have his sentence reversed upon certain conditions had once vested. But this argument overlooks entirely the well-settled distinction between rights and remedies."[1] A subsequent statute requiring the defense of insanity to be specially pleaded at the arraignment is not *ex post facto*.[2] "It works no injustice," say the court, "to the defendant and deprives him of no substantial right which he would otherwise have. It is not, therefore, objectionable as an *ex post facto* [law] when applied, as in the present case, to a crime already committed at the time of its enactment, any more than a statute authorizing indictments to be amended, or conferring additional challenges on the government, or authorizing a change of venue, or other like statutes regulating the mode of judicial or forensic proceeding in a cause."[3]

[1] Jacquins v. Commonwealth, *supra*.

[2] Perry v. State, 87 Ala. 30.

[3] Id. A statute of Iowa authorized the treatment of traffic in intoxicating liquors as a nuisance and subject to equitable proceedings for abatement. A later statute authorized the court to tax an attorney fee in such cases against the defendant and to close the building in which the nuisance had been maintained for one year. This latter law, applied to a nuisance created or maintained prior to its passage, was held not *ex post facto*. "This," say the court, "is a civil not a criminal proceeding, and the provisions of the statute referred to relate to the remedy. The right to a particular mode of procedure is not a vested one which the state cannot change or abolish." Drake v. Jordan, 73 Iowa, 707; 36 N. W. Rep. 653, citing Cooley, C. L. (5th ed.) 349, 443; Tilton v. Swift, 40 Iowa, 80;

§ 470. Change of punishment by subsequent legislation.— Obviously enough a retrospective statute would be *ex post facto* which increased in kind the punishment, or which added new elements of punishment. But there has been some diversity of decision where the punishment has been changed and on the whole, as judicially considered, has thus been made less severe.[1] It is believed, however, that at the present time, the doctrine accepted as most consonant to reason and authority is that laid down in Hartung v. People.[2] After the prisoner had been convicted of murder and sentenced to death, and while her case was pending on appeal, the legislature changed the law for the punishment of murder in general, so as to authorize the governor to postpone indefinitely the execution of the sentence of death, and to keep the party confined in the penitentiary at hard labor until he should order the full execution of the sentence or should pardon or commute it. The court of appeals held that this later law repealed all laws for punishment for murders theretofore committed. It was *ex post facto* as to that case, and could not be applied to it. Mr. Justice Denio said: "It is highly probable that it was the intention of the legislature to extend favor, rather than increased severity, towards this convict and others in her situation; and it is quite likely that, had they been consulted, they would have preferred the application of this law to their cases, rather than that which existed when they committed the offenses of which they were convicted. But the case cannot be determined upon such considerations. No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, and according to the spirit of our legal institutions, because the rule exists in the form of an express written precept, the binding force of which no one disputes. . . . It is

Wormley v. Hamburg, id. 25; Equitable L. Ins. Co. v. Gleason, 56 id. 48; County of Kossuth v. Wallace, 60 id. 508.

[1] See Strong v. State, 1 Blackf. 193; Herber v. State, 7 Tex. 69; McInturf v. State, 20 Tex. App. 335; Clarke v. State, 23 Miss. 261; State v. Arlin, 39 N. H. 179; Turner v. State, 40 Ala. 21.

[2] 22 N. Y. 95.

enough to bring the law within the condemnation of the constitution that it changes the punishment, after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. . . . It is enough, in my opinion, that it changes it in any manner, except by dispensing with divisible portions of it. . . . Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. Any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offenses; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict; but would not raise any question under the constitutional provision" against *ex post facto* laws.[1]

In Commonwealth v. McDonough[2] it was held that a law passed after the commission of the offense, which mitigated the punishment, as regarded the fine and the maximum of imprisonment that might be inflicted, was an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offense. As to a defendant convicted of carrying a concealed weapon, an amended law was held *ex post facto*, first, because it abrogated the right which before existed of defending against the charge on the ground that he had good and suffi-

[1] Shepherd v. People, 25 N. Y. 406; Ratzkey v. People, 29 id. 124; Kuckler v. People, 5 Park. Cr. R. 212; Carter v. Burt, 12 Allen, 424; Green v. Shumway, 39 N. Y. 418; In re Petty, 22 Kan. 477; Garvey v. People, 6 Cal. 554; State v. Willis, 66 Mo. 131; Marion v. State, 16 Neb. 349; State v. Cooler, 8 S. E. Rep. 692.

[2] 13 Allen, 581.

cient reason to apprehend an attack, and made an act criminal which was not so at the time the amendment was passed, and because it changed but did not mitigate the punishment for the offense. "There has been much diversity of opinion," said Arnold, C. J., "as to what would constitute mitigation of punishment in such a case; but the view best sustained by reason and authority is, that a law changing the punishment of offenses committed before its passage is objectionable, as being *ex post facto*, unless the change consists in the remission of some separable part of the punishment before prescribed, or is referable to prison discipline or administration as its primary object.[1] It is enough for courts to render judgment according to law, without being required to determine the relative severity of different punishments, when there is no common standard in the matter by which the mind can be satisfactorily guided."[2]

§ **471. Laws impairing obligation of contracts.**— The federal constitution provides that no state shall pass any law impairing the obligation of contracts.[3] The obligation of a contract is the law which binds the parties to perform their agreement.[4] It is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation.[5] A contract valid at its inception cannot be made invalid, its construction changed, or the remedy thereon taken away or materially impaired, by subsequent legislation. The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficiency for its enforcement.[6] A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word "ton" should thereafter be held, in prior as well as subsequent contracts, to

[1] Cooley, C. L. 329.

[2] Lindzey v. State, 65 Miss. 542; Cooley, C. L. 324.

[3] Art. I, sec. 10.

[4] Ogden v. Saunders, 12 Wheat. 213; Sturges v. Crowninshield, 4 id. 122.

[5] Louisiana v. New Orleans, 102 U. S. 203.

[6] Green v. Biddle, 8 Wheat. 92; Ogden v. Saunders, *supra;* Bronson v. Kinzie, 1 How. 319; McCracken v. Hayward, 2 id. 612; Walker v. Whitehead, 16 Wall. 314; Von Hoffman v. Quincy, 4 Wall. 535; Edwards v. Kearzey, 96 U. S. 595; Tennessee v. Sneed, id. 69; Mason v. Haile, 12 Wheat. 370.

mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy. It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last mentioned not less than the first.[1]

§ **472.** The prohibition has been considered as extending to contracts executed and executory; to conveyances of land as well as commercial contracts; to public grants from the state to corporations and individuals, as well as private contracts between citizens; to grants and charters in existence when the constitution was adopted and even before the revolution, and to compacts between the different states themselves.[2] "An executed contract," says Chief Justice Marshall, "as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is therefore always estopped by his own grant. Since, then, in fact, a grant is a contract, the obligation of which still continues, and since the constitution uses the general term 'contract,' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized

[1] Von Hoffman v. Quincy, 4 Wall. 552.

[2] Ogden v. Saunders, 12 Wheat. 217; Fletcher v. Peck, 6 Cr. 87; New Jersey v. Wilson, 7 id. 164: Terrett v. Taylor, 9 id. 43; Town of Pawlet v. Clark, id. 292; Dartmouth College v. Woodward, 4 Wheat. 518; Society, etc. v. New Haven, 8 id. 464, 481; Green v. Biddle, id. 1; Davis v. Gray, 16 Wall. 203; Hall v. Wisconsin, 103 U. S. 5; Montgomery v. Kasson, 16 Cal. 189; Grogan v. San Francisco, 18 id. 590; People v. Platt, 17 John. 195; Rehoboth v. Hunt, 1 Pick. 224; Lowry v. Francis, 2 Yerg. 534; State v. Barker, 4 Kan. 379, 435; University of North Carolina v. Fay, 1 Murph. 58; Wabash, etc. Co. v. Beers, 2 Black, 448; State Bank v. Knoop, 16 How. 369; Hartman v. Greenhow, 102 U. S. 672; Hawkins v. Barney's Lessee, 5 Pet. 457; De Graff v. St. Paul, etc. R. R. Co. 23 Minn. 144; Robertson v. Land Commissioner, 44 Mich. 274.

of their former estates, notwithstanding these grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances."[1] When a state becomes a party to a contract, the same rules of law are applied to her as to private persons under like circumstances.[2] So when the state, as such, or any lesser public corporation, makes a grant, or otherwise contracts, it is bound by its obligations by the same supreme and paramount rule.[3]

§ **473.** Charters creating corporations for private purposes, laws giving franchises, bounties to encourage enterprise and expenditures, and patents and copyrights, or any exclusive privilege, are also inviolable contracts, the obligations of which are secured by the constitutional provision under consideration.[4] It does not apply to municipal charters or offices; they are mere agencies of government, and, except as specially restrained by other constitutional restrictions, are within the continued exclusive control of the legislature.[5] Counties and

[1] Fletcher v. Peck, 6 Cranch, 87, 136.

[2] Davis v. Gray, 16 Wall. 232.

[3] Cincinnati, etc. R. R. Co. v. Carthage, 36 Ohio St. 631; State v. Commissioners, etc. 4 Wis. 414.

[4] Slaughter-House Cases, 16 Wall. 36, 74; Dartmouth College v. Woodward, 4 Wheat. 518; Planters' Bank v. Sharp, 6 How. 391; Trustees of V. University v. Indiana, 14 How. 268; State Bank v. Knoop, 16 How. 369; State v. Heyward, 3 Rich. 389; Norris v. Trustees, etc. 7 G. & J. 7; Grammar School v. Burt, 11 Vt. 632; Commonwealth v. Cullen, 13 Pa. St. 133; Backus v. Lebanon, 11 N. H. 19; State v. Noyes, 47 Me. 189; Bank of Natchez v. State, 6 Sm. & M. 599; People v. Manhattan Co. 9 Wend. 351; Miners' Bank v. United States, 1 Greene (Ia.), 553; Bridge Co. v. Hoboken Co. 13 N. J. Eq. 81; Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 227; People v. Jackson, etc. Plank Road Co. 9 Mich. 285; Hawthorne v. Calef, 2 Wall. 10; Bank of the Dominion v. McVeigh, 20 Gratt. 457; Bank of the State v. Bank of Cape Fear, 13 Ired. 75; Mills v. Williams, 11 id. 558; Wales v. Stetson, 2 Mass. 143; Nichols v. Bertram, 3 Pick. 342; King v. Dedham Bank, 15 Mass. 447; Turnpike Co. v. Davidson Co. 3 Tenn. Ch. 396; Sloan v. Pacific Co. 61 Mo. 24; Central Bridge v. Lowell, 15 Gray, 106; State v. Richmond, etc. R. R. Co. 73 N. C. 527; Detroit v. Plank Road Co. 43 Mich. 140; Bruffett v. G. W. R. R. Co. 25 Ill. 353; State v. Tombeckbee Bank, 2 Stew. 30; Edwards v. Jagers, 19 Ind. 407; People v. Board of State Auditors, 9 Mich. 327.

[5] Butler v. Pennsylvania, 10 How. 402; United States v. Hartwell, 6 Wall. 385; Newton v. Commissioners, 100 U. S. 559; Koontz v. Franklin Co. 76 Pa. St. 754; French v. Commonwealth, 78 Pa. St. 339; Augusta v. Sweeney, 44 Ga. 463; Opinion of Justices, 117 Mass. 603; People v. Green, 58 N. Y. 295; Wyandotte v. Drennan, 46 Mich. 478; State v. Kalb 50 Wis. 178; People v. Power, 25 Ill.

towns are, as to their corporate existence, completely within such control. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature.[1] And all private corporations and grantees of franchises are subject to the exercise of all essential powers of government — to taxation,[2] so far as not contracted away upon consideration, to the power of eminent domain and of police.[3] The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. It may increase or diminish the salary or change the mode of compensation.[4]

§ **474.** The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed therein, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.[5] Where municipal bonds have been put upon the market as commercial paper, the rights of the parties thereto are to be determined according to the statutes of the state as they were then

187, 181; Sangamon Co. v. Springfield, 63 Ill. 66; Borough of Dunmore's Appeal, 52 Pa. St. 374; Guilford v. Cornell, 18 Barb. 615; Guilford v. Supervisors, 13 N. Y. 143; Richland Co. v. Richland Center, 59 Wis. 591.

[1] Id.; Beckwith v. Racine, 7 Biss. 142.

[2] Cooley, C. L. 340.

[3] Matter of Kerr, 42 Barb. 119; West River Br. Co. v. Dix, 16 Vt. 446; 6 How. 507; Enfield Toll Br. Co. v. Hartford, etc. R. R. Co. 17 Conn. 40, 454; Providence Bank v. Billings, 4 Pet. 514; Thorpe v. R. & B. R. R. Co. 27 Vt. 140; McCulloch v. Maryland, 4 Wheat. 327; Ohio, etc. R. R. Co. v. McClelland, 25 Ill. 140; Osborn v. Bank of U. S. 9 Wheat. 738; Indianapolis, etc. R. R. Co. v. Kercheval, 16 Ind. 84; Bradley v. McAtee, 7 Bush, 667; State v. Noyes, 47 Me. 189; Vanderbilt v. Adams, 7 Cow. 349; State v. Sterling, 8 Mo. 697; Calder v. Kurby, 5 Gray, 597; Hirn v. State, 1 Ohio St. 15; Toledo, etc. R. R. Co. v. Jacksonville, 67 Ill. 37; Chicago Packing Co. v. Chicago, 88 Ill. 221; People v. Commissioners, 59 N. Y. 92; Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, id. 659; Stone v. Mississippi, 101 U. S. 814.

[4] Butler v. Pennsylvania, 10 How. 402; Newton v. Commissioners, 100 U. S. 559.

[5] Green v. Biddle, 8 Wheat. 84; Planters' Bank v. Sharp, 6 How. 327.

construed by her highest court; and in a case involving those rights the supreme court of the United States will not be governed by any subsequent decision in conflict with that under which they became payable. The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in effect on pre-existing contracts as a repeal or an amendment by legislative enactment.[1] A bankrupt or insolvent law of any state, which discharges both the person of the debtor and his future acquisitions of property, is not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such law. But a certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States or of any other state than that where the discharge was obtained.[2] A law which authorizes the discharge of a contract by the payment of a smaller sum or at a different time or in a different manner than the parties have agreed impairs its obligation by substituting for the compact of the parties a legislative act to which they have never assented.[3] "It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within a limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a deed is to render the prior deed fraudulent and void as against a subsequent purchaser, it is not a law impairing the obligation of contracts."[4] Contracts made in violation of some interest or revenue regulation may be validated by repeal of such regulation. In validating a void contract its obligations are not impaired, but legal impediments to its enforcement according to the intention of the parties are removed.[5] A corporation charter is not subject to forfeiture for acts or omis-

[1] Douglass v. Pike Co. 101 U. S. 677.

[2] Ogden v. Saunders, 12 Wheat. 213. See Denny v. Bennett, 128 U. S. 439.

[3] Golden v. Prince, 3 Wash. 313.

[4] Jackson v. Lamphire, 3 Pet. 290.

[5] Satterlee v. Matthewson, 2 Pet. 406; Gibson v. Hibbard, 13 Mich. 214; Welch v. Wadsworth, 30 Conn. 149; Wood v. Kennedy, 19 Ind. 68. See Baugher v. Nelson, 9 Gill, 299.

sions which were not causes of forfeiture at the time they occurred.[1] If, when a private corporation contracts a debt, its stockholders are under a certain liability by law, this law cannot, as to creditors becoming such while it existed, be repealed.[2] So a statute imposing liabilities on stockholders in a corporation to which they were not subject by the charter or general law under which the corporation was organized is unconstitutional.[3]

§ **475.** The prohibition of the constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the state, and to those of its agents acting under its authority, as well as to those between individuals. And that obligation is impaired, in the sense of the constitution, when the means by which a contract at the time of its execution could be enforced — that is, by which the parties could be obliged to perform it — are rendered less efficacious by legislation operating directly upon those means.[4] As long as a city exists, laws are void which withdraw or restrict her taxing power, so as to impair the obligation of her contracts made upon a pledge, expressly or impliedly given, that it shall be exercised for their fulfillment.[5] A statute authorized a city to issue bonds to a specified amount, and, among other stringent provisions to secure their prompt payment, prohibited the subsequent issue of any other bonds, for any other purpose whatever, except in payment of such bonded debt. It was held that the holders of those bonds were entitled to the benefit of this restriction as a most material element of the contract, and that it was not subject to legislative repeal and amendment so as to impair the right or diminish the security without their consent.[6] Where a municipal corporation has

[1] People v. Jackson, etc. Pl. R. Co. 9 Mich. 285.

[2] Hawthorne v. Calef, 2 Wall. 10; Corning v. McCullough, 1 N. Y. 47; Story v. Furman, 25 N. Y. 214; Norris v. Wrenschall, 34 Md. 492.

[3] Ireland v. Palestine, etc. T. Co. 19 Ohio St. 369.

[4] Wolff v. New Orleans, 103 U. S. 358, 367.

[5] Wolff v. New Orleans, 103 U. S. 358; State v. Madison, 15 Wis. 30; Von Baumbach v. Bade, 9 id. 559; Phelps v. Rooney, id. 70.

[6] Smith v. Appleton, 19 Wis. 468; People v. Woods, 7 Cal. 579; People v. Bond, 10 id. 563; Munday v. Rahway, 43 N. J. L. 338; Board of Liquidation v. McComb, 92 U. S. 531.

lawfully issued its bonds for specified sums, to bear interest at a stated rate, it cannot subsequently provide for taxing that debt, and for detaining a part of it for payment of the tax.[1]

§ 476. **Change of remedy.**— The constitutional provision is a negation. No law is permitted to be enacted to impair the obligation of contracts. There is no mandate to enact laws for their enforcement. Remedies exist in the common law. And courts are supposed to exist throughout the states with competent jurisdiction. The practical question arises upon changes in the law — upon affirmative legislation. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guarantied by the constitution against impairment.[2] If legislation "tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat*,— he who gives quickly gives twice,— has its counterpart in a maxim equally sound,— *qui serius solvit, minus solvit*,— he who pays too late, pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."[3] The rule affirmed by the court of last resort is that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarrass it with conditions as to seriously impair the value of the right.[4] If a particular form of proceeding is prohibited, and another is left or is provided which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired.[5] A statutory provision requiring a plaintiff having an

[1] Murray v. Charleston, 96 U. S. 432.

[2] Walker v. Whitehead, 16 Wall. 314.

[3] Louisiana v. New Orleans, 102 U. S. 203, per Field, J.

[4] Tennessee v. Sneed, 96 U. S. 69; Bronson v. Kinzie, 1 How. 311; Sturges v. Crowninshield, 4 Wheat. 122; Mason v. Haile, 12 id. 370; Green v. Biddle, 8 Wheat. 92; White v. Hart, 13 Wall. 646.

[5] Id.; Huntzinger v. Brock, 3 Grant's Cas. 243; Evans v. Montgomery, 4 Watts & S. 218; McDaniel v. Webster, 2 Houst. 305; Read v. Bank, 28 Me. 318; Walker v. Whitehead, 16 Wall. 314; Von Hoffman v. Quincy, 4 id. 552; Pollard, Ex parte, 40 Ala. 77; Nelson v. McCrary, 60 id. 301; Collins v. East Tenn. etc. R. R. Co. 9 Heisk. 841; Williams v. Weaver, 94 N. C. 134; Cutts v. Hardee, 38 Ga.

executory judgment against a city to file a certified copy thereof with the controller, preliminary to obtaining a warrant on the treasury in payment, does not impair the obligation, and is constitutional.[1]

§ 477. A statute, passed after the making of a mortgage, which declared that the equitable estate of the mortgagor should not be extinguished for twelve months after a sale under a decree in chancery, and which prevented any sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor, impaired the obligation of the contract.[2] Taney, C. J., says: "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And although a new remedy may be deemed less convenient than an old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be

350; Stocking v. Hunt, 3 Denio, 274; Wolfkell v. Mason, 16 Abb. Pr. 221; Sullivan v. Brewster, 1 E. D. Smith, 681; Miller v. Moore, id. 739; Coleman v. Ballandi, 22 Minn. 144; Quackenbush v. Danks, 1 Denio, 128; Danks v. Quackenbush, 3 Denio, 594; 1 N. Y. 129; Cusic v. Douglas, 3 Kan. 123; Morse v. Goold, 11 N. Y. 281; Hill v. Kessler, 63 N. C. 437; Martin v. Hughes, 67 N. C. 293; Story v. Furman, 25 N. Y. 214, 223-4; Maxey v. Loyal, 38 Ga. 531; Hardeman v. Downer, 39 id. 425; Sneider v. Heidelberger, 45 Ala. 126; Maull v. Vaughn, id. 134; Farley v. Dowe, id. 324; Rockwell v. Hubbell's Adm'r, 2 Doug. (Mich.) 197; Sprecher v. Wakeley, 11 Wis. 432; In re Kennedy, 2 S. C. 216; Breitung v. Lindauer, 37 Mich. 217.

[1] Louisiana v. New Orleans, 102 U. S. 203.

[2] Bronson v. Kinzie, 1 How. 311.

altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution."[1] In McCracken v. Hayward[2] it was held that a law which provided that a sale should not be made of property levied on under an execution unless it would bring two-thirds of its appraised value was unconstitutional and void for like reason. Baldwin, J., delivered the opinion of the court, in the course of which he said: "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right; compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." In Edwards v. Kearzey[3] it was held that an exemption of a homestead to the value of $1,000, inserted in a new constitution adopted after a debt was contracted, impaired the obligation of the contract.[4] Mr. Justice Swayne

[1] Bronson v. Kinzie, 1 How. 311.

[2] 2 How. 608.

[3] 96 U. S. 595.

[4] Gunn v. Barry, 15 Wall. 610;

delivered the opinion of the court, and, alluding to what had been said by the chief justice in Bronson v. Kinzie relative to the power of the states to enact exemption laws, said: "The learned chief justice seems to have had in his mind the maxim *de minimis*, etc. Upon no other ground can any exemption be justified. Policy and humanity are dangerous guides in the discussion of a legal proposition.[1] He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it." He concludes with this declaration: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution and is therefore void."

§ **478.** Legislation cannot be permitted to affect the construction of existing contracts. It is also held that the parties are entitled to a remedy as efficacious as that afforded when the contract was made. They are entitled to have the identical compact enforced, but not by the precise modes of procedure in force at its execution; only an equivalent remedy. There is some diversity of opinion as to the degree of change or departure from an exact equivalence there may be without conflicting with the constitution. What the suitor has a right to claim is the use of such remedy as may be adequate to his demand; not that he shall be permitted to enforce that demand in any special form or by any specific process.[2] No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights; every case must be determined on its own circumstances.[3] Statutes taking away all remedy on existing contracts would be manifestly void.[4] Where the changes in-

Homestead Cases, 22 Gratt. 266; Lessley v. Phipps, 49 Miss. 790.

[1] See Von Hoffman v. Quincy, 4 Wall. 553.

[2] Tennessee v. Sneed, 96 U. S. 73, 74.

[3] Von Hoffman v. Quincy, 4 Wall. 553.

[4] Call v. Hagger, 8 Mass. 430; State v. Bank, 1 S. C. 63; Osborn v. Nicholson, 13 Wall. 662; West v. Sansom, 44 Ga. 295; Johnson v. Bond, Hempst. 533; Rison v. Farr, 24 Ark. 161; McFarland v. Butler, 8 Minn. 116; Jackson v. Butler, id. 117.

troduced are intended and suited to clog, hamper and embarrass the proceedings to enforce the right, so as to destroy it, the statute is not a regulation of the remedy but impairs the obligation of the contract.[1] The remedy for the enforcement of a contract to which a party is entitled under state statutes in force when the contract was made cannot be subsequently taken away by decisions of the state courts giving those statutes an erroneous construction, any more than by subsequent legislation.[2] It has been held that the remedy is within the discretion of the states, and that a stay of execution for a reasonable time is not obnoxious to constitutional objection.[3] An act passed in Wisconsin in May, 1862, exempting from civil process all persons who had or might volunteer or enroll themselves as members of any military company, mustered into the service of the United States or of that state, during their service, was held to be void as operating to impair the obligation of contracts; that it was within the recognized power of the states to change or modify the laws governing proceedings in courts of justice in regard to past as well as future contracts. That power was held to be unrestricted, except that a substantial remedy must be afforded according to the course of justice as it existed at the time the contract was made.[4] A Pennsylvania act of like nature passed in 1861, and construed to mean a stay during the war or for three years and thirty days, unless it should sooner terminate, was sustained. "In such cases," says Woodward, J., "the rule is that the remedy becomes part of the obligation of the contract, and any subsequent statute which affects the remedy impairs the obligation, and is unconstitutional. Bronson v. Kinzie[5] and Billinger v. Evans[6] are illustrations of this rule. The time and manner in which stay laws shall operate are properly legislative questions, and will generally depend, said Judge Baldwin in Jackson v. Lamphire,[7] "on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to the enactment."[8] The learned judge added: "It is

[1] Oatman v. Bond, 15 Wis. 20.
[2] Butz v. Muscatine, 8 Wall. 575.
[3] Chadwick v. Moore, 8 W. & S. 49.
[4] Hasbrouck v. Shipman, 16 Wis. 296.
[5] 1 How. 322.
[6] 4 Wright, 327.
[7] 3 Pet. 280.
[8] Breitenbach v. Bush, 44 Pa. St. 313.

impossible to separate this question of reasonableness from the actual circumstances in which the country found itself at the date of the war. . . . Now, if a stay of execution for three years would not be tolerated in ordinary times, did not these circumstances [then historically known] constitute an emergency that justified the pushing of legislation to the extremest limits of the constitution? . . . In view of the extraordinary circumstances of the case we cannot pronounce it unreasonable. We see in it no wanton or careless disregard of the obligation of contracts. . . . Another circumstance which bears on the reasonableness of the enactment is the provision which suspends all statutes of limitation in favor of the soldier during the time he is exempted from process. The provisions were reciprocal and both were reasonable."[1] Where an indefinite stay was provided for on the consent of two-thirds of the creditors, subject to no other than their discretion, the obligation of the contracts held by the non-consenting minority was impaired.[2]

A statute directing that execution upon any judgment thereafter obtained should not issue until two years after the rendition of the judgment, unless the plaintiff should indorse upon the execution that satisfaction may be received in notes of particular banks, was held unconstitutional. Such a law attempts to impair the obligation.[3] An ordinance, ostensibly to change the

[1] See Coxe's Ex'r v. Martin, 44 Pa. St. 322.

[2] Bunn v. Gorgas, 41 Pa. St. 441.

[3] Townsend v. Townsend, Peck, 1; S. C. 14 Am. Dec. 722. "The contract," says Haywood, J., "is made by the parties, and, if sanctioned by law, it promises to enforce performance should the party decline performance himself. The law is the source of the obligation, and the extent of the obligation is defined by the law in use at the time the contract is made. If this law direct a specific execution, and a subsequent act declares that there shall not be a specific execution, the obligation of the contract is lessened and impaired. If the law in being at the date of the contract gives an equivalent in money, and a subsequent law says the equivalent shall not be in money, such act would impair the obligation of the contract. If the law in being at the date of the contract gives immediate execution on the rendition of the judgment, a subsequent act declaring that the execution shall not issue for two years would lessen or impair the contract equally as much in principle as if it suspended execution forever; in which case the legal obligation of the contract would be wholly extinguished. The legislature may alter remedies, but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in

jurisdiction of the courts, provided that all contracts, without regard to the terms of payment made by the parties, should be payable in four annual instalments. This was held unconstitutional.[1] A law which changes the rules of evidence relates to the remedy and is not within the constitutional inhibition.[2] A law abolishing distress for rent has been sustained as applicable to existing leases.[3] The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper.[4] A law which takes from a mortgagee a right of possession until after foreclosure;[5] a law suspending the right to sue on

being when the contract was made, if such alteration be the direct and special object of the legislature, apparent in an act made for the purpose." See Farnsworth v. Vance, 2 Cold. 108; overruled by Webster v. Rose, 6 Heisk. 93. A Missouri act extended the time for return of executions to second term after issue, and prohibited sales till within fifteen days of the return day, and from justices' courts for twelve months. This was held unconstitutional. Stevens v. Andrews, 31 Mo. 205. In this case Napton, J., said: "We do not question the power of the legislature over remedies, whether they relate to past or future contracts, provided the new remedy does not impair the obligation of the contract. It is the unquestioned power of the legislature to regulate the modes of proceedings in their courts, and prescribe the forms of process, both final and *mesne*, and their manner and time of execution. General laws relating to the modes of proceeding, both before and after judgment, would hardly be called in question, although applied to past contracts, merely because of some incidental effect favorable to the plaintiff or defendant in the suit. . . . The act now under consideration is not designed to make any permanent change in the forms of proceedings heretofore in use. On the contrary, the old system is retained; and the act, without changing the rule, attempts to suspend its operation. It recognizes the propriety of letting executions run for six months as the permanent rule, but it suspends this general regulation for two years and applies the suspension to past contracts." See Webster v. Rose, 6 Heisk. 93; Burt v. Williams, 24 Ark. 91; Hudspeth v. Davis, 41 Ala. 389; Taylor v. Stearns, 18 Gratt. 244; Cutts v. Hardee, 38 Ga. 350; Aycock v. Martin, 37 id. 124; Sequestration Cases, 30 Tex. 688; Clark v. Martin, 3 Grant's Cas. 393; Johnson v. Higgins, 3 Met. (Ky.) 566.

[1] Jacobs v. Smallwood, 63 N. C. 112.

[2] Neass v. Mercer, 15 Barb. 318; Howard v. Moot, 64 N. Y. 262.

[3] Van Rensselaer v. Snyder, 9 Barb. 302; 13 N. Y. 299; Guild v. Rogers, 8 Barb. 502; Conkey v. Hart, 14 N. Y. 22.

[4] Von Hoffman v. Quincy, 4 Wall. 552; Beers v. Haughton, 9 Peters, 359; Ogden v. Saunders, 12 Wheat. 230; Sturges v. Crowninshield, 4 id. 200.

[5] Mundy v. Monroe, 1 Mich. 68; Blackwood v. Van Vleet, 11 id. 252.

the note or bond until after foreclosure;[1] extending redemption;[2] or shortening the redemption,[3] impairs the obligation, and is within the prohibition under consideration.

§ **479.** Limitation laws relate to the remedy and not directly to the right. They are not considered as elements entering into contracts, for, it is said, parties do not look forward to a breach of their agreements, but to the performance.[4] A law passed subsequently to a contract, and changing the period of limitation, is not necessarily a law impairing its obligation.[5] And ordinarily courts disregard the limitation fixed in the place of the contract or tort and enforce only that of the *lex fori*.[6] Usually the bar of a statute limiting transitory actions is said not to extinguish the right, because such actions may be brought anywhere, while the statute can have no effect beyond the territory of the sovereign that enacted it; therefore the right remains to s ıpport such action whenever the *lex fori* will permit it to be brought. But even under these statutes, if the subject-matter of an action and the opposing claimants of the right have continued within the same jurisdiction until the statutory term has expired, the title is transferred to him in whose favor the bar exists, and that title will be recognized and upheld in the tribunals of other states as well.[7]

§ **480. Vested rights inviolable.**—Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights, and the constitutional limita-

[1] Boice v. Boice, 27 Minn. 371.

[2] Robinson v. Howe, 13 Wis. 341; Dikeman v. Dikeman, 11 Paige, 484; Greenfield v. Dorris, 1 Sneed, 550; January v. January, 7 T. B. Mon. 542; Goenen v. Schroeder, 8 Minn. 387. But see Stone v. Bassett, 4 Minn. 298.

[3] Cargill v. Power, 1 Mich. 369.

[4] Moore v. State, 43 N. J. L. 203; Ogden v. Saunders, 12 Wheat. 313; Don v. Lippmann, 5 Cl. & Fin. 1.

[5] 3 Parsons on Cont. 557.

[6] Moore v. State, 43 N. J. L. 203; Gulick v. Loder, 13 id. 68; Townsend v. Jemison, 9 How. 407; Edwards v. Kearzey, 96 U. S. 595; Drake v. Wilkie, 30 Hun, 537; Calhoun v. Kellogg, 41 Ga. 231.

[7] Moore v. State, 43 N. J. L. 203; Newby's Adm'r v. Blakey, 3 H. & M. 57; Brent v. Chapman, 5 Cr. 358; Shelby v. Guy, 11 Wheat. 361; Thompson v Caldwell, 3 Litt. 136; Story's Conf. L. § 582*b*; Huber v. Steiner, 2 Bing. N. C. 202; Don v. Lippmann, 5 Cl. & Fin. 1; Brown v. Wilcox, 14 S. & M. 127; Davis v. Minor, 1 How. (Miss.) 183; Woodman v. Fulton, 47 Miss. 682; Spencer v. McBride, 14 Fla. 403. See Swickard v. Bailey, 3 Kan. 507.

tions upon the exercise of the sovereign powers.[1] There is a vested right in property which one owns, and it cannot be legislated away.[2] A vested right is property as tangible things are when they spring from contract or the principles of the common law.[3] There is a vested right in an accrued cause of action;[4] in a defense to a cause of action;[5] even in the statute of limitations when the bar has attached, by which an action for a debt is barred. That statute presumes evidence from length of time which cannot now be produced; payment which cannot now be proved.[6] A person in adverse possession is no longer subject to action to disturb him; the one has a vested right to his defense, and the other a title with all its incidents and implications.[7] And it is then secure against legislative interference.[8]

[1] Wilson v. Wall, 34 Ala. 288; Davidson v. New Orleans, 96 U. S. 97; Baugher v. Nelson, 9 Gill, 299; Maxwell v. Goetschius, 40 N. J. L. 383; Collins v. East Tenn. etc. R. R. Co. 9 Heisk. 841; Dash v. Van Kleeck, 7 John. 477; Davis v. Minor, 1 How. (Miss.) 183; Dodge v. County of Platte, 16 Hun, 285; Wood v. Mayor, etc. 34 How. Pr. 501; State Bank v. Knoop, 16 How. 369; Dodge v. Woolsey, 18 id. 331; Greenough v. Greenough, 11 Pa. St. 489; De Chastellux v. Fairchild, 15 Pa. St. 18; Smith v. Louisville, etc. R. R. Co. 62 Miss. 510; Halloran v. T. etc. R. R. Co. 40 Tex. 465; Aldridge v. Tuscumbia, etc. R. R. Co. 2 St. & P. 199; Boatwright v. Faust, 4 McCord, 439; Municipality No. 3 v. Michoud, 6 La. Ann. 605; Steele v. Steele, 64 Ala. 438; Coosa R. Co. v. Barclay, 30 Ala. 120; Dillon v. Dougherty, 2 Grant's Cas. 99; State v. Squires, 26 Iowa, 340; Smith v. Van Gilder, 26 Ark. 527.

[2] Lane v. Nelson, 79 Pa. St. 407; Greenough v. Greenough, 11 Pa. St. 489; De Chastellux v. Fairchild, 15 Pa. St. 18; Norman v. Heist, 5 W. & S. 171; Aldridge v. Tuscumbia, etc. R. R. Co. 2 Stew. & Port. 199; Thistle v. Frostburg Coal Co. 10 Md. 129.

[3] Collins v. East Tenn. etc. R. R. Co. 9 Heisk. 841; Dillon v. Dougherty, 2 Grant's Cas. 99.

[4] Smith v. Louisville, etc. R. R. Co. 62 Miss. 510.

[5] Davis v. Minor, 1 How. (Miss.) 183.

[6] Davis v. Minor, *supra*.

[7] Knox v. Cleveland, 13 Wis. 249; Moore v. Luce, 29 Pa. St. 260; Leffingwell v. Warren, 2 Black, 599.

[8] Moore v. State, 43 N. J. L. 207; Maxwell v. Goetschius, 40 id. 383. A statute provided that by particular pleading a borrower might defend against a usurious loan to the extent of the usury. It was regarded as remedial, and though imposing a duty to pay the loan and lawful interest in accordance with the debtor's equitable duty, and made to operate retrospectively in derogation of the statute in force when the loan was made by which the contract was unlawful, it was held not obnoxious to the objection that it took away a vested right, for it was said there could be no vested right to do wrong. Baugher v. Nelson, 9 Gill, 299; Town of Danville v. Pace, 25

If a contract when made is a nullity, it cannot be validated by an act of the legislature, for that would be to impose a binding agreement where none existed.[1] A right of redemption once vested is a property right which can only be taken by due process of law; it cannot be abrogated by a legislative act.[2] A lien or other right once attached cannot be destroyed by repeal of the law under which it was derived.[3] After a tax has been legally remitted it cannot be reimposed.[4] When a right has been perfected by judgment the fruits of recovery cannot be diverted by new legislation,[5] nor subjected to new hazard by reviving a new right to appeal,[6] or some other mode of review.[7] An act cannot affect the construction of the will of a testator who died before it was passed.[8] Rights of a husband in the property of the wife when vested cannot be impaired by subsequent legislation.[9] Treaties are the supreme law of the land; rights which have vested under them cannot be destroyed or affected by the action of either the legislative

Gratt. 1; Satterlee v. Mathewson, 16 S. & R. 191; The Ironsides, Lushington, 458.

[1] N. Y. etc. R. R. Co. v. Van Horn, 57 N. Y. 473.

[2] Willis v. Jelineck, 27 Minn. 18.

[3] Appeal Tax Court v. Western R. R. Co. 50 Md. 274; Warren v. Jones, 9 S. C. 288; Daniels v. Moses, 12 S. C. 130; Walton v. Dickerson, 4 Rich. L. 568. The repeal of a general corporation law by a statute substantially re-enacting and extending its provisions does not affect the existence of corporations organized under it. United Hebrew B. Assoc. v. Benshimol, 130 Mass. 325.

[4] Municipality No. 3 v. Michoud, 6 La. Ann. 605.

[5] Commonwealth v. Welch, 2 Dana, 330.

[6] Hooker v. Hooker, 10 Sm. & M. 599; Halloran v. T. & N. etc. R. R. Co. 40 Tex. 465; Burch v. Newbury, 10 N. Y. 374.

[7] Stewart v. Davidson, 10 Sm. & M. 351; Johnson v. Johnson, 52 Md. 668.

[8] Boatwright v. Faust, 4 McCord, 439. Statutes prescribing the requisites to be observed in making a will may be made to operate upon wills already made where the testator dies afterwards. Sutton v. Chenault, 18 Ga. 1; Wynne v. Wynne, 2 Swan, 405. So its provisions may be controlled and their validity affected by legislation intermediate the execution of the will and the death of the testator. Magruder v. Carroll, 4 Md. 335. See Blackman v. Gordon, 2 Rich. Eq. 43. Congress has power to authorize by special act the extension of a patent, notwithstanding the fact that the original patent had previously expired and the invention has been introduced to public use. A special act of congress authorizing the extension of a particular patent should be read and construed in connection with the general acts on the subject of patents. Jordan v. Dobson, 2 Abb. (U. S.) 398.

[9] Westervelt v. Gregg, 12 N. Y. 202; Bouknight v. Epting, 11 S. C. 71.

or the executive department of the government, nor by the rules of practice adopted by the officers of the latter department; nor are the courts in determining those rights to be controlled by the action or rules of practice of the other departments.[1] It is not within the power of the legislature to create a legal liability out of a past transaction, for which none arose by the law as it stood at the time of its occurrence.[2]

§ **481.** Imperfect and inchoate rights are subject to future legislation and may be extinguished while in that condition;[3] but such statutes, and others which involve expense or interfere with the existing course of business, will not be construed to affect such rights or existing cases, or impose new duties or disabilities in respect of past transactions, unless the intention to do so is clearly expressed — even remedial statutes.[4]

§ **482. Remedial statutes may apply to past transactions and pending cases.**[5] — Where statutory relief is prescribed for a cause which is continuous in its nature, as a statute of limitations, or desertion for a certain time as ground for divorce, if the cause continues after the statute goes into effect, the future continuance of the cause may be supplemented by the time it was continuous immediately before the act was passed to constitute the statutory period.[6] No person can claim a

[1] Wilson v. Wall, 34 Ala. 288. See Hauensteine v. Lynham, 28 Gratt. 62.

[2] Steele v. Steele, 64 Ala. 438; Coosa R. Co. v. Barclay, 30 id. 120; Frasier v. Town of Tompkins, 30 Hun, 168; N. Y. etc. R. R. Co. v. Van Horn, 57 N. Y. 473; Sutherland v. De Leon, 1 Tex. 250.

[3] Cage v. Hogg, 1 Humph. 48; Tivey v. People, 8 Mich. 128.

[4] State v. Bradford, 36 Ga. 422; Bond v. Munro, 28 id. 597; The Ironsides, Lush. 458; Allhusen v. Brooking, L. R. 26 Ch. Div. 564; Evans v. Williams, 2 Drewry & Sm. 324; Marsh v. Higgins, 9 C. B. 551; Waugh v. Middleton, 8 Ex. 352; Green v. Anderson, 39 Miss. 359.

[5] Ludeling v. His Creditors, 4 Martin (N. S.), 603; Carnes v. Parish of Red River, 29 La. Ann. 608; Kimbray v. Draper, L. R. 3 Q. B. 160; Wright v. Hale, 6 H. & N. 227; Singer v. Hasson, 50 L. T. 326; Excelsior Manuf'g Co. v. Keyser, 62 Miss. 155; Garrison v. Cheeney, 1 Wash. T'y, 489; Gardenhire v. McCombs, 1 Sneed, 83; Johnson v. Koockogey, 23 Ga. 183; Lockett v. Usry, 28 id. 345; Eskridge v. Ditmars, 51 Ala. 245; Sumner v. Miller, 64 N. C. 688; Bailey v. R. R. Co. 4 Harr. 389; Berry v. Clary, 77 Me. 482; Costa Rica v. Erlanger, L. R. 3 Ch. Div. 69; Duanesburgh v. Jenkins, 57 N. Y. 191.

[6] McCraney v. McCraney, 5 Iowa, 232; Benkert v. Benkert, 32 Cal. 467; Thornburg v. Thornburg, 18 W. Va. 522; Spencer v. McBride, 14 Fla. 403; Ross v. Duval, 13 Pet. 45; Hare v. Hare, 10 Tex. 355; Greenlaw v. Green-

vested right in any particular mode of procedure for the enforcement or defense of his rights.[1] Where a new statute deals with procedure only, *prima facie* it applies to all actions — those which have accrued or are pending, and future actions.[2] If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings.[3] But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened.[4] A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist.[5] Every case must to considerable extent depend on its own circumstances. General words in remedial statutes may be applied to past transactions and

law, 12 N. H. 200; Clark v. Clark, 10 id. 391; Crossman v. Crossman, 33 Ala. 486; Bailey v. Bailey, 21 Gratt. 43.

[1] Id.

[2] Chaffe v. Aaron, 62 Miss. 29; Wright v. Hale, 6 H. & N. 227; Edmonds v. Lawley, 6 M. & W. 285; Kimbray v. Draper, L. R. 3 Q. B. 160; Lawrence R. R. Co. v. Mahoning Co. 35 Ohio St. 1; Matter of Beams, 17 How. Pr. 459; Sampeyreac v. United States, 7 Pet. 222; Dobbins v. Bank, 112 Ill. 553; People v. Tibbets, 4 Cow. 384; People v. Supervisors, 63 Barb. 83; Lane v. Nelson, 79 Pa. St. 407; Gardner v. Lucas, L. R. 3 App. Cas. 582; People v. Peacock, 98 Ill. 172; Rockwell v. Hubbell, 2 Doug. (Mich.) 197; Henschall v. Schmidtz, 50 Mo. 454; Jacquins v. Clark, 9 Cush. 279; Blair v. Cary, 9 Wis. 543; Commonwealth v. Bradley, 16 Gray, 241; Walston v. Commonwealth, 16 B. Mon. 15; McNamara v. Minn. etc. R. R. Co. 12 Minn. 388; Rivers v. Cole, 38 Iowa, 677.

[3] Ludeling v. His Creditors, 4 Martin (N. S.), 603; Scott v. Duke, 3 La. Ann. 253; Commercial Bank v. Markham, id. 698; Featherstonh v. Compton, 8 id. 285; State v. Brown, 30 id. 78; Tennant v. Brookover, 12 W. Va. 337.

[4] Culver v. Woodruff Co. 5 Dill. 392; Ewing's Case, 5 Gratt. 701; Trist v. Cabenas, 18 Abb. Pr. 143; Womack v. Womack, 17 Tex. 1; Litch v. Brotherson, 25 How. Pr. 416; Tennant v. Brookover, *supra;* Newsom v. Greenwood, 4 Oregon, 119; State v. Solomons, 3 Hill (S. C.), 96; Bates v. Stearns, 23 Wend. 482; Bedford v. Shilling, 4 S. & R. 401; Butler v. Palmer, 1 Hill, 324; Williams v. Smith, 4 H. & N. 559; Palmer v. Conly, 4 Denio, 374; Satterlee v. Matthewson, 2 Pet. 380.

[5] Anonymous, 2 Stew. 228; Commonwealth v. Hall, 97 Mass. 570; Sutherland v. De Leon, 1 Tex. 250; Davis v. Branch Bank, 12 Ala. 463; Coosa R. Co. v. Barclay, 30 Ala. 120; City v. R. R. Co. 35 La. Ann. 679; Buckley, Ex parte, 53 Ala. 43; Society, etc. v. Wheeler, 2 Gall. 139.

pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice.[1]

§ **483. Curative statutes.**—The legislature has power to pass healing acts which do not impair the obligation of contracts nor interfere with vested rights.[2] They are remedial by curing defects, and adding to the means of enforcing existing obligations.[3] The rule in regard to curative statutes is that if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by a prior law, it may do so by a subsequent one.[4] On this principle the legislature may validate contracts made *ultra vires* by municipal corporations.[5] It may thus ratify a contract of a municipal

[1] Tilton v. Swift, 40 Iowa, 78; Miller v. Graham, 17 Ohio St. 1; Riggins v. State, 4 Kan. 173; State v. Smith, 38 Conn. 397; Mabry v. Baxter, 11 Heisk. 682; Mann v. McAtee, 37 Cal. 11; Chaney v. State, 31 Ala. 342; Merwin v. Ballard, 66 N. C. 398; Simco v. State, 8 Tex. App. 406; Bradford v. Barclay, 42 Ala. 375; Duanesburgh v. Jenkins, 57 N. Y. 191.

[2] Green v. Abraham, 43 Ark. 420.

[3] Jarvis v. Jarvis, 3 Edw. Ch. 462; Satterlee v. Matthewson, 2 Pet. 380.

[4] Green v. Abraham, *supra;* State v. Squires, 26 Iowa, 340; Watson v. Mercer, 8 Pet. 88; Chesnut v. Shane, 16 Ohio, 599; Newman v. Samuels, 17 Iowa, 518; Journeay v. Gibson, 56 Pa. St. 57; Shonk v. Brown, 61 id. 327; Dulany v. Tilghman, 6 G. & J. 461; Dentzel v. Waldie, 30 Cal. 138; Johnson, v. Richardson, 44 Ark. 365; Barnet v. Barnet, 15 S. & R. 72; Tate v. Stooltzfoos, 16 id. 35; Jackson v. Gilchrist, 15 John. 89; Raverty v. Fridge, 3 McLean, 230; Goshorn v. Purcell, 11 Ohio St. 641; Davis v. State Bank, 7 Ind. 316; Thornton v. McGrath, 1 Duv. 349; State v. Town of Union, 33 N. J. L. 350; Jacksonville v. Basnett, 20 Fla. 525; Re Van Antwerp, 1 T. & C. 423; 56 N. Y. 261; Bass v. Mayor, etc. 30 Ga. 845; Honey v. Clark, 37 Tex. 686; Montgomery v. Hobson, Meigs, 437; Constantine v. Van Winkle, 6 Hill, 177; Van Winkle v. Constantine, 10 N. Y. 422; Hardenburgh v. Lakin, 47 N. Y. 109; Davis v. Van Arsdale, 59 Miss. 367; Jackson v. Dillon, 2 Overt. 261; Matthewson v. Spencer, 3 Sneed, 513; O'Brian v. County Commissioners, 51 Md. 15; Washington v. Washington, 69 Ala. 281; Vaughan v. Swayzie, 56 Miss. 704; People v. Supervisors, 20 Mich. 95; People v. Mitchell, 35 N. Y. 551; People v. McDonald, 69 id. 362; Duanesburgh v. Jenkins, 57 N. Y. 191; Morris v. State, 62 Tex. 728.

[5] O'Brian v. County Commissioners, 51 Md. 15; Bass v. Mayor, etc. 30 Ga. 845; Single v. Supervisors, 38 Wis. 363; Brown v. Mayor, etc. 63 N. Y. 239.

corporation for a public purpose. Municipal corporations are agencies of the state through which the sovereign power acts in matters of social concern. It may confer upon them, subject to such constitutional restraints as exist, power to enter into contracts, and may annex such limitations and conditions to its exercise as, in its discretion, it deems proper for the protection of the public interests. The right to limit involves the power to dispense with limitations; and in such case as the legislature could have authorized a contract without previous advertisement, or competitive bidding, it may affirm a contract made, although made originally without authority of law.[1] The legislature may establish contracts and deeds defectively executed, acknowledged or recorded,[2] including those of married women;[3] marriages may be validated and offspring legitimated;[4] also defective sales of property,[5] defective assessments of taxes,[6] and municipal ordinances irregularly adopted.[7]

§ **484.** The important question on such statutes is, would the acts done be effectual for the purpose intended, if a law, made prior to those acts, had directed them as they were done; whether the statute alone made them essential for that purpose. Acts which are jurisdictional and could not be antecedently dispensed with by statute cannot be made immaterial by subsequent legislation.[8] Rights resting upon such curable defects alone cannot be deemed meritorious and are not entitled to the protection accorded to vested rights. Where they are

[1] Id.; In re Van Antwerp, 56 N. Y. 261.

[2] Jackson v. Dillon, 2 Overt. 261; Montgomery v. Hobson, Meigs, 437; Jackson v. Gilchrist, 15 John. 89; Hardenburgh v. Lakin, 47 N. Y. 109; Atwell v. Grant, 11 Md. 101; Cutler v. Supervisors, 56 Miss. 115; Hughes v. Cannon, 2 Humph. 589.

[3] Constantine v. Van Winkle, 6 Hill, 177; Van Winkle v. Constantine, 10 N. Y. 422; Johnson v. Richardson, 44 Ark. 365; Watson v. Mercer, 8 Pet. 88. But see Alabama Ins. Co. v. Boykin, 38 Ala. 510.

[4] Honey v. Clark, 37 Tex. 686; Washington v. Washington, 69 Ala. 281.

[5] Davis v. State Bank, 7 Ind. 316; Thornton v. McGrath, 1 Duv. 349; Power v. Penny, 59 Miss. 5.

[6] Davis v. Van Arsdale, 59 Miss. 367; People v. McDonald, 69 N. Y. 262; Jacksonville v. Basnett, 20 Fla. 525; Cochran v. Baker, 60 Miss. 282; Francklyn v. Long Island City, 32 Hun, 451; Vaughan v. Swayzie, 56 Miss. 704.

[7] State v. Town of Union, 33 N. J. L. 350; Walpole v. Elliott, 18 Ind. 258; Schenley v. Commonwealth, 36 Pa. St. 29; Morris v. State, 62 Tex. 728.

[8] State v. Town of Union, *supra*.

relied on as an excuse for repudiating contracts, executory or executed, they are not within the protection of the constitution.[1] If the jurisdictional facts are wanting the proceeding is a nullity and cannot be cured by any subsequent legislation, for no prior legislation could make it effectual. Thus, for example, in Lane v. Nelson:[2] "It is settled by a current of authority that the legislature cannot by an arbitrary edict take the property of one man and give it to another; and that when it has been attempted to be taken by a judicial proceeding, as a sheriff's sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead."[3]

[1] Baugher v. Nelson, 9 Gill, 299; O'Brian v. County Commissioners, 51 Md. 15; Thomson v. Lee County, 3 Wall. 327; People v. Mitchell, 35 N. Y. 551; Johnson v. Richardson, 44 Ark. 365; Green v. Abraham, 43 id. 420.

[2] 79 Pa. St. 407.

[3] Citing Newman v. Heist, 5 W. & S. 171; Greenough v. Greenough, 11 Pa. St. 489; De Chastellux v. Fairchild, 15 id. 18; Menges v. Dentler, 33 id. 495; Bagg's Appeal, 43 id. 512; Schafer v. Eneu, 54 id. 304; Shonk v. Brown, 61 id. 320; Richards v. Rote, 68 id. 248; Hegarty's Appeal, 75 id. 503.

Addendum D

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THE BASIC DOCTRINE OF AMERICAN CONSTITUTIONAL LAW.

THE two leading doctrines of American Constitutional Law before the Civil War, affecting state legislative power, were the Doctrine of Vested Rights and the Doctrine of the Police Power. The two doctrines are in a way complementary concepts, inasmuch as they represent the reaction upon each other of the earlier conflicting theories of natural rights and legislative sovereignty. But the older doctrine is the doctrine of vested rights, which may be said to have flourished before the rise of the Jacksonian Democracy. Furthermore, if Constitutional Law be regarded from the point of view of its main purpose, namely, that of setting metes and bounds to legislative power, it is the more fundamental doctrine.

Judicial review, we are told repeatedly, rests only upon the written constitution. We shall find ample reason presently to impugn the accuracy of this assertion, particularly for that most important formative period when the tree of Constitutional Law was receiving its initial bent. But letting it for the moment pass unchallenged, the question still remains, what is a constitution for—does it exist to grant power or to organize it? The former of these views is undoubtedly the older one, not only of the national Constitution, but of the state constitutions as well. For the written constitution, wherever found, was at first regarded as a species of social compact, entered into by sovereign individuals in a state of nature. From this point of view, however, governmental authority, wherever centered, is a trust which, save for the grant of it effected by the written constitution, were non-existent, and private rights, since they precede the constitution, gain nothing of authoritativeness from being enumerated in it, though possibly something of security. These rights are not, in other words, fundamental because they find mention in the written instrument; they find mention there because

fundamental. Suppose then the enumeration of such rights to have been but partial and incomplete, does that fact derogate from the rights not so enumerated? Article IX of the Amendments to the United States Constitution answers this question. The written constitution is, in short, but a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail.

And by the other view of the written constitution, whether the so-called "natural rights" were enumerated or not was also a matter of indifference, but for precisely the opposite reason. By this view too the constitution was in a certain sense a grant of power, since government always rests upon the consent of the governed. The power granted, however, was not simply this or that item of specifically designated power but the sum total of that unrestrained sovereignty which in the state of nature was each man's dower. By the very act of calling government into existence, or more accurately, the legislative branch of government, this vast donation of power was conferred upon it, and irretrievably too, save for the right of revolution. Thus, whereas by the first view a constitution is wrapped about, so to say, by an ocean of rights, by this view it is enclosed in an enveloping principle of sovereign power. It thus follows first, that the mere co-existence of three departments within a written constitution leaves the legislature absolute, and secondly, that a mere enumeration of rights in the written constitution leaves them subject to legislative definition. Only by pretty specific provision of the written constitution is the legislative power, by this view, to be held in leash, even with judicial review a recognized institution, and the maxim that all doubts are to be resolved in its favor is to be taken for all that it seems to mean.

But let us consider the effect of these two theories of the nature of the constitution upon the question of the scope of judicial review more directly. The two theories were brought into juxtaposition in the classic case of *Calder* v. *Bull*,[1] which was decided by the Supreme Court in 1798. In that case an act of the Connecticut legislature setting aside a decree of a probate court and granting a new hearing for the benefit of those claiming under a will was denounced by the heirs at law as *ex post facto* and so void under Art. I, § 10 of the United States Constitution. The court rejected this view, holding partly upon the authority of BLACKSTONE, partly upon the *usus loquendi* of the state constitutions, and partly on that of the

[1] 3 Dall. 386 (1798).

United States Constitution, that the prohibition in question did not extend to all "retrospective" legislation, but only to enactments making what were innocent acts when they were done criminal or aggravating the legal character and penalty of past acts. The prohibition was intended, said Justice CHASE, "to secure the *person* of the subject from injury or *punishment,* in consequence of such a *law.*" It was not intended to secure the citizen in his *"personal rights," i. e.,* "his *private rights,* of either *property* or *contracts.*"

Whether this construction of the *ex post facto* clause of Art. I, § 10 met the intentions of the framers of the Constitution is an open question.[2] But it is certain that it did not entirely satisfy the court that made it. Said Justice PATERSON: "I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws." Justice CHASE's condemnation was hardly less sweeping. He admitted that there were "cases in which laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion, or of pardon," but statutes taking away or impairing *"rights vested,* agreeably to existing laws," were also "retrospective," "generally unjust," and "oppressive." Nor was it at all his intention to throw open the doors to such legislation. True the *ex post facto* clause bore a narrow technical meaning, but other clauses of the same section were of broader application: the clause prohibiting states from making laws impairing the obligation of contracts and that prohibiting them from making anything but gold or silver a legal tender. Furthermore there were certain fundamental principles of the social compact and republican government.

"I cannot subscribe," wrote Justice CHASE in a passage which must be regarded as furnishing American Constitutional Law with its leavening principle, "to the *omnipotence* of a *state legislature,* or that it is *absolute* and *without* control, although its authority should not be *expressly* restrained by the *constitution or fundamental law* of the state. The people of the United States erected their constitutions . . . to establish justice, to promote the general welfare, to secure the blessing of liberty, and to protect persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide the proper objects of it. The *nature* and *ends* of *legislative*

[2] See Farrand, Records of the Federal Convention, II, 368, 375, 378, 448, 571, 596, 610, 617, 656; III, 165. See also note by Johnson, J., in 2 Pet. 681 (1829).

power will limit the *exercise* of it. . . . There are acts which the federal or state legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An *Act* of the legislature (for I cannot call it a *law*) contrary to the great principles of the social compact cannot be considered a rightful exercise of legislative authority. . . . A law that punishes an innocent action . . .; a law that destroys, or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes *property* from A and gives it to B: it is against all reason and justice for a people to entrust a legislature with *such* powers; and therefore it cannot be presumed that they have done it. The *genius,* the *nature,* and the *spirit* of our state governments amount to a prohibition of such acts of legislation; and the *general principles of law and reason* forbid them." To hold otherwise were a "political heresy" "altogether inadmissible."

This appeal from the strict letter of the Constitution to general principles CHASE'S associate IREDELL, on the other hand, flatly pronounced invalid. True, "some speculative jurists" had held "that a legislative act against the natural justice must, in itself, be void," but the correct view was that if "a government composed of legislative, executive and judicial departments were established by a constitution which imposed no limits on the legislative power . . . whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. . . . Sir William BLACKSTONE, having put the strong case of an act of Parliament which should explicitly authorize a man to try his own cause, explicitly adds that even in that case 'there is no court that has the power to defeat the intent of the legislature'" when couched in unmistakable terms.[3] Besides, "the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the court could properly say in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of justice."

Now which of these two views of the range of judicial power under the constitution has finally prevailed? In appearance, IREDELL'S has, but in substance, as I have already hinted, it is CHASE'S theory that has triumphed. The evidence for both these

[3] 1 Comm. 91.

propositions is to be found in COOLEY'S CONSTITUTIONAL LIMITATIONS.[4] Dealing with the subject "of the circumstances under which a legislative enactment may be declared unconstitutional," COOLEY writes: "If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, *unless it shall be found that those principles are placed beyond the legislative encroachment by the Constitution.* . . . Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the Constitution, *but not expressed in words.*" Farther along but still dealing with the same topic, he continues: "It is to be borne in mind . . . that there is a broad difference between the Constitution of the United States and the constitutions of the states as regards the power which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the states are possessed of all the general powers of legislation . . . We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation."

And thus far the victory seems to rest with IREDELL'S view,—but it is in appearance only, as we immediately discover. For whatever terms he may use at times, it is as far as possible from COOLEY'S intention to admit in any real sense the principle of legislative sovereignty. Thus he proceeds: *"It does not follow however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of powers; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done."* But he has just said that a state constitution exists to limit the *otherwise plenary* power of the legislature. How explain this apparent contradiction? An explanation has already been supplied by a quotation from the New York decision of *Sill* v. *Corning*.[5] The object of the constitution, runs the passage quoted, "is not to grant legislative power, but to confine and restrain it. Without constitutional

[4] Cooley, Constitutional Limitations (ed. 1) 169-173; (ed. 7) 237-242.

[5] 15 N. Y. 297, 303 (1857). See also Weister v. Hade, 52 Pa. St. 474, 477 (1866).

limitations, the power to make laws would be absolute. These limitations are created and imposed by the express words, *or, arise by necessary implication. The leading feature of the constitution is the separation and distinction of the powers of the government. It takes care to separate the executive, legislative and judicial powers and to define their limits.*" In a word the power which is conferred upon the legislature is the *legislative* power, and no other. This single phrase tells the tale. It is no longer good form, because it is no longer necessary, for a court to invoke natural rights and the social compact in a constitutional decision. But the same result is achieved by construing the very term by which "legislative power" is conferred upon the legislature. Such doctrine plainly has nothing in common with that of IREDELL. His theory was that in a constitution which should stop short with creating the three departments of government, the legislative power would be absolute. The doctrine espoused by COOLEY, on the other hand, reposes the main structure of Constitutional Law upon the simple fact of the coexistence of the three departments in the same constitution. Natural rights, expelled from the front door of the constitution are readmitted through the doctrine of the separation of powers. And what does this fact signify for judicial review? The answer is self-evident. Once it was recognized that to define "legislative power" finally and authoritatively lay with the courts, the power of judicial review became limited only by the discretion of the judges and the operation of the doctrine of *stare decisis*. The history of judicial review is, in other words, the history of constitutional limitations.

Preliminary, however, to entering upon this story, it is necessary for us to turn back a little way to supply a phase of the topic just under discussion. The date of the decision in *Sill* v. *Corning* was 1857 and COOLEY'S great work did not appear until 1868. Such recognition moreover as is accorded the principle of legislative sovereignty in these places, slight and banal as upon investigation it is seen to be, was due to developments lying this side the formative period of American Constitutional Law, in fact to developments that brought that period to a close. Despite therefore his tone of disparagement for the views of "speculative jurists," if we are to judge of views from their comparative success in establishing themselves in practice, it was IREDELL himself who was "speculative." The fact of the matter is that IREDELL'S tenet that courts were not to appeal to natural rights and the social compact as furnishing a basis for constitutional decisions was disregarded by all the leading

judges and advocates of the early period of our constitutional history. MARSHALL, it is true, had imbibed from BLACKSTONE'S pages much the same point of view as had IREDELL. But on the crucial occasion of his decision in *Fletcher* v. *Peck*,[6] he freely appealed to "the nature of society and government" as setting "limits to the legislative power," and putting the significant query, "How far the power of giving the law may involve every other power," proceeded to answer it in a way that he could not possibly have done had he not, for the once, at least, abandoned BLACKSTONE. The record of others has not even this degree of ambiguity. Justices WILSON, PATERSON, STORY and JOHNSON, Chancellors KENT and WALWORTH, Chief-Justices GRIMKE, PARSONS, PARKER, HOSMER, RUFFIN and BUCHANAN all appealed to natural rights and the social compact as limiting legislative powers. They and other judges based decisions on this ground. The same doctrine was urged by the greatest lawyers of the period, without reproach. How dominant indeed were Justice CHASE'S "speculative" views with both bench and bar throughout the period when the foundation precedents of constitutional interpretation were being established is shown well by what occurred in connection with the case of *Wilkinson* v. *Leland*,[7] decided by the Supreme Court of the United States in 1829, at the very close of this epoch. The attorney of defendants in error was Daniel WEBSTER. "If," said he, "at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end to private property. Though there may be no prohibition in the constitution, the legislature is restrained from acts subverting the great principles of republican liberty and of the social compact." To this contention his opponent William WIRT, responded thus: "Who is the sovereign? Is it not the legislature of the state and are not its acts effectual, *unless they come in contact with the great principles of the social compact?*" The act of the Rhode Island legislature under review was upheld, but said Justice STORY speaking for the court: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." Forty-five years later, Justice MILLER, speaking for an all but unanimous bench in *Loan Association* v. *Topeka*,[8] makes the same doctrine the

[6] 6 Cranch 87 (1810).
[7] 2 Pet. 627, 646-7, 652, 657 (1829).
[8] 20 Wall. 655 (1874).

basis of a decision overturning a state enactment, while IREDELL'S view receives reiteration in the lone dissent of Justice CLIFFORD.

But now was it the intention of these men to leave it with the courts to draw the line between legislative power and *all* rights which might be designated "natural rights"? We speedily discover that it was not, and in so doing discover at last IREDELL'S vindication. *A priori,* it is difficult to see how our judges, having set out to be defenders of "natural rights," were in a position to decline to defend, and therefore to define, all such rights whether mentioned in the constitution or not. The difficulty is disposed of, however, the moment we recollect that our judges envisaged their problem not as moral philosophers but as lawyers, and especially as students of the *Common Law.* "Natural rights," in short, were to be defined in light of Common Law precedents.

But there was also a second consideration limiting and easing the task of the judges. In his chapter on "The Absolute Rights of Individuals" BLACKSTONE had written thus: "These may be reduced to three principal or primary articles . . . I. The right of personal security" consisting "in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. . . . II. . . . the personal liberty of individuals . . ." consisting "in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, *unless by due course of law.* . . . III . . . The absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land.*"[9] As we have already seen BLACKSTONE regarded Parliament's power as legally unlimited. His subordination of the "Absolute Rights of Individuals" in each case to the law signifies therefore their plenary control by the legislature and so for our purpose must be ignored. What *is* to our purpose is the definition given in the above quotation of the rights pronounced "absolute." For these are the rights precisely which, with judicial review based upon the social compact and directed to keeping legislative power within its inherent limitations, the courts were called upon to protect against legislative attack.

But were all these rights in fact exposed to legislative attack? The right of *personal security* certainly was not. On the contrary from the very beginning we find the courts characterizing the legislative power as calculated to safeguard that right by assuring the

[9] 1 Black, Comm. 129-137.

prevalence of the maxim of the Common Law: "*Sic utere tuo ut alienum non laedas.*" Again it was little likely that the right of *personal liberty* would be infringed under a republican form of government. This was a right that all were capable of enjoying equally merely by virtue of their being persons. Furthermore, the rights of accused persons were safeguarded in both the federal Constitution and, for the most part, the state constitutions by elaborate and detailed specification; and the decision in *Calder* v. *Bull* had not weakened these safeguards. The right meant to be safeguarded by the appeal to the social compact and natural rights was therefore the Property Right. This was the right which, the old DIALOGUE OF DOCTOR AND STUDENT informs us, was protected by the "law of reason," by which term those "learned in the law of England" were wont to designate the "law of nature."[10] More than that, it was the right precisely which, in the estimation of the fathers, representative institutions had left insecure.

We are now prepared to consider the underlying doctrine of American Constitutional Law, a doctrine without which indeed it is inconceivable that there would have been any Constitutional Law. This is the Doctrine of Vested Rights, which—to state it in its most rigorous form—setting out with the assumption that the property right is fundamental, treats any law impairing *vested rights,* whatever its intention, as a bill of pains and penalties, and so, void.

The fundamental character of the property right was asserted repeatedly on the floor of the Convention of 1787.[10a] It is therefore no accident that the same doctrine was first brought within the purview of Constitutional Law by a member of that Convention, namely, Justice PATERSON in his charge to the jury in *Van Horne's Lessee* v. *Dorrance,*[11] the date of which is 1795. "The right of acquiring and possessing property and *having it protected* is one of the natural, inherent and unalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact and by the late constitution of Pennsylvania was made a fundamental law. . . . The legislature therefore had no authority to make an act divest-

[10] C. H. McIlwain, The High Court of Parliament and its Supremacy, 105-6.

[10a] Farrand, loc. cit. I, 424, 533-4, 541-2, II, 123. cf. ib. I, 605. See also Federalist No. 10.

[11] 2 Dall. 304, 310 (1795).

ing one citizen of his freehold and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution." On the basis of this reasoning an act of 1789 is pronounced "void, . . . a dead letter and of no more virtue or avail than if it never had been made."

A full decade earlier, however than *Van Horne's Lessee* v. *Dorrance,* the doctrine of vested rights is simply assumed by the Supreme Court of Connecticut in the *Symbury Case.*[12] Again in 1789 in the case of *Ham* v. *McClaws and wife,*[13] the Supreme Court of South Carolina had invoked similar principles to give to a particular statute such construction as would "be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law." Three years later, the same court pronounced invalid an act of the assembly passed in 1712, transferring a freehold from the heir at law to another individual. The court announced itself as "clearly of the opinion that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against the Magna Charta to take away the freehold of one man and vest it in another, . . . without any compensation, or even a trial by the jury of the country, to determine the right in question; that the act was therefore *ipso facto* void; and that no length of time could give it validity, being originally founded on erroneous principles."[14] It is a striking fact that in at least half of the original fourteen states, to include Vermont in the reckoning, the doctrine of judicial review was first recognized in connection with cases involving also an acceptance of the doctrine of vested rights.[15] We are able therefore to comprehend the significance of a remark by Justice CHASE in 1800 to the effect that the court ought to accord different treatment to laws passed by the states during the Revolution and those passed since the Constitution of the United States had gone into effect, since "few of the revolutionary acts would stand the rigorous tests now applied."[16]

[12] Kirby 444 (1785).

[13] 1 Bay 93, 98 (1789).

[14] Bowman v. Middleton, 1 Bay 252 (1792).

[15] Besides the cases just mentioned, see the case described by Jeremiah Mason in his Memories, pp. 26-7, in which the New Hampshire court pronounced an Act unconstitutional, in 1784. The same case is referred to by Wm. Plumer's Life of Wm. Plumer, p. 59. See also Proprietors, etc. v. Laboree, 2 Greenl. (Me.) 275, 294 (1823); Emerick v. Harris, 1 Binn. (Pa.) 416 (1808); Whittington v. Polk, 1 Harr. & J. (Md.) 236 (1802).

[16] Cooper v. Telfair, 4 Dall. 14, 19 (1800).

This assertion soon received striking confirmation. In 1802 the Virginia Court of Appeals, after having in 1797 given the most sweeping possible interpretation to the law forbidding entails,[17] proceeded to the very verge of overturning laws disposing of the Church's lands, which was saved by the mere accident of Justice PENDLETON's death the night before the decision, leaving the court equally divided. And even the judges who affirmed the constitutionality of the statute under review took pains not to traverse the doctrine of vested rights, one of them, Judge ROANE, going so far as to say that the constitution itself could not validly impair such rights.[18]

But the acceptance of this doctrine by the courts one after the other is but the beginning of the story. We must see how the progress of the doctrine was aided by the obscuration on the part of the courts of essential distinctions, or even their deliberate obliteration; how the doctrine attracted to its support other congenial principles; how it vitalized certain clauses of the written constitution; how in short it gradually operated to give legal reality to the notion of governmental power as *limited power*.

Of the distinctions above referred to the one whose disappearance we should first note is that between "retrospective laws," in the strict sense of laws designed "to take effect from a time anterior to their passage," and laws "which though operating only from their passage affect vested rights and past transactions." The distinction is recognized by STORY in *Society* v. *Wheeler*,[19] but only to be thrust aside. "Upon principle," he declares, "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." In support of his argument he cites *Calder* v. *Bull*, and warrantably. The distinction in fact was not so much obscured as entirely ignored from the first. Of more vital necessity, however, to the doctrine of vested rights, was the elimination of the distinction underlying the decision in *Calder* v. *Bull* between legislative enactments designed to punish individuals for their past acts and enactments which in giving effect to the legislature's view of public policy incidentally affected private rights detrimentally. Doubtless, this result was facilitated by the oft-expressed reluctance of the courts to enter into the question of the motives of the legislature, *i. e.*, of its members. And this question

[17] Carter v. Tyler, 1 Call 165 (1797).
[18] Turpin v. Locket, 6 Call 113 (1804).
[19] 2 Gall. C. C. 105, 139 (1814), Fed. Cas. 13, 156.

and that of the intention underlying the legislature's acts, though two quite different matters, it was easy to confuse. Hence it became doctrine in many quarters that the validity of statutes must depend upon external tests, particularly upon their actual operation upon private rights. The matter is one that will receive further attention later on.

But if the obliteration of one distinction is thus sufficiently explained, that of another is by the same line of reasoning made the more difficult of palliation. This is the very obvious distinction between *special* acts and *general* acts. The mischief of what has been called "prerogative legislation," that is, legislation modifying the position of named parties before the law, was one of the most potent causes of the general disrepute into which state legislatures had fallen before 1787.[20] For such measures, furthermore, rarely or never could the justification be pleaded of an imperative public interest. When accordingly such measures bore heavily upon the vested rights of particular, selected persons it was not strange that the courts should have treated them as equivalent to bills of pains and penalties. But the case of general statutes is obviously different. To enact these is of the very essence of legislative power. Their generality indeed furnishes the standard of legislation from which special acts are condemned. It is true that such measures will often bear more particularly upon some members of the community than others, but this fact is perhaps but the obverse of the necessity for their enactment. Notwithstanding these considerations the courts, building upon the Common Law maxim that statutes ought not in doubtful cases be given a retrospective operation, laid down from the first the doctrine as one of constitutional obligation, that in no case was a statute to receive an interpretation which brought it into conflict with vested rights.[21] So far as a statute did not impair vested rights, it was good, but so far as it did, it was a bill of pains and penalties and void, not under Art. I, § 10 of the United States Constitution,—for the actual precedent of *Calder* v. *Bull* still held, despite protests from eminent judges,—but under the general principles of Constitutional Law held to underlie all constitutions.

We turn next to consider the support which the doctrine of vested rights drew from other principles. In this connection our attention is first drawn to the decision of the Massachusetts Supreme Court in *Holden v. James*[22], in which the sentiment of equality before the

[20] See, e. g., Federalist No. 48 (Lodge's Ed.).

[21] Cf. Elliott v. Lyell, 3 Call 268, 286 (1802) and Turpin v. Locket, 6 Call 113 (1804). See also Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 498 (1811).

[22] 11 Mass. 396 (1814). See also Lewis v. Webb, 3 Greenl. (Me.) 326 (1825).

law, given its classic expression in the Declaration of Independence, is forged into a maxim of Constitutional Law. More specifically it was held in this case that, notwithstanding the fact that the twentieth article of the Massachusetts constitution expressly recognized the power of the legislature to suspend laws, such suspensions must be general and not for the benefit of a particular individual or individuals, it being "manifestly contrary to the first principles of civic liberty, natural justice, and the spirit of our constitution and laws that any one citizen should enjoy privileges or advantages which are denied to all others under like circumstances." The converse of this doctrine was stated by Chief Justice CATRON of the Tennessee Supreme Court fifteen years later in the much cited case of *Vanzant v. Waddell.*[23] There it was declared that the kind of legislation which the legislature was created to enact was "general, public law equally binding upon every member of the community . . . . . under similar circumstances." The final clause of the first section of the Fourteenth Amendment takes its rise thence.

But of all principles brought to the support of the doctrine of vested rights, the one destined to prove, at least before the Civil War, of most varied and widest serviceability was the principle of the separation of powers. I have already touched upon the matter a few pages back. At this point I wish to review briefly some historical phases of the subject. Our starting point is the case of *Cooper v. Telfair,*[24] decided by the Supreme Court of the United States in 1800 on appeal from the United States Circuit Court for the District of Georgia. The measure under review was the act of the Georgia legislature of May 4, 1782, inflicting penalties on, and confiscating the estates of, certain persons declared guilty of treason. In opposition to the statute it was urged especially that it transgressed Art. I of the Georgia Constitution of 1777, which provided that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." The act was nevertheless upheld as valid. Said Justice CUSHING: " The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of Georgia: and it naturally, as well as tacitly, belongs to the legislature." Said Justice PATERSON: "The legislative power of Georgia, though it is in some respects restricted and qualified, *is not defined* by the constitution of the state." To the same

[23] 2 Yerg. (10 Tenn.) 259 (1829). See also Wally's Heirs v. Kennedy, 2 Yerg. (10 Tenn.) 554 (1831) and Jones' Heirs v. Perry, 10 Yerg. (18 Tenn.) 59 (1836).

[24] 4 Dall. 14 (1800).

effect were the words of Justice CHASE: "The general principles contained in the constitution are not to be regarded as rules to fetter and control, but as *matter merely declaratory and directory.*"

At first, in other words, the doctrine of the separation of powers, even when formulated in the written constitution, was not deemed precise enough to admit of its being applied by courts as a constitutional limitation. The other point of view, however, was not long in making its appearance. In *Ogden* v. *Blackledge*,[25] which was certified to the Supreme Court from the United States Circuit Court for the District of North Carolina in 1804, the question to be determined was whether the state statute of limitations of 1715 had been repealed in 1789, the North Carolina legislature having declared in 1799 that it had not been. Said attorneys for plaintiff: "To declare what the law is, or has been, is a judicial power; to declare what it shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial." "The Court," runs the report, "stopped counsel, observing that it was unnecessary to argue that point." Without recurring to the constitutional question, the court held that "under all the circumstances stated," the act in question had been repealed in 1789. Fifteen years later, the New Hampshire Supreme Court, in the leading case of *Merrill v. Sherburne*,[26] brought the principle of the separation of powers squarely to the support of the doctrine of vested rights. There was henceforth no apology or evasion on the part of judges in the manipulation of this principle.

The doctrine of vested rights was at last within reach of the haven of the written constitution; in fact it had already found anchorage there, in certain jurisdictions. The reflex effect upon it of its new security was what might have been anticipated: it became a yet more exacting and rigorous test of legislation than ever before. Henceforth, accordingly, it becomes necessary to recognize two varieties of the doctrine of vested rights, the milder and more flexible, the more abstract and rigorous. Courts which continued to appeal to natural rights were compelled by their own logic to consider constitutional questions not simply in their legal aspects but in their moral aspects as well. We thus find Chief Justice PARKER in *Foster v. Essex Bank*[27] declaring, with reference to the immunity claimed by the defendant corporation under its charter, from action for

[25] Cranch 272 (1804); see also Ogden v. Witherspoon, 2 Haywood 227, 3 N. C. 404 (1802).

[26] 1 N. H. 199, 204 (1819).

[27] 16 Mass. 245, 273 (1819); see also State v. Newark, 3 Dutcher (27 N. J. L.) 185, 197 (1858).

debt, that "there is no vested right to do wrong." A little later, Chief Justice HOSMER in *Goshen* v. *Stonington*[28] sustained on the ground of its reasonableness and justice a statute the retrospective operation of which he admitted to be "indisputable" and "equally so its purpose to change the legal rights of the litigating parties." The decision of the United States Supreme Court in *Livingston* v. *Moore*[29] was to like effect. Those courts, on the other hand, which sought to effect an absolute separation of legislative and judicial powers regarded any enactment disturbing vested rights, whatever the justification of it, as representing an attempt by the legislature to exercise powers not belonging to it and *ipso facto* void. This attitude is well represented by the New Hampshire Supreme Court in *Opinions of the Judges*,[30] but it also became in time the attitude embodied in the conservative doctrine of New York.

This differentiation of two varieties of the doctrine of vested rights brings us to a highly important branch of our subject: namely, the effect of this doctrine upon the acknowledged prerogatives and functions of government. As we have already seen, the doctrine of vested rights takes its origin from a certain theory of the nature and purpose of government. But political theory is not Constitutional Law, though often the source of it. The doctrine of vested rights, however, is Constitutional Law; indeed in one disguise and another it is a great part of it. Its protean faculty of appearing ever in new forms and formulations is, however, to be of later concern. What we need to do now is to see it at work in the forms which it assumed from the first, shaping the great uncontroverted powers of the American state, the power of taxation, the power of eminent domain, and what is today designated "the police power."

Mention has been made of the conservative New York doctrine. The founder of this doctrine and so to no small extent the founder of American Constitutional Law was the great Chancellor KENT, whose COMMENTARIES were and remain not only a marvel of legal learning but also of literary expression, and altogether one of the greatest intellectual achievements to the credit of any American. The work is divided into "Parts," which in turn fall into "Lectures." The opening Lecture of Part V, the 34th of the work, deals with "The History, Progress and Absolute Rights of Property" and to this Lecture, which was composed about the year 1825, we now turn.

KENT sets out by disparaging the idea of "a state of man prior

[28] 4 Conn. 209, 221 (1822). See also Booth v. Booth, 7 Conn. 350 (1829) and Welch v. Wadsworth, 30 Conn. 149 (1861).

[29] 7 Pet. 469, 551 (1833).

[30] 4 N. H. 565, 572 (1827).

to the existence of any notion of separate property." "No such state," he contends, "was intended for man in the benevolent dispensations of Providence. . . . The sense of property is inherent in the human breast and the gradual enlargement and cultivation of that sense from its feeble force in the savage state to its full vigor and maturity among polished nations forms a very instructive portion of the history of civil society. Man was fitted and intended by the author of his being for society and government and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature: and by obedience to this law, he brings all his faculties into exercise and is enabled to display the various and exalted powers of the human mind." Nevertheless, "there have been modern theorists," KENT marvels, "who have considered separate and exclusive property and inequalities of property as the cause of injustice and the unhappy result of government and artificial institutions. But," he rejoins to such theorists, "human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is bestowed on mankind for the purpose of rousing them from sloth and stimulating them to action. . . . The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections." "The legislature," therefore, "has no right to limit the extent of the acquisition of property. . . . A state of equality as to property is impossible to be maintained, for it is against the laws of our own nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life." And by the same token, "civil government is not entitled, in ordinary cases, ... to regulate the uses of property in the hands of the owners by sumptuary laws or any other visionary schemes of frugality and equality. . . . No such fatal union (as some have supposed) necessarily exists between prosperity and tyranny or between wealth and national corruption in the harmonious arrangements of Providence." *Liberty "depends essentially upon the structure of government,* the administration of justice and the intelligence of the people and it has very little concern with equality of property and frugality of living . . . ."

The interest and importance of these words of KENT arises from no novelty of doctrine advanced in them, but on the contrary, from their explicit formulation of a point of view that is so far from novel that it is ordinarily simply assumed. And so it would have remained with KENT, very likely, had he not deemed it necessary to meet and refute the levelling doctrines of HARRINGTON, CONDORCET and ROUSSEAU. But the matter of especial importance at this stage is to find out how this point of view manifested itself when brought into contact with those prerogatives which KENT freely accorded government.

As to taxation, KENT's theory is obviously the *quid pro quo* theory and this has remained the theory of American courts from that day to this. From it follows the maxim that taxation must be "equal in proportion to the value of property."[31]

With reference to the power of eminent domain, KENT but reiterates in his COMMENTARIES the views which as Chancellor he had earlier developed in the leading case of *Gardner* v. *Newburgh*,[32] to which therefore we turn directly. In this case, which was decided in 1816, the statute under review was one authorizing the trustees of the village of Newburgh to supply its inhabitants with water by means of conduits. As stated by the Chancellor, the statute made "adequate provision for the party injured by the laying of the conduits through his land" and also "to the owners of the spring or springs from whence the water" was to be taken. But no compensation was provided the plaintiff Gardner, "through whose land the water issuing from the spring" had been accustomed to flow. At this date there was no provision in the New York constitution with reference to the power of eminent domain. Nevertheless upon the authority of GROTIUS, PUFFENDORF, BYNKERSHOECK and BLACKSTONE, KENT developed the following propositions: 1st, that the legislature might "take private property for necessary or useful *public* [sic] purposes;" 2ndly, that such taking, however, did not involve the absolute "stripping of the subject of his property," but, in the language of BLACKSTONE, "the giving him a full indemnification," since "the public is now considered as an individual treating with an individual for an exchange;" 3rdly, that such indemnification was due not merely those whose property was actually appropriated by the state but also those whose property should be injured in consequence of the use made by the state of the property appropriated; 4thly, that the legislature itself was not the final judge of what sum

[31] 2 Kent, Comm. 332.
[32] 2 Johns. Ch. 162, 166-7 (1816).

was "a full indemnification" of owners whose property was taken or injured. The court thereupon isued an injunction against the trustees, "to see whether the merits of the case will be varied," it being a nuisance at the Common Law to divert a watercourse and an injunction being necessary to prevent an impending injury. In his COMMENTARIES ten years later KENT reaffirms all these propositions. His exposition of them furthermore makes it plain that he regards the requirement of a public purpose a true constitutional limitation, susceptible of judicial enforcement. In other words, not every purpose for which the legislature may elect to exercise the power of eminent domain is for that reason a *public* purpose. The legislature cannot even by the power of eminent domain transfer the property of A to B without A's consent.[33]

The third power of government touching property rights KENT describes in the following terms: "But though property be thus protected, it is still to be understood, that the law-giver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others or of the public. The government may by general regulations interdict such uses of property as would create nuisances and become dangerous to the lives and health or peace or comfort of the citizens. Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of gunpowder, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community."[34]

But is the power thus described unlimited, that is, limited only by the discretion of the lawgiver? In the first place, be it noted, the power in question is described as a power of *regulation,* which, at least so it came eventually to be urged, is distinguishable from a power of *prohibition.* True KENT himself admits that there are uses of property which constitute *nuisances* in certain cases, and he says in another place, that there are "cases of urgent necessity" in which property may be destroyed, as for instance when houses are razed to prevent the spread of a conflagration.[35] But it is apparent from his citations that he regards such cases as already provided

[33] 2 Kent, Comm. 340, and notes. Cf. Paterson, J., in Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310 (1795).

[34] 2 Kent, Comm. 340 and notes.

[35] 2 Kent, Comm. 338-9 and notes.

for in Common Law precedent, that he has no intention of recognizing in the legislature a power to define cases of nuisance and urgency, unrestrained by precedent. Again his doctrine of consequential damages must not be forgotten in this connection. For if it was incumbent upon the state to render compensation for damages resulting from its use of the power of eminent domain, why should it not also be the state's duty to pay private owners for damages resultant from the use of its police powers? Lastly, it is entirely apparent that KENT had not the least idea in the world of abandoning the doctrine which had received his repeated sanction, that a legislative enactment must never be so interpreted as to impair vested rights.[36]

For further instruction in the New York doctrine we turn to some New York decisions following KENT'S COMMENTARIES. The very year of the publication of the second volume of this work occurred the cases of *Vanderbilt* v. *Adams* and *Coates* v. *Mayor of the City of New York,* both to be found in the seventh volume of Cowen's reports.[37] In the former, plaintiff in error contended that a statute authorizing harbor masters to regulate and station vessels in the East and North Rivers did not extend to owners of private wharves; or that if it did so extend, it assumed to authorize an interference with private property in a way that was beyond the power of the legislature. The argument was founded upon *Gardner* v. *Newburgh, Dask* v. *Van Kleeck, Fletcher* v. *Peck,* and derivative cases. The court upheld the statute but in language significantly cautious. Said Justice WOODWORTH: "It seems to me that the power exercised in this case is essentially necessary for the purpose of protecting the rights of all concerned. It is not in the legitimate sense of the term a violation of any right, but the exercise of a power indispensably necessary where an extensive commerce is carried on. . . . . The right assumed under the law would not be upheld if exerted beyond what may *be considered* a necessary police regulation. The line between what would *be a clear invasion of the right, on the one hand, and regulations not lessening the value of the right and calculated for the benefit of all must be distinctly marked.* . . . Police regulations are legal and binding because for the general benefit and *do not proceed to the length of impairing any right in the proper sense of the term.* The sovereign power in a community, therefore, may and ought to prescribe the manner of

[36] Dash v. Van Kleeck, 7 Johns. 477, 498 (1811); see also 1 Kent Comm. 455-6 and notes.

[37] Vanderbilt v. Adams, 7 Cow. 349 (1827) and Coates et al. v. Mayor etc., 7 Cow. 585 (1827).

exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. . . . . ." The individual himself, as well as others, is benefitted by legitimate regulation.

But what is *legitimate regulation?* In *Coates* v. *Mayor,* the statute under review authorized the City of New York to make by-laws "for regulating, or if they found it necessary, preventing, the interment of the dead" within the city. In pursuance of this statute the city had passed a prohibitory ordinance, which plaintiffs in error claimed to be inoperative in their cases on account of certain grants of land held in trust by them for the sole purpose of interment. The argument against the legislative power in the premises again rested upon *Gardner* v. *Newburgh, Fletcher* v. *Peck,* and like precedents. "The public good," it was conceded, "is paramount. This is admitted in taking land for roads and canals. But land thus taken must be paid for. Is it not the same thing," it was asked, "whether the public good is to be promoted by taking the use of property for public benefit or destroying the property for the same purpose?" "The legislature cannot take away a single attribute of private property without remuneration." To meet these contentions the attorneys for the municipality were forced to resort to doctrine from an alien jurisdiction, doctrine which moreover bore in its origin no reference to the question before the New York court. Thus in his opinion in *Gibbons* v. *Ogden,*[38] Chief Justice MARSHALL had described the field of legislation left to the states *by the Constitution of the United States* in very board terms. This description was now utilized to show the scope of legislative power *under the state constitution* in relation to the property right. Again, in *McCulloch* v. *Maryland,*[39] MARSHALL had construed the words "necessary and proper" of Art. I, § 8, of the United States Constitution as meaning "expedient," and it was now urged that the term "necessary" in the legislative grant of power to the municipality must be similarly defined. Finally, in *Martin* v. *Mott,*[40] the Supreme Court of the United States had held that where a discretionary authority was vested by the Constitution in the President, its use was not subject to judicial review. The same line of argument was now contended to be applicable to a state legislature in the exercise of its powers. "The power in question," declared defendant's attorney, "is a legislative power, which must, on the subject of regulation, be transcendent. The legislators are the

[38] 9 Wheat. 1 (1824).
[39] 4 Wheat. 316 (1819).
[40] 12 Wheat. 19 (1827).

judges and their decision must be conclusive. Even a general law to prevent the growing of grain throughout the state, however despotic, could not be disobeyed as wanting constitutional validity."

The by-law, and the statute upon which it was based, were both sustained. Speaking of the question of the necessity of the former, the court said: "This necessity is not absolute. It is nearly synonymous with *expediency* or *what is necessary for the public good.*" To judge of that matter, however, is the function of the legislature; it being "of the nature of legislative bodies to judge of the exigency upon which their laws are founded." And the law itself is "equivalent to an averment that the exigency has arisen, been adjudicated and acted upon." The duty of the court is merely to see "that the law operates upon the subject of the power."

It would be easy to interpret this language in a way to release the legislature from all constitutional restraints. To do this, however, was as far as possible from the intention of the court. "We are of opinion," its decision proceeds, "that this by-law is not void, either as being unconstitutional, or as conflicting with what we acknowledge as a *fundamental principle of civilized society, that private property shall not be taken even for public use without just compensation.* No property has in this instance been entered upon or taken. None are benefitted by the destruction, or rather the suspension, of the rights in question in any other way than citizens always are when one of their number is forbidden to continue a nuisance."

Coates v. *Mayor* therefore seems to furnish authority for the following propositions: 1 The legislature is the exclusive judge of the expediency of exercising its powers; 2 Property can be appropriated by the State only for a public use and upon the making of just compensation; 3 The legislative power of regulation extends to the abatement of nuisances,existing or impending: 4 If in such cases, property rights are destroyed, no compensation is due their owner. The power of eminent domain and that of regulation are distinct and the doctrine of consequential damages does not apply in the case of the latter.

One question remains, however: Who is to say finally whether there *is* a nuisance? The plain inference from the whole line of argument taken by the court in this case is that, what is a nuisance is a question of fact to be judged of in the last analysis by the courts in accordance with Common Law standards. And this inference becomes certainty when we turn to a line of decisions, extending from 1837 to 1845, in which a statute authorizing municipal officers to

destroy buildings to prevent the spread of fire, is reviewed and applied by the Court of Errors and Appeals.[41] The language of some of the lay members of the court is especially significant. By Senator EDWARDS the statute is treated as merely defining and limiting a Common Law right of even private persons in such an exigency. By Senator VERPLANCK, the right assumed by the statute is described as "a natural right, arising from inevitable and pressing necessity, when [of] two immediate evils, one must be chosen and the less is voluntarily inflicted in order to avoid the greater." In support of this definition is cited COKE's language in *Mouse's case,* where it was said, with reference to baggage thrown overboard in time of storm, that "if the danger accrued by the act of God . . . everyone ought to bear his loss for safeguard of the life of man." In other words, since no right of action would lie for private trespass in such a case, neither could compensation be claimed against the state. The same course of reasoning is pursued by Senators SHERMAN and PORTER in *Russell* v. *Mayor.*[41a] The occasions, in short, when the state might legitimately press its power of regulation to the extent of actually destroying property rights were relatively few and were plainly indicated in the Common Law.

The New York doctrine invites comparison with that of Massachusetts. In the latter commonwealth the rejection of the doctrine of consequential damages and the resultant differentiation of the power of eminent domain from that of police regulation preceded, though it does not seem to have aided, the like development in the former. And once again, the starting-point was furnished by the law of private trespass. In the case of *Thurston* v. *Hancock,*[42] decided in 1815, it was concluded, from an exhaustive review of the precedents by Chief Justice PARKER, that where one dug so deep into his own land as to endanger a house on land adjoining, the owner of the latter had no right of action for the damage done the house, but only for the damage arising from the falling of the natural soil into the pit so dug. In *Callender* v. *Marsh,*[43] decided eight

[41] The ensuing quotations are from Stone v. Mayor, 25 Wend. 157 (1840) at pages 161 and 174. see also Hart v. Mayor, 9 Wend. 571 (1832); Van Wormer v. Mayor, 15 Wend. 262 (1836); Meeker v. Van Rensselaer, 15 Wend. 397 (1836); and Mayor v. Lord, 17 Wend. 285 (1837). In Van Wormer v. Mayor the court held that the finding of a board of health, that certain premises were a nuisance, could not be traversed in court.

The citation of Mouse's case is 12 Coke 62.

[41a] 2 Denio 461 (1844).

[42] 12 Mass. 220 (1815).

[43] 1 Pick. 417 (1823).

years later, it was held, on the basis of this precedent, that the tenth article of the Massachusetts Declaration of Rights gave "no right to compensation for an indirect or consequential damage or expense resulting from the right use of property already belonging to the public." Finally, in *Baker* v. *Boston,*[44] which was an action to prevent the municipality from filling up a creek which had become injurious to the public health, it was ruled that "police regulations to direct the use of private property so as to prevent its being pernicious to the citizens at large are not void though they may in some measure interfere with private rights without providing for compensation." KENT in his COMMENTARIES stigmatizes the doctrine of *Callender* v. *Marsh* as "erroneous" and in contravention of "a palpably clear and just doctrine," for which he cites his own decision in the *Newburgh case.*[45] At the same time he apparently approves of the New York decision in the *Coates* case. The explanation of the apparent contradiction is to be found in his recognition that the property right infringed in the New York case was a nuisance by Common Law standards.

This, however, is not to say that Common Law standards did not obtain in Massachusetts, in interpreting the Constitution, but only that they were applied in a rather more flexible fashion than in New York. To illustrate this point is therefore the second object of our comparison of the two doctrines. The relative flexibility of the Massachusetts doctrine was due in part, as we have already seen, to the retention of the natural rights theory as the foundation of the doctrine of vested rights. But a further reason for it is to be found in the very words in which legislative power is vested by the Massachusetts constitution in the General Court. This is described as the power "to make, ordain, and establish all manner of *wholesome and reasonable* orders, laws, statutes, and ordinances . . . as they shall judge to be for the government and welfare of the commonwealth."[46] Quoting this passage in the case of *Rice* v. *Parkman,*[47] Chief Justice PARKER ruled, in 1820, that the General Court must be deemed to have a parental or tutorial power over persons not *sui juris,* that is "minors, persons *non compos mentis,* and others," and upon that basis upheld a legislative act licensing the sale of the real estate of certain minors. In New Hampshire, where vested rights had been brought under the protection of the doctrine of the

[44] 12 Pick. 184 (1831). See also Com. v. Breed, 4 Pick. 460 (1827); Com. v. Tewksbury, 11 Metc. 55 (1846); and Com. v. Alger, 7 Cush. 53 (1851).

[45] 2 Kent, Comm. 340, footnote (page 526 of 14th edition).

[46] Part the Second, Chapter I, Section I, Article IV. Thorpe, III, 1894.

[47] 16 Mass. 326, 331 (1820).

separation of powers, similar legislative acts were overturned. The New York court in *Cochran* v. *Van Surley*,[48] accepted the Massachusetts doctrine, but at that date the doctrine of natural rights had not yet been decisively expelled from New York. Also the broader basis for the Massachusetts decision was not adverted to.

But another avenue for the entry of the doctrine that legislation must be "reasonable," in some sense or other, was afforded by the terms in which power is usually conferred by the state legislature upon municipal corporations. A case in point, in which the doctrine in question was turned against the legislation under review, is that of *Austin* v. *Murray*,[49] decided by the Massachusetts Supreme Court in 1834. The question at issue was the validity of a by-law interdicting the bringing of the dead into the town from abroad for purposes of burial, a prohibition which touched chiefly or exclusively Catholic parishioners. The court overturned the by-law as being "wholly unauthorized" by the act of the legislature, and as "an unreasonable infringement on private rights." Elaborating the latter point it said: "The illegality of a by-law is the same whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived unless the public good requires it. And the law will not allow the right of property to be invaded under the guise of a police regulation for the preservation of health when it is manifest that such is not the object and purpose of the regulation . . . [This by-law] is a clear and direct *infringement of the right of property without any compensating advantages, and not a police regulation, made in good faith for the preservation of health.*" In other words the ordinance is overturned, not simply because it impaired vested rights but because it did so without any good public reason. Had such reason been present, the measure would have been upheld. For then the individual whose rights were infringed would himself have benefitted as a member of the public. The police power, like the power of taxation, is controlled by the principle of a *quid pro quo*. The line of reasoning is the same as had been taken by the New York court in *Vanderbilt* v. *Adams*.[50]

But the question of the flexibility of the doctrine of vested rights involves yet another question. This doctrine, to restate it as compendiously as possible, is that the legislature cannot, at least except

[48] 20 Wend. 365, 373 (1838).

[49] 16 Pick. 121 (1834).

[50] 7 Cow. 349 (1827). For further illustrations of the Massachusetts doctrine, see Com. v. Tewksbury, 11 Metc. 55 (1846), and Com. v. Alger, 7 Cush. 53 (1851). See also Stoughton v. Baker, 4 Mass. 522 (1808); Vinton v. Welsh, 9 Pick. 87 (1829); and Com. v. Badlam, 9 Pick. 361 (1830).

for reasons of public policy, enact laws impairing vested rights. The doctrine has therefore two dimensions, so to say, the term "impair" and the term "vested rights." But the general significance of the former term we have already learned in our investigation of the operation of the doctrine upon the powers of government. And even of the second term we have supplied most of the materials for a definition, which only awaits our more circumstantial formulation.

Vested rights are rights vested in specific individuals in accordance with the law in what the law recognizes as *property*. But what for the purposes of the doctrine of vested rights, did the law recognize as property? What, in other words, was the objective of the rights which this doctrine treated as vestable?

In his ESSAY ON PROPERTY, composed in 1792, MADISON had written thus: "This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' But in its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to every *one else the like advantage*. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . . If there be a government then which prides itself on maintaining the inviolability of property, which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their person, and their faculties, nay more which indirectly violates their property in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated that such a government is not a pattern for the United States. If the United States mean to obtain or deserve the full praise due to wise and just governments they will equally respect the rights of property and the property in rights."[51]

These words are important as showing the elasticity attaching to

[51] Madison, Writings (Hunt ed.) VI, 101 ff.

the term "property," as used by American statesmen, from the beginning. Such latitudinarian views, however, found little or no support from the Common Law, and had in consequence before the Civil War little influence upon judges. So far as the courts liberalized the legal notion of the property right it was chiefly by analyzing it into its constituent elements, the right of use, the right of sale, the right of control, and so on, which were sometimes recognized as property rights even when inhering in another than the legal owner.[52] But the objective of these rights remained for the most part, tangible property, property which could be taken by the power of eminent domain, hence especially real property.[53] Still there were some exceptions to this rule. Art. I, § 10, of the United States Constitution was regarded from the outset as placing the legal fruits of one's lawful contracts in the category of vested rights. By the same token, the *Dartmouth College* decision extended the concept to charter rights, a result which, however, had been anticipated at least in Massachusetts independently of the contract clause.[54] Finally in *Dash* v. *Van Kleeck,* Chancellor KENT, by treating the right to prosecute an action at law, already begun, as a vested right, entered a more controversial field. In a much stronger case some years later, Chief Justice PARKER declared the more usual view that "there is no such a thing as a vested right to a particular remedy."[55]

And doubtless attorneys and suitors would fain have extended the application of the term still further. Said Justice NELSON in *People* v. *Morris*:[56] "Vested rights are indefinite terms, and of extensive signification; not unfrequently resorted to when no better argument exists, in cases neither within the reason or spirit of the principle." Despite this tendency, however, the concept is soon seen, when we bring it into comparison with ideas that have become current since the Fourteenth Amendment was added to the Constitution, to have been kept, first and last, well within bounds. Certainly no one would have thought of suggesting before the Civil War that the right to engage in trade, the right to contract, the right —to employ MADISON'S phrase—of the individual "in the use of his

[52] See some New York cases: Holmes v. Holmes, 4 Barb. 295 (1848); White v. White, 5 Barb. 474 (1849); Perkins v. Cottrell, 15 Barb. 446 (1851); Westervelt v. Gregg, 12 N. Y. 202 (1854).

[53] See McLean, J., in West River Bridge Co. v. Dix, 6 How. 507 (1848) at 536-7.

[54] Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819). The Massachusetts case referred to is Wales v. Stetson, 2 Mass. 143 (1806). Cf. Austin v. Trustees, 1 Yeates (Pa.) 260 (1793).

[55] Com. v. Commissioners of Hampden, 6 Pick. 501 (1828). See also Yeaton v. U. S., 5 Cranch 281 (1809).

[56] 13 Wend. 325, 329 (1835).

faculties," were "vested rights." To this fact MADISON'S own antithesis between "rights to property" and "property in rights" is indirect testimony, but most direct evidence is by no means lacking. Especially pertinent are some of the utterances of Chief Justice PARKER in deciding the case of *Portland Bank* v. *Apthorp*,[57] in which the question at issue was the validity of a tax on the stock of an incorporated bank. Said the court: "The privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern-keeper . . . . etc." have been subjected to taxation "from the earliest practice," and this notwithstanding the fact that "every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic to use his personal calling. . . . . Every man has the implied permission of the government to carry on any lawful business, and there is no difference in the right between those which require a license and those which do not, *except in the prohibition, either express or implied,* where a license is required."[57a]

Nor is the logical implication of this language weakened when we turn to consider legislative measures designed not to tax but to regulate business. Many such measures were municipal ordinances, and while their validity was challenged again and again, it was never on grounds furnished by the doctrine of vested rights or any collateral doctrine. In Massachusetts the favorite argument against such by-laws was that they were in restraint of trade and that therefore the authority to enact them had not been conferred by the legislature. This was the argument in the case of *Commonwealth* v. *Worcester*,[58] where the ordinance under review forbade persons in charge of wagons, carts, etc., from driving their horses through the streets at a trot. The court rejected the contention, as also it did the like argument in *Nightingale's* case,[59] where the by-law before the court provided that no one not offering the produce of his own farm for sale should occupy any stand for the vending of commodities except by the permission of the clerk of the market. *Vandine's* case[60] was argued and decided on like grounds.

But of course when the objectionable legislation came from the

[57] 12 Mass. 252 (1815). See also Shaw, C. J., in Com. v. Blackington, 24 Pick. 352 (1837).

[57a] The point of view of Marshall, C. J. in Ogden v. Saunders is the same. The obligation of contracts which arose from the moral law, was protected by Art. I, § 10 of the Constitution, but the right to contract was subject absolutely to legislative control. 12 Wheat. 213, 346-49.

[58] 3 Pick. 462 (1826).

[59] 11 Pick. 168 (1831).

[60] 6 Pick. 187 (1828).

legislature itself, other principles had to be resorted to. Yet even in such cases, with a simple exception so plainly anomalous as not to merit comment in this connection,[60a] fundamental principles were conspicuously not appealed to. Two cases especially to the point are a Massachusetts case of 1835, *Hewitt* v. *Charier*,[61] and an Ohio case of 1831, *Jordan* v. *Overseers of Dayton*.[62] In these cases the statutes drawn into question confined the practice of medicine to members of certain medical societies and to persons qualified in other stipulated ways. In the Massachusetts case the protestant, who had continued in practice in defiance of the statute, based his case, not upon the ground that would seem most available today, that the statute operated to deprive him of his livelihood and chosen profession, but upon art. 6 of the Massachusetts Declaration of Rights, which forbids, in essence, special privileges to favored individuals. The court overruled the argument. Said Chief Justice SHAW: "Taking the whole article together, we think it manifest that it was especially pointed to the prevention of hereditary rank." But even in applying it according to its literal meaning, "it is necessary to consider whether it was the *intent or one of the leading and substantive purposes of the legislature* to confer an exclusive privilege on any man or class of men," or whether "this is indirect and incidental, ... not one of the purposes of the act," and therefore not "a violation of this article of the Bill of Rights." His conclusion was that the act under review was not "a violation of any principle of the constitution."

In the Ohio case, the argument of plaintiff in error was even more far-fetched, being based upon a patent which he held from the national government for certain drugs and concoctions. Said the court in response: "The sole purpose of a patent is to enable the patentee to prevent others from using the products of his labor except with his consent. But his own right of using is not enlarged or affected. There remains in him . . . . the power to manage his property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be . . . . regulated by laws which render it subservient to the general welfare." The court concluded with a long list of

[60a] The reference is to Ex parte Dorsey, 7 Porter (Ala.) 293 (1838). The line of reasoning there employed was rejected by the same court and same judges in Mobile v. Yuille, 3 Ala. 137 (1841), where a municipal ordinance prescribed the price of bread.

[61] 16 Pick. 353 (1835).

[62] 4 Ohio 295 (1831). Some other citations of like import may be added: Furman v. Knapp, 19 Johns. (N. Y.) 248 (1821); People v. Jenkins, 1 Hill (N. Y.) 469 (1841); Com. v. Ober, 12 Cush. (Mass.) 493 (1853).

trades which were at that time regulated by statute in the state of Ohio.

Our conclusion then from these and similar cases must be that the doctrine of vested rights was interposed to shield only the property right, in the strict sense of the term, from legislative attack. When that broader range of rights which is today connoted by the terms "liberty" and "property" of the Fourteenth Amendment were in discussion other phraseology was employed, as for example the term "privileges and immunities" of Art. IV, § 2, of the Constitution. In his famous decision in *Corfield* v. *Coryell*,[63] rendered in 1823, Justice WASHINGTON defined this phrase to signify, as to "citizens in the several states," "those privileges and immunities which are in their nature, *fundamental*, which belong of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union." "What these fundamental principles are," he continued, "it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following heads; protection by the government: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the good of the whole."

But now of all the rights included in this comprehensive schedule, one only, and that in but a limited sense, was protected by the doctrine of vested rights, the right namely of one who had *already* acquired some title of control over some particular piece of property, in the physical sense, to continue in that control. All other rights, however fundamental, were subject to limitation by the legislature, whose discretion as that of a representative body in a democratic country, was little likely to transgress the few, rather specific, provisions of the written constitution.

To conclude:—The doctrine of vested rights represents the first great achievement of the courts after the establishment of judicial review. In fact, in not a few instances, judicial review and the doctrine of vested rights appeared synchronously and the former was subordinate, in the sense of being auxiliary, to the latter. But always, before the Fourteenth Amendment, judicial review, save as a method of national control upon the states, would have been ineffective and lifeless enough, but for the *raison d'etre* supplied it by

[63] 4 Wash. C. C. 371, 380-1 (1823), Fed. Cas. 3230.

the doctrine of vested rights, in one guise or other.[64] Furthermore, the doctrine represented the essential spirit and point of view of the founders of American Constitutional Law, who saw before them the same problem that had confronted the Convention of 1787, namely, the problem of harmonizing majority rule with minority rights, or more specifically, republican institutions with the security of property, contracts, and commerce. In the solution of this problem the best minds of the period were enlisted, WILSON, MARSHALL, KENT, STORY, and a galaxy of lesser lights. But their solution, grounded though it was upon theory that underlay the whole American constitutional system, would yet hardly have survived them had it not met the needs and aspirations of a nation whose democracy was always tempered by the individualism of the free, prosperous, Western World. That distrust of legislative majorities in which Constitutional Limitations were conceived, from being the obsession of a superior class, became, with advancing prosperity, the prepossession of a nation, and the doctrine of vested rights was secure.[65]

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[64] For the most important guise which the doctrine assumed in state courts, particularly the New York courts, see the writer's article on "The Doctrine of Due Process of Law before the Civil War" in 24 Harv. L. Rev. 366, 460. The most important guise which the doctrine developed in the federal courts is to be seen in their interpretation of Art. I, § 10. See Fletcher v. Peck. 6 Cranch 87 (1810), and Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

[65] See the discussion of the relation of government to the Property Right, in the Mass. Convention of 1820, Journal (Boston, 1853), pp. 247, 254, 275-6, 278, 280, 284-6, 304 ffg. The speakers are Webster, Story, John Adams, et al. Webster's Oration on the Completion of Bunker Hill Monument is a splendid statement of the theory that a democracy in which men are equal will inevitably want to protect private rights against governmental excesses. Writings and Speeches (National Ed., 1903) I, 259 ff'g. On Mar. 21, 1864 Lincoln addressed a committee from the Workingmen's Association of N. Y. He closed with the following words: "Property is the fruit of labor; property is desirable; is a positive good in the world. That some should become rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built." Complete works (Ed. of 1905) 54. See also V, 330, 361.

Addendum E

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STATE LEGISLATION AND MARITIME CASES

In recently denying to Congress the power to amend the Judicial Code so as to extend to claimants other than seamen rights and remedies under the workmen's compensation laws of any state, the Supreme Court brought to a close the struggle of maritime shore workers to obtain in full the benefits of modern state industrial legislation.[1] It

[1] *State of Washington v. W. C. Dawson & Co.* (1924) 264 U. S. 219, 44 Sup. Ct. 302. Mr. Justice Brandeis dissented. The Act of October 6, 1917 (40 Stat. at

would perhaps be easier to acquiesce in the result reached if one could be quite satisfied with the reasoning of the Court in so far as it involves the problem of the power of the states to legislate on maritime matters. Indeed, when one reads recent decisions in which this problem has been considered, he discovers that the extent of the power of the states to enact legislation affecting maritime matters is in such a state of uncertainty that it is impossible to predict with any reasonable degree of accuracy the fate of legislation not yet passed upon. Much of this uncertainty, it is believed, is due to an erroneous notion that all cases in which the validity of state statutes is involved can be solved through the application of one set formula or test. The problem is not a single one but comprises several distinct questions the answer to each of which depends on distinct considerations of policy.

An examination of the decisions since the adoption of the Constitution will reveal that they may be divided into two classes: first, those in which it was sought to enforce state legislation in admiralty, and second, those in which it was sought to apply local legislation to maritime cases in state courts. The first involves a question of power of a state to enact legislation affecting maritime law as administered by the federal courts; the second, one of power of state tribunals to apply to maritime cases their own rules of law.

Statutes which have been held to be enforceable in admiralty include legislation giving a right of action for wrongful death,[2] creating liens for supplies to a vessel in her home port[3] and regulating pilotage fees.[4] This legislation may be properly included within the term "legislation affecting maritime law," since, being enforceable in admiralty, it substitutes local for general maritime rules of law or creates new local

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L. 395) undertook to amend the provision of Secs. 24 and 256 of the Judicial Code which saves to suitors in all causes of admiralty and maritime jurisdiction "the right of a common-law remedy where the common law is competent to give it," by adding the words, "and to claimants the rights and remedies under the Workmen's Compensation Law of any state." This amendment having been held unconstitutional in *Knickerbocker Ice Co. v. Stewart* (1920) 253 U. S. 149, 40 Sup. Ct. 438, a second attempt was made to amend the saving clause by adding substantially the words of the first amendment but excluding from their scope injuries to master and crew. Act of June 10, 1922 (42 Stat. at L. 634). In holding both amendments unconstitutional the court treated them as attempts on the part of Congress to delegate to the states the power to enact legislation affecting maritime law, which would be prejudicial to the uniformity of the maritime law in its interstate and international relations. Workmen injured on land may obtain relief under local law. *State Industrial Commission v. Nordenholt Corp.* (1922) 259 U. S. 263, 42 Sup. Ct. 473.

[2] *The Corsair* (1892) 145 U. S. 335, 12 Sup. Ct. 949; *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133.

[3] *The Lottawanna* (1874, U. S.) 21 Wall. 558; *The J. E. Rumbell* (1893) 148 U. S. 1, 13 Sup. Ct. 498.

[4] *Ex parte McNiel* (1871, U. S.) 13 Wall. 236.

maritime rules where before there were none. The moving factor in applying these local rules in maritime courts seems to have been a desire to make use of the relief they provide to fill gaps in the maritime law which have resulted from prior decisions or inability of courts to act.[5] In recently re-affirming the doctrine that state wrongful-death acts are enforceable in admiralty, the Supreme Court merely re-affirmed this policy.[6]

While the first class of cases involves only a question of the Constitutional power of the states to enact legislation affecting the maritime law of admiralty courts, an important element in the second is the fact that immediately after the adoption of the Constitution the First Congress, by vesting in the Federal Courts "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction," and at the same time saving "to suitors in all cases the right of a common law remedy where the common law is competent to give it," granted admiralty and common law courts concurrent jurisdiction in maritime cases.[7] Until recently it had been generally supposed that the saving clause authorized common law courts to apply to maritime cases their own rules of substantive as well as procedural law.[8] However, in 1917, in *Southern Pacific Co. v. Jensen*,[9] the Supreme Court held the New York Workmen's Compensation Act invalid in so far as it was sought to apply it to a case involving compensation to the widow of a stevedore killed while engaged in loading a vessel in New York harbor. This case, the first to hold a state statute creating a substantive right, and enforceable in a state court alone, inapplicable to a maritime tort, was

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[5] In *The Harrisburg* (1886) 119 U. S. 199, 7 Sup. Ct. 140, the Supreme Court held that independently of statute a right of action for wrongful death does not exist in admiralty. In *The General Smith* (1819, U. S.) 4 Wheat. 438, it was held that under the general maritime law of the United States there is no lien for supplies to a vessel in her home port. In both instances relief in admiralty was desirable; and since Congress had not legislated, the court had recourse to state legislation. Likewise regulation of pilotage fees was desirable. Since such regulation could only be made by legislation and Congress had not legislated, state regulation was acquiesced in. On the other hand, if a rule of liability exists in admiralty and the matter is one not requiring regulation, there would be no need for state legislation. Thus far no state statute has been applied in admiralty where a rule of liability already existed under the maritime law.

[6] *Western Fuel Co. v. Garcia* (1921) 257 U. S. 233, 42 Sup. Ct. 89. See also *Great Lakes Dredge & Dock Co. v. Kierejewski* (1923) 261 U. S. 479, 43 Sup. Ct. 418.

[7] Judiciary Act of 1789, sec. 9 (1 Stat. at L. 73, 77); *cf.* Judicial Code, secs. 24, 256. Art. 3, sec. 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."

[8] *Belden v. Chase* (1893) 150 U. S. 674, 14 Sup. Ct. 264; *cf. Steamboat Co. v. Chase* (1872, U. S.) 16 Wall. 522, in which a state wrongful-death statute was held applicable to a maritime tort in a suit in a state court as a "common-law remedy."

[9] 244 U. S. 205, 37 Sup. Ct. 524.

followed by *Chelentis v. Luckenbach S. S. Co.*,[10] in which a seaman who had been injured in the course of his employment brought an action in a common law court. It was held that his right to redress was governed solely by maritime law and that, if action should be brought in a common law court, that court could give only such relief as would be given in admiralty. Mr. Justice McReynolds, speaking for the Court, distinguished between a common law right and right to a common law remedy, it being only the latter which is saved to suitors.

In thus holding that the right is created by maritime law and that the only power in a common law court is that of applying its procedure and remedies in enforcing it, the Supreme Court imposed on state courts, in which actions under the saving clause are brought, a doctrine similar to its own rule of Conflict of Laws as applied to foreign torts.[11] Like the obligation created by foreign law in case of tort, the theory here is that the obligation is created by maritime law, and following the defendant, is equally enforceable in common law and admiralty courts. Consistent application of this doctrine would seem to preclude state courts from applying to maritime cases statutory rules of substantive law different from those applied in admiralty, but it would not impair the validity of decisions holding that local tribunals are free to apply their own statutory rules of procedure in enforcing maritime causes of action.[12]

However, the majority opinion in *Southern Pacific Co. v. Jensen* also announced a new test for determining the validity of state statutes affecting maritime cases; though state legislation may to some extent change, modify or affect maritime law, "no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony of that law in its international and interstate relations."[13] This test has been

[10] (1918) 247 U. S. 372, 38 Sup. Ct. 501. See also *Carlisle Packing Co. v. Sandanger* (1922) 257 U. S. 255, 42 Sup. Ct. 475; *Port of New York Stevedoring Corp. v. Castagna* (1922, C. C. A. 2d) 280 Fed. 618; *Kennedy v. Cunard S. S. Co.* (1921, 1st Dept.) 197 App. Div. 459, 189 N. Y. Supp. 402.

[11] In *Slater v. Mexican N. R. Co.* (1904) 194 U. S. 120, 126, 24 Sup. Ct. 581, 582, the doctrine applied to foreign torts was expressed as follows: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which like other obligations, follows the person, and may be enforced wherever the person may be found." For a criticism see COMMENTS (1918) 28 YALE LAW JOURNAL, 67.

[12] A number of decisions have held that the saving clause authorizes state courts to apply to maritime cases local statutory rules of procedure, subject to the limitation that a state may not authorize proceedings *in rem* according to the course in admiralty in maritime cases in state courts. *Knapp Stout & Co. v. McCaffrey* (1900) 177 U. S. 638, 20 Sup. Ct. 824; *Rounds v. Cloverport Foundry & Machine Co.* (1915) 237 U. S. 303, 35 Sup. Ct. 596. To the effect that a state may not authorize proceedings *in rem* in a state court, see *The Glide* (1897) 167 U. S. 606, 17 Sup. Ct. 930; see also *Red Cross Line v. Atlantic Fruit Co.* (1924) 264 U. S. 109, 44 Sup. Ct. 274.

[13] (1917) 244 U. S. 205, 216, 217, 37 Sup. Ct. 524, 529.

applied in all subsequent cases in which state workmen's compensation acts have been considered. But these statutes create substantive rights enforceable in state tribunals only.[14] Since their enforcement in state tribunals cannot in any manner affect maritime law as applied in admiralty courts, the question involved is, not one of power of a state to change, modify or affect the general maritime law, but, more specifically, one of power of state tribunals to apply to maritime cases rules of substantive law different from those applied in the federal admiralty courts. If it is the purpose of the Supreme Court to preserve a theory of "vested maritime rights" and workmen's compensation acts create obligations *ex delicto,* they would never be applicable to maritime cases.[15] On the other hand, if they create obligations *ex contractu,* their application to maritime cases would depend, perhaps, on the nature of the contract and its binding force in admiralty.[16]

Whether state tribunals should be precluded from applying to maritime cases statutory rules of substantive law different from those

[14] Workmen's Compensation Acts provide special machinery for the enforcement of the rights they create. No attempt has been made to obtain the relief they grant in admiralty.

[15] Three theories of the nature of the obligation created by Workmen's Compensation Acts have been advanced in Conflict of Laws cases. Massachusetts follows a tort theory. *In re Gould* (1913) 215 Mass. 480, 102 N. E. 693. Connecticut has adopted a contract theory. *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372. New York seems to have adopted a quasi-contract theory. *Smith v. Heine Safety Boiler Co.* (1918) 224 N. Y. 9, 119 N. E. 878. If the obligation is treated as arising from tort, following the analogy to the decisions in Conflict of Laws cases, a theory of "vested maritime rights" would preclude application of these statutes to maritime cases in state courts.

[16] In *Grant Smith-Porter Ship Co. v. Rhode* (1922) 257 U. S. 469, 42 Sup. Ct. 157, a shipbuilding company and a carpenter employee accepted a state workmen's compensation act by making payments to an industrial accident fund. It was held that the carpenter, who had been injured on a vessel in the course of construction, but launched, was barred from proceeding in admiralty for damages. The court seems to have adopted the view that the parties contracted with reference to the state law. But its decision was also based on the test announced in the *Jensen* case. If a contractual theory had been definitely adopted, the contract, being binding in admiralty, would preclude relief in that court, but would permit relief in a state tribunal in accordance with local law; and as a result maritime shore workers, who contract with reference to local law, since they work partly on shore and partly on board ship in port, would be entitled to the advantages of state workmen's compensation acts which were enacted for their benefit as well as for the benefit of land workers. In enacting the second amendment Congress probably had in mind the possibility of such a theory being adopted. It is believed that it would have been better policy to adopt this theory in order to avoid some of the consequences of denying to maritime workers who are not seamen, the advantages of modern state industrial legislation. See dissent of Brandeis, J. in *State of Washington v. Dawson & Co., supra* note 1.

It should be noted that application of the state act would not impair a doctrine that state courts must apply to maritime cases rules of substantive law similar to those in admiralty, as the state tribunal would be enforcing a contract that is binding on the parties in admiralty and hence binding on them in a state court.

applied in admiralty is a question on which opinions may differ, but it is believed to be one which must be decided if confusion is to be avoided in the future. As it is, as the result of attempts to reach a solution through the application of an inadequate test, the problem involved in the workmen's compensation cases has been confused with that involved in applying state statutes in admiralty, and needless uncertainty introduced into a subject already sufficiently complicated by prior decisions.[17]

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THE VARIABLE QUALITY OF A VESTED RIGHT

A recent New York case, *Robinson v. Robbins Dry Dock & Repair Co.* (1924) 238 N. Y. 271, 144 N. E. 579, brings forward once again that troublesome problem, whether a right[1] can become so "vested" as to be beyond the reach of governmental power. The plaintiff recovered under the New York Workmen's Compensation Act for the death of her husband. Later the act was declared unconstitutional, but before the plaintiff could assert her common law right, the statute of limitations had barred her cause of action, the New York Supreme Court, Appellate Division, so declaring. Thereafter, the Legislature, to give relief to a large number of sufferers in this same situation, passed a relief act, granting them a year within which to sue. The plaintiff recovered in the Court of Appeals, the basis of the decision being the well-established rule thus phrased by Mr. Justice Holmes:[2] "Multitudes of cases have recognized the power of the Legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing view of justice, and if the obstacle in the way of creation were small."[3]

[17] The test of the *Jensen* case is also open to the objection that it has no definite meaning. A comparison of the legislation upheld with that declared invalid does not reveal any reason why the one interferes with the general maritime law in its international and interstate relations more than the other.

[1] "Right" is here used in its general sense; but by splitting the term into some of its component legal parts of "right," "power," "privilege," and "immunity," the nature of the interest involved is made more manifest. Property interests are no more than legal relations of lesser or greater value, any one of which may accurately be brought within the popular term, "private property."

[2] *Danforth v. Groton Water Co.* (1901) 178 Mass. 472, 477, 59 N. E. 1033, 1034.

[3] *Goshen v. Stonington* (1822) 4 Conn. 209 (act validating a marriage performed by minister under a disability); *Watson v. Mercer* (1834, U. S.) 8 Pet. 88 (act validating deed of married women); *Syracuse City Bank v. Davis* (1853, N. Y. Sup. Ct.) 16 Barb. 188 (act curing defect in organization of corporation); *Thomson v. Lee County* (1865, U. S.) 3 Wall. 327 (act validating subscription of bonds); *Lane v. Nelson* (1875) 79 Pa. 407 (act curing defect in judicial proceedings); *Ewell v. Daggs* (1883) 108 U. S. 143, 2 Sup. Ct. 408 (act curing contract void for usury); *Evans-Snider-Buel Co. v. McFadden* (1900) 105 Fed. 293, 44

This case falls in the field of so-called "curative acts." In these cases the rights of an individual are subordinated to the "prevailing view of justice." The same subordination of individual interest can be found whenever a court strains a rule of law to mete out substantial justice.[4] It appears most prominently in cases under the police power, the vague instrument whereby society effects its adjustments, whenever the court determines that some property interest is not so sacred but that it may be cut off by legislative enactment.[5] Somewhat different terminology is used in the "curative acts" cases and in the police power cases. In the former the term "vested right" indicates a property interest which the court believes to be so fixed that it cannot be impaired by retrospective legislation.[6] In the latter, the term, when employed at all, has generally the significance that "vested rights"[7] may be taken away under the police power provided they are not so impregnable or sacred that they can be taken only under the power of eminent domain.[8] But this latter use of the term "vested right" seems to render still more misleading an already misleading term; for the problem in each group of cases is analogous. In the "curative acts" cases: Is the property interest involved so sacred that it may not be impaired at all? In the police power cases: Is the property interest so sacred that

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C. C. A. 494 (act curing invalid mortgage against attaching creditor who had already obtained judgment against the debtor); *Dunbar v. Boston Ry. Corp.* (1902) 181 Mass. 383, 63 N. E. 916 (act extending time for filing petitions for damages, after time had expired); *West Side Belt Ry. Co. v. Pittsburgh Construction Co.* (1911) 219 U. S. 92, 31 Sup. Ct. 196 (act curing contract void because of a statute); Cooley, *Constitutional Limitations* (7th ed. 1903) 528-546.

[4] The fiction of common recovery was adopted by judicial legislation to meet the popular demand for a relaxation of the practice of strictly entailing lands. *Taltarum's case* (1473) Y. B. 12 Ed. IV, f. 19, pl. 25. Similarly the anomalous doctrine of ancient lights was created by the English Court, probably influenced by the plague-scare terrorizing London, to keep all the light and air possible. *Lewis v. Price* (1761) 2 Wms. Saunders. 175a, note.

[5] See *infra* note 18.

[6] *Huffman v. Alderson's Admr.* (1876) 9 W. Va. 616.

[7] The courts even in police power cases occasionally speak of some legislative act as unconstitutional as impairing "vested rights." *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 283, 22 Atl. 561, 563; *Arizona Copper Co. v. Hammer* (1919) 250 U. S. 400, 423, 39 Sup. Ct. 553, 557. In *Dobbins v. Los Angeles* (1904) 195, U. S. 223, 239, 25 Sup. Ct. 18, 22, the court says, "The plaintiff . . . . had acquired 'property rights.'"

[8] Private property may always be taken by the government for public purposes under the power of eminent domain, and where an interest is involved which lends itself to compensation the courts will be found determining whether the police power or the power of eminent domain is the appropriate instrument. See *Pumpelly v. Green Bay Co.* (1871, U. S.) 13 Wall. 166. But where the interest does not lend itself to compensation, the courts do not mention the power of eminent domain, saying that since the interest may not be taken under the police power it may not be taken at all. *Burns Baking Co. v. Bryan* (1924) 264 U. S. 504, 44 Sup. Ct. 412.

it may not be taken away without compensation? And in each instance "Due Process" is invoked to protect the rights of the individual.

Just as the problems involved are analogous, so are the processes of rationalization by which the courts reach their conclusions. These famous clauses: "Due Process of Law," "Equal Protection of the Laws," and others, have defended the interests of the individual against the encroachment of society; but their restrictive interpretation has gradually receded before the expanding police power.[9] The point of contact of these opposing forces is constantly shifting.[10] An ulterior public advantage may justify a comparatively insignificant taking of private property," says Mr. Justice Holmes, in a case involving the police power,[11] practically paraphrasing his language in the "curative acts" cases. In the instant case the Legislature was enabled, in complete harmony with "Due Process," to take from the defendant his privilege not to respond in damages, worth to him in money the exact amount of the damages he was later called upon to pay.[12] Under the

[9] *Meffert v. State Board of Medical Registration* (1903) 66 Kan. 710, 718, 72 Pac. 247, 250, aff'd (1904) 195 U. S. 625, 25 Sup. Ct. 790; *Arizona Copper Co. v. Hammer, supra* note 7.

[10] 1 Bryce, *The American Commonwealth* (1888) 267.

[11] *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 110, 31 Sup. Ct. 186, 187. "When private property becomes attached with a public interest it ceases to be *juris privati* only." Hale, C. J. in *De Portibus Maris*, 1 Harg. Law Tracts, 78. This doctrine has been relied on in many police power cases. *Munn v. Illinois* (1876) 94 U. S. 113, 132; *Budd v. New York* (1892) 143 U. S. 517, 533, 12 Sup. Ct. 468, 472; *German Alliance Ins. Co. v. Kansas* (1914) 233 U. S. 389, 408, 34 Sup. Ct. 612, 617. Compare: "Police powers of a state are nothing more or less than the powers of government, inherent in every sovereignty." Taney, C. J., in *License Cases* (1847, U. S.) 5 How. 504, 583.

[12] Ordinarily the defendant's defense might have been said to be "vested" though there is some conflict on this point. Where the statute of limitations has run in favor of the adverse possessor of real or personal property the title to that property becomes "vested" as though by grant, and is beyond the reach of the legislature. *Chapin v. Freeland* (1886) 142 Mass. 383, 8 N. E. 128; *Toltec Ranch Co. v. Cook* (1903) 191 U. S. 532, 24 Sup. Ct. 166; Taylor, *Due Process* (1917) 523, 524. Likewise a contract of record becomes "vested" when the period for filing bill of exceptions has expired. *Johnson v. Gehbauer* (1902) 159 Ind. 271, 64 N. E. 855; *Smith v. Walton* (1924, N. J. Ch.) 125 Atl. 878. And in defenses to debt actions the majority rule favors the "vesting" of the defense. *Chambers v. Gallagher* (1918) 177 Calif. 704, 171 Pac. 931; Clark, *Adverse Possession of One's Own Debt* (1919) 29 YALE LAW JOURNAL, 91. Though for a long time a contrary view was held. *Campbell v. Holt* (1885) 115 U. S. 620, 6 Sup. Ct. 209. See 3 Ames, *Select Essays* (1909) 569, that *Campbell v. Holt* "stands almost alone," and *Robinson v. Robbins Dry Dock & Repair Co.* (1924) 238 N. Y. 271, 144 N. E. 579, for a similar view. This distinction that has been drawn between the effect of the statute of limitations in actions for real or personal property and the effect in debt actions may be due to the fact that the early jurists could not see how there could "be a transfer of a right unless the right is embodied in some corporeal thing." 2 Pollock & Maitland, *History of English Law* (2d ed. 1905) 226. But, expressing the modern view, Holmes, J. says in *Portuguese-American Bank of San Francisco v. Welles* (1916) 242 U. S.

police power, in nuisance cases, individuals, also in harmony with "Due Process," have been deprived of privileges relating to the use of their property, losing property interests as valuable as those of which the defendant was deprived.[13] But the police power has expanded more startlingly than has the doctrine of the "curative acts" cases. In the Granger Cases,[14] and later in the Insurance Company cases,[15] semi-public corporations lost privileges which were property interests of large value; while under prohibition laws, going brewery concerns,[16] worth as businesses many millions of dollars, were reduced to practical worthlessness.[17] Such use of the police power[18] was not contemplated before the Granger cases, and no one can tell to what uses it may be put in the future. Under the police power, and its legitimate offspring, the doctrine of the "curative acts" cases, it is impossible to say that a property interest is so sacred to-day that it may not be taken away to-morrow.

There is in fact no standard of sacredness.[19] The language that Mr.

7, 11, 37 Sup. Ct. 3, 4, "when a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a horse." Compare note 1, *supra*.

[13] *Pa. Lead Co.'s Appeal* (1880) 96 Pa. 116; *Baltimore & P. Ry. v. Fifth Baptist Church* (1883) 108 U. S. 317, 2 Sup. Ct. 719.

[14] *Munn v. Illinois, supra* note 11; *Chicago, B. & Q. Ry. v. Iowa* (1876) 94 U. S. 155; *Peik v. Chicago & N. W. Ry.* (1876) 94 U. S. 164; *Chicago M. & St. P. Ry. v. Ackley* (1876) 94 U. S. 179; *Winona & St. Peter Ry. v. Blake* (1876) 94 U. S. 180; 3 Warren, *The Supreme Court in United States History* (1922) ch. 33. The Granger cases "evidently represent a different point of view of the sacredness of private rights and of the powers of a Legislature, from that entertained by Chief Justice Marshall and his contemporaries." Bryce, *loc. cit. supra* note 10.

[15] *German Alliance Ins. Co. v. Kansas, supra* note 11.

[16] *Mugler v. Kansas* (1887) 123 U. S. 623, Sup. Ct. 273; *Crowley v. Christensen* (1890) 137 U. S. 86, 11 Sup. Ct. 13.

[17] It had been previously thought that rights of corporations had been settled as absolutely "vested" and indefeasible. *Dartmouth College v. Woodward* (1819, U. S.) 4 Wheat. 518. There it was held that in the absence of a reservation of power the rights granted in the charter of a corporation could not be taken away by a subsequent legislature.

[18] Many valuable property interests have been taken away under the police power. *Barbier v. Connolly* (1885) 113 U. S. 27, 5 Sup. Ct. 357 (denying privilege of working in laundries between 10 p.m. and 6 a. m.); *Davis v. The State* (1880) 68 Ala. 58 (forbidding transportation of cotton at night); *Powell v. Pennsylvania* (1888) 127 U. S. 678, 8 Sup. Ct. 992 (suppressing the sale of oleomargarine). And see many cases cited in *Wilson v. New* (1917) 243 U. S. 332, 349, 37 Sup. Ct. 298, 302, and Warren, *op. cit. supra* note 14, ch. 38. Also a striking recent case where it was held constitutional under the police power to prevent negroes from voting in primaries. *Chandler v. Neff* (1924, W. D. Tex.) 298 Fed. 515. The doubtful character of this decision serves to emphasize the indefinite limits of the police power.

[19] Compare the campaign remark of John W. Davis at Omaha, Neb., N. Y. Times, Sept. 7, 1924, p. 28: "When this country was set up . . . . we gave Americans . . . . certain fundamental rights which can never be taken away."

Justice Holmes uses in speaking of the police power,[20] like his language in referring to the "curative acts" cases,[21] seems to imply the existence somewhere of a definitely fixed "property right."[22] But his words of apparent limitation do not in fact limit, and have little significance save as they indicate a natural shrinking from laying down in cold words a doctrine so pregnant with unlimited power. Private property has been taken in the police power cases and in the "curative acts" cases in all but name.[23] And we are driven to the conclusion that the term "vested right" as used in the latter cases, and occasionally even in the former, is one of convenience and not of definition.[24] It cannot mean more than a property interest, the infringement of which would shock society's sense of justice. For the idea of a "vested right" is less legal than political and sociological. The traditions, mores, and instincts of a community determine it. The conception of a "vested right" in a socialistic state will naturally differ greatly from that in a purely individualistic state; just as the conception of a "vested right" in war time[25] or emergency[26] will little resemble the conception that prevails in days of peace. And since society's concept of a "vested

[20] *Supra* note 11.

[21] *Supra* note 2.

[22] Compare the language of Holmes in *Danforth v. Groton Water Co., supra* note 2: "The prevailing judgment of the profession has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same footing as those which stand on fundamental grounds. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power."

[23] "The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed." Holmes, J. in *Block v. Hirsh* (1921) 256 U. S. 135, 155, 41 Sup. Ct. 458, 459. See also comment on "manual tradition," *supra* note 12.

[24] See *supra* note 7. The attempted definitions of the police power show their vagueness on their face, and that they state conclusions and not reasons: "Police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of public interests." *Camfield v. United States* (1897) 167 U. S. 518, 524, 17 Sup. Ct. 864, 866. See similar statement regarding "due process of law." *Davidson v. New Orleans* (1877) 96 U. S. 97, 104.

[25] By conscription in war time the individual's most valuable interest, his liberty, is taken away. In the event of future wars we are promised by the 1924 platforms of the two major parties that "every resource which may contribute to success" shall be "drafted." *Platform of Republican Party* (1924) 12; *Democratic Campaign Book* (1924) 39.

[26] Rent laws were justified under the due process clause "as a temporary measure . . . . to tide over a passing trouble"; whereas they could "not be upheld as a permanent change." *Block v. Hirsh* (1921) 256 U. S. 135, 157, 41 Sup. Ct. 458, 460; *Wilson v. New, supra* note 18 (Adamson law upheld "because of the existing emergency").

right" is the measuring yardstick of the right itself, it must be said that in any absolute sense there is no such thing as a "vested right," and that there is no property interest so sacred that it may not be sacrificed to the public need.[27]

Nevertheless, society's conception of a "vested right" must be interpreted. Until about 1890 the Supreme Court, and following its lead the courts of the several states, declared that where a legislature acted reasonably under the appropriate power it was not within the province of the court to pass on the social wisdom of the measures enacted.[28] Thus the ultimate definition was for the legislature; and the remedy for abuse of power was, as a famous judge said, for the people at the polls.[29] Since the eighteen-nineties, however, the Supreme Court has undertaken, against the protests of a minority of its membership, to set up as the standard of a "vested right" its own idea of the "ulterior public advantage."[30] But a single court cannot represent the diverging views of a large number of individual communities. At best it can represent but the average. The result has been the cutting off of social and political experiments in some of these states, because their view of a "vested right" has shocked the sense of justice of the court.[31] The Progressive Party this year proposes a considerable reduction of the court's powers. Less radical opinion speaks for a return to the theory of 1890, if not by judicial reinterpretation of its functions, then by the removal by constitutional amendment of the Due Process Clause, which would accomplish the same result.[32] There seems, however, to

[27] It is interesting that in those statutes upheld under the police power the individual is placed under a duty to society in general, while in *Robinson v. Robbins Dry Dock & Repair Co., supra* note 12, a further step is taken, the defendant being placed under a duty to a specific individual.

[28] "Those employments when too long employed the legislature has judged to be detrimental to the health of employees, and so long as there is a reasonable ground for believing that this is so its decision upon this subject cannot be reviewed by the Federal courts." McKenna, J. in *Holden v. Hardy* (1898) 169 U. S. 366, 395, 18 Sup. Ct. 383, 389.

[29] Waite, C. J. in *Munn v. Illinois, supra* note 11, at p. 134.

[30] See *Truax v. Corrigan* (1921) 257 U. S. 312, 42 Sup. Ct. 124; Hough, *Due Process of Law To-day* (1919) 32 HARV. L. REV. 218; Smith, *Decisive Battles of Constitutional Law* (July, 1924) A. B. A. JOUR. 505. This is one phase of the clash between Federalism and States Rights. Mr. Smith calls the result a "revolution."

[31] "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." Holmes, J. *dissenting* in *Truax v. Corrigan, supra* note 30.

[32] Clark, *The Courts and the People,* Locomotive Engineers' Journal (Aug. 1923) 626; editorial, *The Red Terrorism of Judicial Reform,* The New Republic (Oct. 1, 1924) 110; Borchard, *LaFollette and the Courts,* The Nation (Oct. 29, 1924) 468.

be some evidence in recent decisions of the Supreme Court of a tendency toward the view of 1890.[33] But whatever theory be adopted, the difficulty that causes such a volume of disagreement[34] is the chameleon character of the term "property right" or "vested right": the fact that it is not an absolute standard, but a variant which each man, layman, legislator, and judge, determines individually out of his own background.

CIVIL RESPONSIBILITY OF JUDGES FOR OFFICIAL ACTS

The state of mind of the disappointed litigant, prepared to disagree, and perhaps embittered, has sometimes led to suits against judges for acts done in a judicial capacity. Such actions raise the question as to whether judges are immune from civil responsibility in damages for official acts; and courts jealous of their dignity and independence, have not been disposed to look too favorably at these attempts to undermine their prestige.[1] In *Dean v. Kochendorfer* (1924) 237 N. Y. 384, 143 N. E. 229, a judgment was rendered against a City Magistrate for malicious prosecution and abuse of process. While the case presents interesting questions as to malicious prosecution and abuse of process,[2] it is intended here to examine solely the problem of judicial responsibility to the injured litigant.[3] Unfortunately the question seems not

[33] See the *dissenting* opinions of Taft, C. J. and Holmes, J. in *Adkins v. Children's Hosp.* (1923) 261 U. S. 525, 43 Sup. Ct. 394; Smith, *op. cit. supra* note 30, at p. 510.

[34] See the wide and excited differences of opinion over the Granger cases as illustrated by press comments of the time. Warren, *op. cit. supra* note 9, at pp. 303-310. Also the same disagreement among members of the Supreme Court itself. *Munn v. Illinois, supra* note 11; *Chicago B. & Q. Ry. v. Iowa, supra* note 14. For later phases of the same dissension see Pomeroy, *The Supreme Court and State Repudiation* (1883) 17 AM. L. REV. 684; Vance, *The Road to Confiscation* (1916) 25 YALE LAW JOURNAL, 285; Swayze, *The Growing Law* (1915) 25 YALE LAW JOURNAL, 1, 17; Brewer, *Protection to Private Property from Public Attack* (1891) *passim*.

[1] "De fide et officio Judicis non recipitur quaestio, sed de scientia, sive error sit juris sive facti. The law doth so much respect the certainty of judgments, and the credit and authority of judges, as it will not permit any error to be assigned that impeacheth them in their trust and in wilful abuse of the same; but only in ignorance, and mistaking either of the law of the case or matter in fact." Sir Francis Bacon, *Law Tracts* (2d ed. 1741) 82. However, in the twelfth and thirteenth centuries justices were in certain situations subject to penalty or amercement for erroneous judgments. Morgan, *Brief History of Special Verdicts and Special Interrogatories* (1923) 32 YALE LAW JOURNAL, 575, 582-586.

[2] The ordinary case of malicious prosecution deals with procedure instituted by the now defendant before a judicial officer; here the judge himself starts the action. For a wide distinction between an action against a prosecutor for malicious prosecution, and one against a magistrate for malicious conviction, see Winfield *The Present Law of Abuse of Legal Procedure* (1921) 219.

[3] Judicial responsibility in general is here considered without special reference to "privilege" of the judiciary in defamation, as to which see COMMENTS (1922)

to have been raised by counsel in the instant case. There are traces of the exemption from responsibility early in the reports,[4] and according to Chancellor Kent "it has a deep root in the common law."[5] But while it is frequently asserted that the exemption applies to all persons acting in a judicial capacity, of whatever degree,[6] it is necessary to consider different grades of judges and different kinds of acts[7] in order to ascertain the extent of the doctrine to-day.

Beginning then, with judges of courts of superior or general jurisdiction,[8] it is well settled that no action can be maintained against them for judicial acts, irrespective of motive.[9] As to judges of courts of inferior or limited jurisdiction,[10] there has been some dispute; their lesser rank has perhaps prevented them from receiving as much protection, and their freedom from responsibility is not as extensive. The difference in the authorities is professedly based on the individual court's conception of the materiality of two elements: lack of jurisdiction[11] and bad faith. Thus some courts have held that a judge of an inferior court acting without power (beyond his jurisdiction) is civilly answerable to the aggrieved litigant regardless of motive.[12] On the other hand, it has been held that an act in excess of power unaccompanied by bad faith will not subject the judge to responsibility in a

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31 YALE LAW JOURNAL, 765, 766; 32 *ibid.* 414. For protection afforded to judges acting under unconstitutional statutes, see (1905) 3 MICH. L. REV. 486; (1906) 4 *ibid.* 239; NOTES (1906) 6 COL. L. REV. 586.

[4] Winfield, *The History of Conspiracy and Abuse of Legal Procedure* (1921) 78.

[5] *Yates v. Lansing* (1810, N. Y. Sup. Ct.) 5 John. 282, 291.

[6] 2 Cooley, *Torts* (3d ed. 1906) 795 and note.

[7] It is quite difficult in practice, sometimes, to distinguish between a ministerial and a judicial act; the rule seems to be that in the former the exemption cannot be relied on. See *Evarts v. Kiehle* (1886) 102 N. Y. 296, 6 N. E. 592.

For the position of officers acting in a quasi-judicial capacity with respect to the rule here involved, see Mechem, *Law of Public Offices and Officers* (1890) secs. 636-643; Cooley, *op. cit. supra* note 6, pp. 797-805.

For a mere error in judgment there obviously should be no responsibility; to impose responsibility here would be to discourage anyone from ever ascending the bench. Cooley, *op. cit. supra* note 6, at p. 792.

[8] General jurisdiction is here used to indicate a power to adjudge generally over the subject matter and person without respect to any particular set of facts.

[9] *Floyd v. Barker* (1608, Star Chamber) 12 Co. 23; *Fray v. Blackburn* (1863, Q. B.) 3 B. & S. 576; *Bradley v. Fisher* (1871, U. S.) 13 Wall. 335.

[10] Limited jurisdiction is here used to indicate a power to adjudge only within prescribed limits.

[11] For an analysis of the term "jurisdiction" see Cook, *The Powers of Courts of Equity* (1915) 15 COL. L. REV. 106, 107. "Jurisdiction" is here used in the strict sense, denoting "power to act."

[12] *Piper v. Pearson* (1854, Mass.) 2 Gray, 120 (committed witness for contempt in case over which another court had exclusive jurisdiction); *Vaughn v. Congdon* (1883) 56 Vt. 111 (issued warrant on complaint void on its face); *Grace v. Teague* (1888) 81 Me. 559, 18 Atl. 289 (tried and sentenced after term of office had expired).

civil suit.[13] Where the act complained of is an abuse of jurisdiction, *i. e.* within the jurisdiction of the court but prompted by bad motive, there is a similar divergence of opinion. It has been held that such an act renders the judge civilly responsible.[14] It seems, however, that the greater number of American courts are in favor of absence of responsibility.[15] English authorities are similarly against responsibility.[16]

There is no compelling logic demanding different results based on the presence or absence of the elements enumerated above. Modern cases show that the distinction between judges of courts of inferior or limited jurisdiction and those of superior or general jurisdiction in determining responsibilty is not being strictly followed.[17] On principle it would seem that there should not be such a marked distinction; the reasons for lack of responsibility in the latter class apply with equal force in the former. An absolute freedom from responsibility, regardless of the status of the court and the character of the act,

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[13] *Thompson v. Jackson* (1895) 93 Iowa, 376, 61 N. W. 1004 (entered judgment in good faith on non-resident not served with notice). See criticism in 27 L. R. A. 92, note. See *Health v. Halfbill* (1898) 106 Iowa, 131, 133, 76 N. W. 522, 523. Similarly, a magistrate having acquired jurisdiction and proceeded beyond it has been exempted from civil responsibility unless he acted maliciously. *Starrett v. Connolly* (1912, 2d Dept.) 150 App. Div. 859, 135 N. Y. Supp. 325. See *Bowman v. Seaman* (1912, 2d Dept.) 152 App. Div. 690, 694, 137 N. Y. Supp. 568. 571. And where the judge erroneously and wilfully attempted to take jurisdiction, having no power over crimes punishable by imprisonment in state prison, he was held responsible. *Robertson v. Parker* (1898) 99 Wis. 652, 75 N. W. 423.

[14] *Knell v. Briscoe* (1878) 49 Md. 414 (malicious rendition of judgment); see *Pepper v. Mayes* (1884) 81 Ky. 673, 676.

[15] *Stone v. Graves* (1843) 8 Mo. 148 (neglect, and wilful refusal to give judgment); *Pratt v. Gardner* (1848, Mass.) 2 Cush. 63 (maliciously received groundless complaint); *Raymond v. Bolles* (1853, Mass.) 11 Cush. 315 (issued writ on false claim and secreted and destroyed it after service); *Irion v. Lewis* (1876) 56 Ala. 190 (wilfully tampered with jury); *Kress v. State* (1878) 65 Ind. 106 (fraudulently rendered smaller judgment); *Curnow v. Kessler* (1896) 110 Mich. 10, 67 N. W. 982 (maliciously issued summons to enable plaintiff to collect civil demand); see *Moser v. Summers* (1916) 172 Ky. 553, 557, 189 S. W. 715, 717; *Seneca v. Colvin* (1917, 4th Dept.) 176 App. Div. 273, 275, 162 N. Y. Supp. 834, 835.

[16] (1848) 11 & 12 Vict. c. 44, sec. 1, required that malice must be alleged and proved in bringing an action against a justice of the peace. But it has been pointed out that this statute, while it provides for bringing the action, does not create the remedy, but merely assumes its existence. The statute therefore regulates what does not necessarily exist. The existence of civil liability, nevertheless, can be shown both prior to 1848 and after the passage of the act. See *Cave v. Mountain* (1840, C. P.) 1 Man. & G. 257, 263; *Kendall v. Wilkinson* (1855, Q. B.) 4 E. & B. 679, 689. *Gelen v. Hall* (1857, Exch.) 2 Hurlst. & N. 379, however, has been taken to indicate the beginning of the rule against the responsibility of Justices of the Peace. Winfield, *op. cit. supra* note 2, at p. 218.

[17] *Broom v. Douglas* (1912) 175 Ala. 268, 57 So. 860; 44 L. R. A. (N. S.) 164, 171, note.

would seem the sounder social policy.[18] By allowing the civil action the magistrate's position is weakened; the decisions of one who has been adjudged guilty of malicious prosecution are not unlikely to go unquestioned. Furthermore ". . . . a prosecution at the instance of the State is a much more effective method of bringing him to account than private suit . . . . Where an officer is impeached his whole career may be gone into . . . . but in private suits the party is confined to the facts of his own case."[19] In *Dean v. Kochendorfer* the provision of the Penal Law which the court cited[20] to show that there was abuse of process, provides for the removal of a magistrate acting as the defendant here did. The result would have been more desirable had the Penal Law been allowed to take its course. While there was here perhaps a clear case of an injustice done to the attorney, the rule should not be relaxed for occasional injustices.[21] "One of the leading purposes of every wise system of law is to secure a fearless and impartial administration of justice."[22]

THE POWER OF THE EXECUTIVE TO PARDON CRIMINAL CONTEMPTS OF COURT[1]

A general popular disapproval of the exercise of the power to punish for contempt of court in cases of political and public interest has led many of our executives to apply their pardoning power to cases of

[18] Reasons which have been advanced for non-responsibility are: (1) It would take up the judge's time unnecessarily to consider his own defense. (2) It would invite him to consult public opinion when he ought to be uninfluenced by it. (3) It would increase litigation—the judge trying the first judge's responsibility could also be tried, and so on *ad infinitem*. (4) It would deter capable men from taking office. Cooley, *op. cit. supra* note 7, at p. 793 *et seq.;* Mechem, *op. cit. supra* note 7, sec. 620.

[19] Mechem, *op. cit. supra* note 7, at p. 403; Cooley, *op. cit. supra* note 6, at p. 794.

[20] Penal Law, N. Y. (1919) sec. 854; (1924) 237 N. Y. 384, 390.

[21] Salmond, *Law of Torts* (5th ed. 1920) 539.

[22] Bigelow, J. in *Piper v. Pearson, supra* note 13, at p. 122.

[1] The courts generally distinguish between contempts which consist of violation of a court order made for the benefit of a party to a civil action, and contempts which consist of acts or conduct tending merely to interfere with the process of the court. The former are denominated civil contempts, the latter criminal contempts. *People, ex rel. Munsell, v. Court of Oyer & Terminer* (1886) 101 N. Y. 245, 4 N. E. 259; *Gompers v. Bucks Stove & Range Co.* (1911) 221 U. S. 418, 31 Sup. Ct. 492; *Adams v. Gardner* (1917) 176 Ky. 252, 195 S. W. 412; Beale, *Contempt of Court, Criminal & Civil* (1908) 21 HARV. L. REV. 161; Taylor, *Procedure in Contempt Cases* (1914) 2 VA. L. REV. 265. The essential nature of civil contempts being coercive, to secure the civil rights of party litigants, it is generally agreed that they are not within the pardoning power. The executive may not destroy civil rights. *In re Bahama Islands* (1893, P. C.) A. C. 138; *In re Nevitt* (1902, C. C. A. 8th) 117 Fed. 448; *People, ex rel. Brundage, v. Peters* (1922) 305 Ill. 223, 137 N. E. 118; *State, ex rel. Rodd, v. Verage* (1922) 177 Wis. 295, 187 N. W. 830; *Contempt of Court and the Pardoning Power*

contempt.[2] In the recent case of *State v. Magee Pub. Co.*[3] the defendant was tried for criminal libel. During the pendency of the libel action, he published in a newspaper owned and controlled by him, derogatory remarks concerning the justice presiding at his trial. He was tried and convicted of contempt of court, but immediately thereafter was pardoned by the governor. The Supreme Court of New Mexico held the pardon valid.[4] An opposite conclusion was reached by a lower federal court in the recent case of *United States v. Grossman.*[5] A temporary injunction was issued restraining the defendant from selling liquor in violation of the Volstead Act. The defendant disobeyed the injunction, and was imprisoned for contempt. The President having pardoned the defendant, the court held that the pardon was invalid.[6]

In this country the power to pardon has its source in constitutional provisions. The federal and state constitutions limit it to "crimes or offenses against the state except treason and impeachment."[7] The first difficulty encountered is in attempting to determine whether criminal contempts are offenses within such provisions. Little help is to be derived from precedent.[8] It has been held repeatedly that a prosecution for contempt does not require the regular criminal procedure of indictment or trial by jury.[9] On the other hand a criminal contempt has been held to be within the criminal statute of limitations, and also within the federal statute providing for the removal of criminals from one federal district to another.[10]

(1893) 46 ALB. L. JOUR. 259. For the difficulties that exist in drawing the line in particular cases between criminal and civil contempts, see *People, ex rel. Stearns, v. Marr* (1905) 181 N. Y. 463, 74 N. E. 431; *Hake v. People* (1907) 230 Ill. 174, 82 N. E. 561; NOTES (1921) 5 MINN. L. REV. 459; (1923) 36 HARV. L. REV. 617.

[2] See (1921) 7 A. B. A. JOUR. 658; (1922) 8 A. B. A. JOUR. 136. See also COMMENTS (1923) 33 YALE LAW JOURNAL, 537.

[3] (1924, N. M.) 224 Pac. 1028 (one judge dissenting).

[4] Accord: *Ex parte Hickey* (1840, Miss.) 4 S. & M. 751; *State, ex rel. Van Orden v. Bauvinet* (1872) 24 La. Ann. 119; *Sharp v. State* (1899) 102 Tenn. 9, 49 S. W. 752.

[5] (May 15, 1924) N. D. Ill. E. Div. The case is now in the United States Supreme Court and will be decided in the October term.

[6] Accord: *Taylor v. Goodrich* (1897) 25 Tex. Civ. App. 109, 40 S. W. 515.

[7] U. S. Const. Art. 2, sec. 4; N. M. Const. Art. 5, sec. 6; Mich. Const. Art. 6, sec. 9; Conn. Const. Art. 4, sec. 10.

[8] For different definitions of "crime or offense" see *State v. Ostwalt* (1896) 118 N. C. 1208, 24 S. E. 660; 4 Blackstone, *Commentaries* 5; 1 Wharton, *Criminal Law* (11th ed. 1912) 18.

[9] *State v. Markuson* (1895) 5 N. D. 147, 64 N. W. 934; *People v. Tool* (1905) 35 Colo. 225, 86 Pac. 224; *Ex parte Allison* (1905) 48 Tex. Cr. App. 634, 90 S. W. 492; *State v. Thomas* (1906) 74 Kan. 360, 86 Pac. 499; *State v. Sides* (1915) 95 Kan. 633, 148 Pac. 624; Rapaljie, *Contempts* (1886) 12.

[10] A federal statute provided that, "No person shall be prosecuted, tried, or punished for any offense not capital . . . . unless the indictment is found or the information is instituted within three pears after such offense shall have been committed." Act of April 13, 1876 (19 Stat. at L. 32). *Held,* that the statute

The lack of a settled judicial definition of the term 'offense' permits a court passing upon the question in the first instance to be influenced by its notions of the nature of the contempt power.[11] Adopting Wilmot's unpublished opinion in *King v. Almon*,[12] that the power to summarily punish for contempt is of immemorial usage and is an inherent attribute of our judiciary, it has been said that an executive pardon is an unwarranted interference with the judicial power.[13] Recent investigations have, however, thrown considerable doubt on the correctness of Wilmot's opinion.[14] The evidence seems to show that prior to the sixteenth century, constructive contempt by one other than an officer of the law was punishable only after trial by jury in the regular criminal procedure.[15] At its source, the power to punish for contempt was regarded not as a mysterious attribute of judicial power but as a practical means to assure the unimpeded transaction of the court's business. Where the obstruction was indirect, it was thought that no impairment of efficiency would result from resorting to the regular criminal procedure. In considering, to-day, the applicability of the power to pardon to cases of contempt, the use of a meaningless phrase such as "inherent power" seems only to cloud the issue, which is practicability and public expediency.[16]

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applied to contempts. *Gompers v. United States* (1913) 233 U. S. 604, 34 Sup. Ct. 693.

A statute provided that "For any crime or offense against the United States, the offender may by any commissioner of a circuit court . . . . be arrested and imprisoned, or bailed as the case may be, for trial before such court of the United States as by law has cognizance of the offense." Act of May 28, 1896 (29 Stat. at L. 184). *Held*, that the statute applied to contempts. *Castner v. Pocahontas Collieries Co.* (1902, D. Va.) 117 Fed. 184. See Barrett, *Contempt in the Federal Courts* (1911) 72 CENT. L. JOUR. 5.

[11] See Cardozo, *The Nature of the Judicial Process* (1921) 71; Pound, "Courts and Legislation," 9 *Modern Legal Philosophy Series* (1917) 223.

[12] (1765, K. B.) Wilmot's Notes 243.

[13] See Larremore, *Constitutional Regulation of Contempt of Court* (1900) 13 HARV. L. REV. 615.

[14] See the series of essays by Fox, *The King v. Almon* (1908) 24 L. QUART. REV. 184, 266; *The Summary Process to Punish Contempt* (1909) 25, *ibid.* 238, 354; *Eccentricities of the Law of Contempt of Court* (1920) 36 *ibid.* 394; *The Writ of Attachment* (1924) 40 *ibid.* 43.

[15] See Fox, *The Summary Process to Punish Contempt, supra* note 14.

[16] "If the President has the power to pardon those who are committed for criminal contempts . . . . this immemorial attribute of judicial power is thus withdrawn from the courts and transferred to the executive . . . . Is there any provision of the Constitution of the United States which grants this inherent and essential attribute of judicial power to the executive?" Sanborn, J. in *Re Nevitt, supra* note 1. "These (contempts) are *sui generis*, neither civil actions nor prosecutions for offenses within ordinary meaning of these terms—and are exertions of the power inherent in all courts to enforce obedience." Mr. Justice McReynolds in *Meyers v. U. S.* (1924, U. S.) 44 Sup. Ct. 272. Compare the attitude of Justice Thacher in *Ex parte Hickey, supra* note 4, at p. 779." A practice of the courts however remarkable for its antiquity, however, far back into a remote

It has been urged, however, that the pardoning of prisoners committed for contempt would subject the judiciary to the control of the executive and would tend to destroy the judiciary as an independent branch of the government.[17] Whatever weight such an argument had in the first instance, the repeated exercise of the power to pardon without apparent impairment of judicial power has greatly detracted from its force.[18] The executive is an elective officer responsible to the electorate, and is normally not likely to exercise this power except to correct hasty action on the part of the judges. To assume gross abuse by the executive of his power is to argue for the abolition of the entire pardoning power, since the executive might nullify the criminal laws by freeing all convicted criminals.[19] Equally so might the judiciary rob the legislature of all its function by abuse of its power to declare legislation unconstitutional. It is interesting to note that similar fears for the prestige of the judiciary were expressed more than a century ago when the question of appellate review of contempt was considered.[20] The reply of Senator Clinton that such fears were imaginary and idle seems still pertinent.[21]

A recent decision of the United States Supreme Court upheld provisions of the Clayton Act for jury trials in constructive contempts. It may be inferred from the opinion that a provision for jury trials in cases of direct contempts would not have been upheld.[22] Should the

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period it looks for its origin . . . . claims no respect or veneration when it is shown to be unessential to the existence, utility or preservation of those courts. This (the power to pardon contempts) is a quasi-political question."

[17] See *Taylor v. Goodrich, supra* note 6.

[18] Executive pardons for contempt have been upheld from an early date. See *Dixon's Case* (1841) 3 Op. Atty. Gen. 622; *Rowan & Wells Case* (1845) 4 *ibid.* 458; *Drayton & Sears Case* (1852) 5 *ibid.* 579; *Anonymous* (1890) 19 *ibid.* 476.

[19] See Johnston, *Constitutional Power to Pardon Contempt of Court* (1909) 12 LAW NOTES, 185.

[20] In the absence of statute a judgment of contempt by a court of competent jurisdiction was final and could not be reviewed by appeal or writ of error. *Ex parte Kearney* (1822, U. S.) 7 Wheat. 38; *State v. Schneider* (1892) 47 Mo. App. 669; Rapaljie, *op. cit.* sec. 141. In a few states a review was allowed in civil contempts. *Haught v. Irwin* (1895) 166 Pa. 548, 31 Atl. 260. This rule has been modified in some jurisdictions by statute. See *Leopold v. People* (1892) 140 Ill. 552, 30 N. E. 348. Where the rule still prevails the tendency of appellate courts is to construe questions of jurisdiction strictly so as to check abuses of the contempt power. See Talbert, *Review of Contempt Proceedings by Habeas Corpus* (1912) 46 AM. L. REV. 838.

[21] Clinton, Senator, in *Yates v. People* (1810, N. Y. Sen.) 6 Johns. 337, 468: "The inconvenience arising from interfering with convictions of contempt of court is imaginary and idle. . . . It is to be remembered that summary convictions are against the genius and spirit of our constitution and in derogation of civil liberty, and the accused is without the usual guards of freedom. There is no grand jury to accuse, no petit jury to try, but his property and liberty depend upon the fiat of the court. Is not the necessity of the check at least equal to the delegation of power?"

[22] *Michaelson v. United States* (1924, U. S.) 45 Sup. Ct. 18.

power to pardon be also limited to constructive contempts? There seems to be no authority for denying the power to pardon for direct contempts.[23] In principle it seems sound to allow the power of pardon in all criminal contempts. The distinction between direct and constructive contempt is merely one of degree, and while it may be essential that a judge have the power to summarily punish those creating a disturbance in the court room without resorting to the delays of a jury trial, it is not so patent that the punishment should be beyond mitigation. The pardon does not take away the power to punish, but is merely the application of executive clemency after conviction.[24]

Several criminal statutes provide for injunctions to be issued by the court restraining their violation. The disobedience of such injunctions is by express provision made punishable as a contempt.[25] It has been suggested that the power to pardon should be limited to such contempts as are expressly provided for by these statutes, since the contempt process is merely incidental to the enforcement of the criminal law.[26] The proposed limitation would, however, exclude the large class of contempts for offending the dignity of the courts where the likelihood of judicial abuse is the greatest and where there is the most need for such a check as is provided for by an executive pardon.

TORT RESPONSIBILITY OF CHARITABLE CORPORATIONS

Two recent cases, *City of Shawnee v. Roush* (1924, Okla.) 223 Pac. 354 and *St. Vincent's Hosp. v. Stine* (1924, Ind.) 144 N. E. 537, line up on opposite sides of the question whether or not charitable corporations are responsible for the torts of their servants. The facts in the two cases are similar: the plaintiff, a pay-patient in a charitable hospital, was injured through the negligence of a nurse. He sues the hospital. The Oklahoma court imposes on the charity the responsibility of any profit-making corporation; the Indiana court imposes no responsibility at all in the absence of negligence in the selection of the servant. In Oklahoma the problem seems to have been presented for the first time; in Indiana the court follows precedent.[1]

All jurisdictions agree in placing the paying and the non-paying

[23] There seem to be no modern cases involving the pardon of direct contempts. The probable reason is the reluctance of the executive to pardon such offenders. That the power to pardon for direct contempts has been exercised, see *Dixon's Case, supra* note 18 (affray in the presence of the court); *Thomas of Charthan v. Benet of Stanford* (1313) 24 Seld. Soc. 184 (assault with intent to kill in presence of the court).

[24] See Williston, *Does a Pardon Blot out Guilt* (1915) 28 HARV. L. REV. 647.

[25] Sherman Anti-Trust Law, Act of July 2, 1890 (26 Stat. at L. 209, sec. 4); Clayton Act, Act of Oct. 15, 1914 (38 *ibid.* 736, secs. 15-19); Volstead Act, Act of Oct. 28, 1919 (41 Stat. at L. 306, 314, secs. 4, 22, 23).

[26] COMMENTS (1924) 19 ILL. L. REV. 176.

[1] *Pittsburgh, C. C. & St. L. Ry. v. Sullivan* (1895) 141 Ind. 83, 40 N. E. 138.

patient of a charitable corporation on a common footing,[2] but they disagree as to what that common footing shall be. "Public policy" is frankly admitted to be the determining factor. Some courts give no other justification for their decisions.[3] But where reasons are given they may fall within one or more of three categories. There is the "trust fund" doctrine which declares that trust funds may not be diverted from the purposes of the trust, lest, by the frittering away of its resources, the charity become crippled or wiped out.[4] There is the doctrine that *respondeat superior* shall not apply, since charities receive no profit from the activities of their servants: a doctrine which, in fact, merely states the result of the "trust fund" doctrine, but which is nevertheless often relied on by a court to support its conclusions.[5]

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[2] *E. g. Powers v. Mass. Homoeopathic Hosp.* (1901, C. C. A. 1st) 109 Fed. 294.

[3] *E. g. Weston v. Hosp. of St. Vincent* (1921) 131 Va. 587, 107 S. E. 785.

[4] In the following cases the decision was based, wholly or in part, on the "trust fund" doctrine: England: *Heriot's Hosp. v. Ross* (1846, H. L.) 12 Cl. & F. 507. But the doctrine was not relied on in *Hillyer v. St. Bartholomew Hosp.* [1909] 2 K. B. 820. United States: *Lyle v. Nat. Home* (1909, C. C. E. D. Tenn.) 170 Fed. 842. But the "waiver" doctrine was later adopted in *Powers v. Mass. Homeopathic Hosp., supra,* note 2. *Fordyce v. Woman's Assoc.* (1906) 79 Ark. 550, 96 S. W. 155; *Butler v. Berry School* (1921) 27 Ga. App. 560, 109 S. E. 544; *Parks v. N. W. Univ.* (1905) 218 Ill. 381, 75 N. E. 991. But recovery in contract was allowed in *Armstrong v. Wesley Hosp.* (1912) 170 Ill. App. 81; *Davin v. Kansas Benevolent Assoc.* (1918) 103 Kan. 48, 172 Pac. 1002; *Cook v. Norton Infirmary* (1918) 180 Ky. 331, 202 S. W. 874; *Jensen v. Maine Infirmary* (1910) 107 Me. 408, 78 Atl. 898; *Loeffler v. Enoch Pratt Hosp.* (1917) 130 Md. 265, 100 Atl. 301; *Roosen v. Brigham Hosp.* (1920) 235 Mass. 66, 126 N. E. 392; *Downs v. Harper Hosp.* (1894) 101 Mich. 555, 60 N. W. 42. But the "waiver" doctrine was relied on in *Bruce v. Central Church* (1907) 147 Mich. 230, 110 N. W. 951. *Nicholas v. Evangelical Home* (1920) 281 Mo. 182, 219 S. W. 643; *Marble v. Nicholas Senn Hosp.* (1918) 102 Neb. 343, 167 N. W. 208; *Corbett v. Industrial School* (1903) 177 N. Y. 16, 68 N. E. 997. But the "waiver" doctrine was relied on in *Schloendorf v. N. Y. Hosp.* (1914) 211 N. Y. 125, 105 N. E. 92. *Hoke v. Glenn* (1914) 167 N. C. 594, 83 S. E. 807; *Taylor v. Flower Deaconess Hosp.* (1922) 104 Ohio St. 61, 135 N. E. 287; *Hill v. Tualatin Academy* (1912) 61 Or. 190, 121 Pac. 901; *Gable v. Sisters of St. Francis* (1910) 227 Pa. 254, 75 Atl. 1087; *Vermillion v. Woman's College* (1916) 104 S. C. 197, 88 S. E. 649; *Abston v. Waldon Academy* (1907) 118 Tenn. 24, 102 S. W. 351; *Maia v. Eastern Hosp.* (1899) 97 Va. 507, 34 S. E. 617. This was a state agency. But the "waiver" doctrine was relied on in *Hosp. of St. Vincent v. Thompson* (1914) 116 Va. 101, 81 S. E. 13.

[5] In the following cases the decision was based, wholly or in part, on the doctrine that *respondeat superior* shall not apply: *Union Pac. Ry. v. Artist* (1894, C. C. A. 8th) 60 Fed. 365. But the "waiver" doctrine was relied on in *Powers v. Mass. Homoeopathic Hosp., supra* note 2. *Fordyce v. Woman's Assoc.* (Ark.) *supra* note 4; *Hearns v. Waterbury Hosp.* (1895) 66 Conn. 98, 33 Atl. 595; *Parks v. N. W. Univ.* (Ill.) *supra* note 4. But recovery was allowed in contract in *Armstrong v. Wesley Hosp., supra* note 4; *Eighmy v. Union Pac. Ry.* (1895) 93 Iowa, 538, 61 N. W. 1056; *Emery v. Jewish Hosp. Assoc.* (1921) 193 Ky. 400, 236 S. W. 577; *Thornton v. Franklin Sq. House* (1909) 200 Mass. 465, 86 N. E. 909; *Nicholas v. Evangelical Home* (Mo.) *supra* note 4; *Hoke v. Glenn* (N. C.)

And there is the doctrine of "waiver" which proceeds on the fiction that a patient, by accepting benefits, releases the institution from all responsibility for the negligence of its servants if "due care" has been exercised in their selection.[6] From these three doctrines come several degrees of responsibility. Some courts, applying the first two, bar entirely the recovery of any injured person, patient, employee, or utter stranger.[7]

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supra note 4; *Collins v. N. Y. Medical School* (1901, 2d Dept.) 59 App. Div. 63, 69 N. Y. Supp. 106. But the "waiver" doctrine was relied on in *Schloendorf v. N. Y. Hosp., supra* note 4; though it was disapproved in *Phillips v. Buffalo Hosp.* (1924, 4th Dept.) 207 App. Div. 640, 202 N. Y. Supp. 572. There seems to be no recent case in the Court of Appeals. *Taylor v. Flower Deaconess Hosp.* (Ohio) *supra* note 4; *Vermillion v. Woman's College* (S. C.) *supra* note 4; *Morrison v. Henke* (1917) 165 Wis. 166, 160 N. W. 173.

Some cases hold, as a plain question of agency, that members of a hospital staff are not servants within the rule of *respondeat superior. Basabo v. Salvation Army* (1912) 35 R. I. 22, 85 Atl. 120; see *Kellogg v. Charity Foundation* (1908, 2d Dept.) 128 App. Div. 214, 215, 112 N. Y. Supp. 566, 568. While this can well account for some cases, it will hardly account for all, and the question of tort responsibility remains as urgent as ever.

[6] In the following cases the decision was based, wholly or in part, on the "waiver" doctrine: *Powers v. Mass. Homoeopathic Hosp.* (Fed.) *supra* note 2. But the "trust fund" doctrine was relied on earlier in *Lyle v. Nat. Home, supra* note 4. *Burdell v. St. Luke's Hosp.* (1918) 37 Calif. App. 310, 173 Pac. 1008; *Hearns v. Waterbury Hosp.* (Conn.) *supra* note 5; *Mikota v. Sisters of Mercy* (1918) 183 Iowa, 1378, 168 N. W. 219; *Cook v. Norton Infirmary* (Ky.) *supra* note 4; *Bruce v. Central Church* (Mich.) *supra* note 4; *Adams v. University Hosp.* (1907) 122 Mo. App. 675, 99 S. W. 453; *Marble v. Nicholas Senn Hosp.* (Neb.) *supra* note 4; *Hoke v. Glenn* (N. C.) *supra* note 4; *Schloendorf v. N. Y. Hosp.* (N. Y.) *supra* note 4. But *Phillips v. Buffalo Hosp., supra* note 5, disapproves this doctrine. *Gable v. Sisters of St. Francis* (Pa.) *supra* note 4; *Hosp. of St. Vincent v. Thompson* (Va.) *supra* note 4. But the earlier case of *Maia v. Eastern Hosp., supra* note 4, applied the "trust fund" doctrine.

[7] These cases favor the rule of absolute non-responsibility: *Fordyce v. Woman's Assoc.* (Ark.) *supra* note 4; *Davie v. University of Calif.* (1924, Calif.) 227 Pac. 243. (A state agency.) But the "due care" modification was favored earlier in *Burdell v. St. Luke's Hosp., supra* note 6. See *Johnston v. City of Chicago* (1913) 258 Ill. 494, 498, 101 N. E. 960, 962. (A state agency.) But the "due care" modification was favored in *Marabia v. Mary Thompson Hosp.* (1923) 309 Ill. 147, 140 N. E. 836. And in *Armstrong v. Wesley, supra* note 4, recovery in contract was allowed. See *Emery v. Jewish Hosp. Assoc.* (Ky.) *supra* note 5. But the "due care" modification was earlier favored in *Ill. Central Ry. v. Buchanan* (1907) 126 Ky. 288, 103 S. W. 272. *Jensen v. Maine Infirmary* (Me.) *supra* note 4; *Loeffler v. Enoch Pratt Hosp.* (Md.) *supra* note 4; *Kidd v. Mass. Homoeopathic Hosp.* (1921) 237 Mass. 500, 130 N. E. 55. But in *Thornton v. Franklin Sq. House, supra* note 5, the "due care" modification was favored. *Downs v. Harper Hosp.* (Mich.) *supra* note 4. But in *Gallon v. House of Good Shepherd* (1909) 158 Mich. 361, 122 N. W. 631, the "due care" modification was favored. *Nicholas v. Evangelical Home* (Mo.) *supra* note 4; *Duncan v. Benevolent Assoc.* (1912) 92 Neb. 162, 137 N. W. 1120. But by application of the "waiver" doctrine recovery was allowed a stranger. *Marble v. Nicholas Senn Hosp., supra* note 4; see *Wilson v. N. Y. Homoeopathic College* (1924, Sup. Ct.) 122 Misc. 452, 454, 204 N. Y. Supp. 175, 177. But the "due care" modification was

Others applying the third, refuse recovery to the patient,[8] but allow it to the employee[9] or stranger.[10] Still others, while clinging to the "trust fund" doctrine or to the doctrine that *respondeat superior* does not apply, considerably modify their effect by declaring that recovery may be had against a charity if there has been negligence in the selection of the servant who caused the injury; and while in most cases there

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favored in *Barr v. Children's Aid* (1921, Sup. Ct. Spec. T.) 190 N. Y. Supp. 296. *Overholser v. Nat. Home* (1903) 68 Ohio St. 236, 67 N. E. 487. (A state agency.) But the "due care" modification was later favored in *Taylor v. Flower Deaconess Hosp., supra* note 4. *O'Neil v. Odd Fellows' Home* (1918) 89 Or. 382, 174 Pac. 148; *Gable v. Sisters of St. Francis* (Pa.) *supra* note 4; see *Vermillion v. Woman's College* (1916) 104 S. C. 197, 201, 88 S. E. 649, 650. But the "due care" modification was earlier favored in *Lindler v. Columbia Hosp.* (1914) 98 S. C. 25, 81 S. E. 512. *Abston v. Walden Academy* (Tenn.) *supra* note 4; *Maia v. Eastern Hosp.* (Va.) *supra* note 4. (A state agency.) But the "due care" modification was favored in *Weston v. Hosp. of St. Vincent, supra* note 3.

[8] A few decisions imply that if the "waiver" doctrine were to be applied, the patient would be held to free the charity from all responsibility, even where there had not been "due care" in selecting the servant. *Adams v. University Hosp.* (1907) 122 Mo. App. 675, 679, 99 S. W. 453, 454. Some courts, where there has been no negligence in selection, refuse recovery, and expressly avoid the question as to the result if negligence had been present. *Powers v. Mass. Homoeopathic Hosp.* (Fed.) *supra* note 2, at p. 306.

[9] Recovery by an employee was allowed in the following cases: *Thomas v. German Benevolent Assoc.* (1914) 168 Calif. 183, 141 Pac. 1186; *Bruce v. Central Church* (Mich.) *supra* note 4; *McInery v. St. Luke's Hosp.* (1913) 122 Minn. 10, 141 N. W. 837. But absolute responsibility is imposed in Minnesota, see *infra* note 23. *Hewitt v. Woman's Assoc.* (1906) 73 N. H. 556, 64 Atl. 190. This case seems to adopt a general rule of absolute responsibility. *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 92 N. E. 626; *Hotel Dieu v. Armendariz* (1914, Tex. Civ. App.) 167 S. W. 181.

Contra: Emery v. Jewish Hosp. Assoc. (Ky.) *supra* note 5; *Freel v. Crawfordsville* (1895) 142 Ind. 27, 41 N. E. 312 (a state agency); *Zoulalian v. N. E. Sanitarium* (1918) 230 Mass. 102, 119 N. E. 686 (Workmen's Compensation Act); *Whittaker v. St. Luke's Hosp.* (1909) 137 Mo. App. 116, 117 S. W. 1189; *Corbett v. St. Vincent's School* (1903, 4th Dept.) 79 App. Div. 334, 79 N. Y. Supp. 369. But by reliance on the "waiver" doctrine recovery was later allowed in *Hordern v. Salvation Army, supra*. *O'Neil v. Odd Fellows' Home* (Or.) *supra* note 7; see *Vermillion v. Woman's College* (S. C.) *supra* note 7; see *Bachman v. Y. W. C. A.* (1922) 179 Wis. 178, 182, 191 N. W. 751, 753.

[10] A stranger was permitted to recover in the following cases: *Gallon v. House of Good Shepherd* (Mich.) *supra* note 7; *Marble v. Nicholas Senn Hosp.* (Neb.) *supra* note 4; *Van Ingen v. Jewish Hosp.* (1920) 227 N. Y. 665, 126 N. E. 924; *Basabo v. Salvation Army* (1912) 35 R. I. 22, 85 Atl. 120. But this case favors the rule of absolute responsibility.

Contra: Fordyce v. Woman's Assoc. (Ark.) *supra* note 4; see *Emery v. Jewish Hosp. Assoc.* (1921) 193 Ky. 400, 410, 236 S. W. 577, 582; *Loeffler v. Enoch Pratt Hosp.* (Md.) *supra* note 4; *Benton v. City Hosp.* (1885) 140 Mass. 13, 1 N. E. 836; *Hill v. Tualatin* (Or.) *supra* note 4; *Fire Ins. Patrol v. Boyd* (1888) 120 Pa. 624, 15 Atl. 553; *Vermillion v. Woman's College* (Va.) *supra* note 4; *Bachman v. Y. W. C. A.* (Wis.) *supra* note 9; see *Lyle v. Nat. Home* (Fed.) *supra* note 4, at p. 845.

is no such negligence and recovery is refused,[11] in a few the rule is applied to permit recovery.[12]

All three doctrines are open to attack. The doctrine of "waiver" is a mere fiction:[13] for who could maintain that a patient, coming in sickness to a hospital, ever for a moment considers the possibility of a suit against the institution? The "trust fund" doctrine, logically applied, should completely protect the trust funds from tapping for purposes outside the trust.[14] But a charity, even when an agency of the state,[15]

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[11] The following cases favor the rule that there can be no recovery by patients where there has been "due care" in the selection of servants: *Deming Ladies Hosp. v. Price* (1921, C. C. A. 8th) 276 Fed. 668; *Burdell v. St. Luke's Hosp.* (Calif.) *supra* note 6. But absolute non-responsibility was later favored in *Davie v. University of Calif., supra* note 7. *Hearns v. Waterbury Hosp.* (Conn.) *supra* note 5; *South Florida Ry. v. Price* (1893) 32 Fla. 46, 13 So. 638; *Butler v. Berry School* (Ga.) *supra* note 4; *Marabia v. Thompson Hosp.* (Ill.) *supra* note 7. But absolute non-responsibility was favored earlier in *Johnston v. City of Chicago, supra* note 7. *Mikota v. Sisters of Mercy* (Iowa) *supra* note 6; *Pittsburgh, C. C. & St. L. Ry. v. Sullivan* (Ind.) *supra* note 1; *Davin v. Kansas Benevolent Assoc.* (Kan.) *supra* note 4; *Thornton v. Franklin Sq. House* (Mass.) *supra* note 5. But absolute non-responsibility was favored in *Kidd v. Mass. Homoeopathic Hosp., supra* note 7. *Gallon v. House of Good Shepherd* (Mich.) *supra* note 7. But absolute non-responsibility was favored in *Downs v. Harper Hosp., supra* note 4. *Hoke v. Glenn* (N. C.) *supra* note 4; *Barr v. Children's Aid* (N. Y.) *supra* note 7. But absolute non-responsibility was favored in *Wilson v. N. Y. Homoeopathic College, supra* note 7. *Taylor v. Flower Deaconess Hosp.* (Ohio) *supra* note 4; *Lindler v. Columbia Hosp.* (S. C.) *supra* note 7. But absolute non-responsibility was favored in *Vermillion v. Woman's College, supra* note 7. *Barnes v. Providence Sanitarium* (1921, Tex. Civ. App.) 229 S. W. 588; *Gitzhoffen v. Holy Cross Hosp.* (1907) 32 Utah, 46, 88 Pac. 691; *Weston v. Hosp. of St. Vincent* (Va.) *supra* note 3; *Morrison v. Henke* (Wis.) *supra* note 5.

The rule that "due care" in the selection of servants is a personal non-delegable duty of the master seems to account for this modification of a charitable institution's non-responsibility. *McInery v. St. Luke's Hosp.* (Minn.) *supra* note 9. But if "a charity is not to be liable for the negligence of its employees it should equally not be held liable for the negligence of its officers and managers." Zollman, *Liability of Charitable Institutions* (1921) 19 MICH. L. REV. 395, 406. The modification has been rejected in Massachusetts on this ground. *Roosen v. Brigham Hosp., supra* note 4, at p. 72.

[12] In these cases the "due care" rule was applied affirmatively and recovery allowed: *Ill. Central Ry. v. Buchanan* (Ky.) *supra* note 7. But the rule of absolute non-responsibility was favored later in *Emery v. Jewish Hosp., supra* note 5. *McInery v. St. Luke's Hosp.* (Minn.) *supra* note 9. But the rule of absolute responsibility was adopted later in *Mulliner v. Evangelischer, etc.* (1920) 144 Minn. 392, 175 N. W. 699. *St. Paul's Sanitarium v. Williamson* (1914, Tex. Civ. App.) 164 S. W. 36; *Magnuson v. Swedish Hosp.* (1918) 99 Wash. 399, 169 Pac. 828.

[13] *Gamble v. Vanderbilt University* (1918) 138 Tenn. 616, 200 S. W. 510; *Phillips v. Buffalo Gen'l Hosp.* (N. Y.) *supra* note 5.

[14] See *Love v. Nashville Institute* (1922) 146 Tenn. 550, 564, 243 S. W. 304, 308.

[15] *City of Paducah v. Allen* (1901) 111 Ky. 361, 63 S. W. 981. The ground for the decision was that freedom from responsibility would be in violation of the

must respond in damages if it has been guilty of creating a nuisance;[16] or if a tort has been committed in the course of the administration of the trust;[17] and where a suit has been prosecuted against a trustee personally for alleged misconduct as trustee of which he was not guilty, he may reimburse himself from the funds appropriated to the trust.[18] The adoption of the "due care" modification affords still another opportunity for such wastage. Likewise, the fact that a nuisance has been committed by a servant does not free the charity from responsibility.[19] And the "due care" modification adds this further inconsistency: that *respondeat superior* will apply to the manager of a hospital (who is a servant of the corporation) if he has been negligent in selecting a sub-servant; but it will not apply where the sub-servant has been negligent.[20] But since public policy is the dominant consideration, these technical defects might be overlooked. It would seem better to impose the appropriate responsibility frankly on that ground, without more specific rationalization. But since courts find it necessary to give reasons, the various doctrines, with their modifications, serve their purpose; for a court when it has determined what protection the interests of the community require to be afforded to a charitable corporation, can choose the doctrine that will most accurately support its conclusion.[21] And the doctrine so chosen will, if consistently applied, bring a consistent result.[22]

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clause in the state constitution providing that: "Municipal and other corporations, and individuals invested with the privilege of taking property for public use, shall make just compensation for property taken, injured, or destroyed."

[16] *Love v. Nashville Institute* (Tenn.) *supra* note 14. Here it was said that the "trust fund" doctrine being the "child of public policy" should give way to public policy.

[17] Responsibility has been imposed where the tort was committed in a non-charitable activity. *Stewart v. Harvard College* (1866, Mass.) 12 Allen, 58; *Holder v. Mass Hort. Society* (1912) 211 Mass. 370, 97 N. E. 630.

[18] *Bennett v. Wyndham* (1862, Ch.) 4 De G. F. & J. 259.

[19] *Baker v. Tibbetts* (1895) 162 Mass. 468, 39 N. E. 350.

[20] See *supra* note 11.

[21] Where the injury has arisen from the breach of a contractual duty, courts have sometimes been induced to grant recovery, regardless of their rule of tort responsibility. Canada: *Thompson v. Coast Mission* (1914) 15 D. L. R. 656; United States: *Armstrong v. Wesley Hosp.* (Ill.) *supra* note 4; *Roche v. St. John's Hosp.* (1916, Sup. Ct. Spec. T.) 96 Misc. 289, 160 N. Y. Supp. 401; *Hall-Moody Institute v. Copass* (1902) 108 Tenn. 582, 69 S. W. 327; see *Gitzhoffen v. Holy Cross Hosp.* (1907) 32 Utah, 46, 61, 88 Pac. 691, 696; see *Union Pac. Ry. v. Artist* (Fed.) *supra* note 5, at p. 369. *Contra: Davin v. Kansas Benevolent Assoc.* (Kan.) *supra* note 4; see *Roosen v. Brigham Hosp.* (1920) 235 Mass. 66, 75, 126 N. E. 392, 397; see *Downs v. Harper Hosp.* (1894) 101 Mich. 555, 556, 60 N. W. 42, 43; *Duncan v. Neb. Benevolent Assoc.* (1912) 92 Neb. 162, 137 N. W. 1120; see *Wilson v. N. Y. Homoeopathic Hosp.* (N. Y.) *supra* note 7.

[22] The non-responsibility of the state (under the dogma that the "king can do no wrong") is in some part responsible for the non-responsibility of charitable corporations. This dogma has been severely criticized. Borchard, *Government Liability in Tort* (1924) 34 YALE LAW JOURNAL, 1 ff. But courts, nevertheless,

The Oklahoma case, *supra,* imposes the responsibility of any profit-making corporation.[23] This, it is submitted, best serves the welfare of society. The modern tendency, through various forms of insurance,—fire, accident, life, workmen's compensation acts, and the like—is to shift the burden from the innocent victim to the community.[24] The cases that adopt rules relieving charitable corporations from responsibility, wholly or in part, indicate the fear that any other policy will result in the disappearance of charities through the failure of donations and the dissipation of funds. Even if some reason for fear be admitted, a distinction should be drawn between private charities and those created and supported by the state. The public charity has the taxing power of the state to support it.[25] In England, Canada, and those states where absolute responsibility is imposed, these fears have hardly been realized. Under the present majority rules charitable institutions can with impunity allow their servants to be negligent towards patients. The cases sentimentalize much about the unfairness of subjecting the "Good Samaritan" to an action for damages.[26] The alternative is that those must suffer whom the charities were organized to benefit.

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instinctively, where a charity is created and supported by the state, free it from liability. See many cases in Borchard, *op. cit. supra,* at p. 25. Where it is *not* so created, but where its functions are of a "governmental nature," an analogy is drawn to support the same rule. *Fire Ins. Patrol v. Boyd* (Pa.) *supra* note 10. A charity may be technically private and still be in receipt of funds from the public treasury. It is thus impossible to say whether it is in fact public or private. *Gallon v. House of Good Shepherd* (Mich.) *supra* note 7. If its "objects" are "benevolent and charitable" the courts consider it a "charity" regardless of the source of its funds or the method of its creation. *Zoulalian v. N. E. Sanitarium* (Mass.) *supra* note 9. Purely private charities are thus often drawn in under the same rule. Some writers, however, attempt to treat private charities and agencies of the state on an entirely different footing, overlooking the fact that the cases do not seem to distinguish between the two classes, and that such distinction in fact is hardly possible. See Zollman, *op. cit. supra* note 11, at pp. 395, 397, 398.

[23] This case adopts the rule favored in the following jurisdictions: England: *Hillyer v. St. Bartholomew Hosp., supra* note 4; Canada: *Donaldson v. Gen'l Hosp.* (1890) 30 N. B. 279; United States: *Tucker v. Mobile Infirmary* (1915) 191 Ala. 572, 68 So. 4; *Mulliner v. Evangelischer, etc.* (1920) 144 Minn. 392, 175 N. W. 699; *Glavin v. R. I. Hosp.* (1879) 12 R. I. 411. This case was subsequently overruled by legislative enactment. R. I. Gen. Laws, 1896, p. 538. But see *Basabo v. Salvation Army* (1912) 35 R. I. 22, 43, 44, 85 Atl. 120, 129. See *Hewitt v. Woman's Assoc.* (1906) 73 N. H. 556, 565, 64 Atl. 190, 192.

[24] The modern tendency is also shown by growing agitation for some form of compulsory insurance to be taken out by owners of automobiles to pay damages to those injured in automobile accidents. See Marx, *The Curse of the Personal Injury Suit* (1924) 10 A. B. A. JOUR. 491.

[25] See Borchard, *Government Liability in Tort* (1925) 34 YALE LAW JOURNAL, 248.

[26] *Powers v. Mass. Homoeopathic Hosp.* (Fed.) *supra* note 2, at p. 304.

Addendum F

of Congress. As to the existence of a federal common law, however, authorities are as widely at variance as ever. The adherents of its existence from Du Ponceau down are at least equally matched by its opponents [see authorities collected in 63 N. W. R. 589, *supra*]. If, then, the existence of a federal common law is not firmly enough established to afford escape from the results of the doctrines of the principal cases, escape may still be found in controverting the view that the power to control interstate commerce, which was reserved to Congress by the Constitution, excludes, even before legislation, the State common law on the subject. There is a possibility that this contention may prevail.

The exclusiveness of the power of Congress to control depends, according to the test given in *Cooley* v. *Wardens*, 12 How. 299, on whether the nature of the matters to be controlled makes necessary a uniform rule throughout the States. Accordingly States may pass bankruptcy laws in the silence of Congress on the subject; but not statutes controlling interstate commerce [*Wabash Ry.* Co. v. *Illinois*, 118 U. S. 557]. The above test, at first thought final and confidently applied, has been more recently questioned, and the tendency of the United States Supreme Court is toward a greater hesitancy to discover the necessity of a uniform rule [2 Thayer's Cases on Const. Law, 2190, note]. In fact, though the last decided cases on the point are hostile to any control by the states of interstate commerce in the absence of congressional legislation, it would not be suprising to see the law circle back to the position taken by Matthews, J., in the case of *Smith* v. *Alabama*, 124 U. S. 465. He stated that the duties and liabilities of interstate carriers, before Act of Congress, are enforceable only under State common law, and "the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law." Certainly, the last word on this confused subject is far from said.

RECENT CASES.

AGENCY — INSURANCE POLICY ISSUED BY INTERESTED PARTY. — Defendant company's agent, who issued an insurance policy to the plaintiff corporation, was a stockholder and officer in that corporation. On that ground defendant company refused to pay plaintiff corporation's loss for the recovery of which this action is brought. *Held*, that the defendant company is justified in his refusal to be bound by the policy. *Green wood Ice & Coal Co.* v. *Georgia Home Ins. Co.*, 17 So. Rep. 83 (Miss.).

This decision seems clearly right and in accord with authority. *New York Central Ins. Co.* v. *National Protection Ins. Co.*, 14 N. Y. 85. The agent for the one party appears from the statement of facts to have been in effect the agent of the other also, and this relation of parties cannot exist, owing to the antagonistic interests represented. The exception made in the case of auctioneer's clerks does not apply here, as in that case the clerk is agent for a simple ministerial purpose, and it is a custom well understood by all parties concerned. In general, an agent for one party cannot act in the same transaction for the other party, and in such a case the contract is voidable. 1 Biddle on Insurance, § 497.

BANKS AND BANKING — INSOLVENCY OF COLLECTING BANK — TRUST FUNDS. — A bank received a note for collection and remittance, but, instead of remitting, credited its correspondent with the proceeds, and three days later failed. At the time of failure the cash on hand was less than the amount collected, but the receiver realized from the assets enough to pay all preferred claims. *Held*, plaintiff has a lien on cash on hand

at time of failure, but cannot come in as preferred creditor with respect to the amount since realized from the assets by the receiver. *Boone County Nat. Bank* v. *Latimer et al.*, 67 Fed. Rep. 27.

It is now pretty well settled that where trust property has been confused with other property of the same kind the equity is not destroyed, but converted into a charge upon the entire mass, giving the *cestui que trust* a prior right over other creditors. *Peters* v. *Bain*, 133 U. S. 693. But here the assets realized on by the receiver were not, in part or in whole, the product of the converted money, and the principle just stated has never been extended to allowing a priority against funds other than those with which the trust money was mixed. The case is clearly right on both points.

BILLS AND NOTES — NEGOTIABILITY. — A promissory note contained an agreement that if there should be any depreciation, before the maturity of the note, in collateral deposited to secure its payment, the payee or holder might call for further security, and if it were not furnished within two days, might sell the collateral and apply the proceeds towards extinguishing the note. *Held*, non-negotiable. There might be a payment of an uncertain sum before maturity, thus rendering the amount payable at maturity somewhat less than the amount specified on the face of the paper. *Lincoln Nat. Bank* v. *Perry*, 66 Fed. Rep. 887.

This decision is based on the principle that a note for an uncertain amount is non-negotiable. But, it is submitted, there is no uncertainty here as to amount; a definite sum, $5000, mus' be paid, and the only uncertainty is as to the time of payment, the holder having an option under certain circumstances to force payment of the whole or part before maturity. This option should not be held to destroy the negotiability of the note. The time of payment must certainly come, and an option in the maker to pay, or in the holder to enforce payment, before maturity, does not affect the negotiability of notes. *Jordan* v. *Tate*, 19 Ohio St. 586.

CONSTITUTIONAL LAW — BAR OF STATUTE OF LIMITATIONS — VESTED RIGHT. — A school district issued bonds that were declared void after the statute of limitations had run against the recovery of the original consideration. The Illinois Legislature passed an act giving holders of such bonds one year in which to sue for the recovery of their money. It was objected that this was a taking of property without due process of law within the meaning of the prohibition in the State constitution. *Held*, that the right to set up the bar of the statute of limitations as a defence to a debt was a vested right, and could not be suspended by the legislature. *Board of Education* v. *Blodgett*, 40 N. E. Rep. 1025 (Ill.).

The authorities are practically unanimous that a title to property acquired by the statute is a vested right. Cooley Const. Lim. (6th ed.) 448. In regard to the right to plead the statute as a def nce to a debt, the great authority of the United States Supreme Court is against it. *Campbell* v. *Holt*, 115 U.S. 620, 6 Supr. Ct. 209. So in Texas and Alabama *Bentinck* v. *Franklin*, 38 Tex. 458; *Jones* v. *Jones*. 18 Ala. 248. But in eighteen other American jurisdictions where the question has arisen a contrary result has been reached, as shown by the cases cited by the Illinois Court. It is a question scarcely to be argued according to any principle, and the present case follows the overwhelming weight of authority.

CONSTITUTIONAL LAW — VALIDITY OF A PARTLY UNCONSTITUTIONAL STATUTE. — *Held*, that where one entire scheme of taxation is provided for in certain sections of an act, so that to declare part of the tax unconstitutional, would leave in operation a tax which Congress would never have intended to stand alone, all the sections are invalid. *Pollock* v. *Farmers' Loan & Trust Co.*, 15 Sup. Ct. Rep. 912, 920.

The principle recognized in this "income tax" decision has long been well established; but the notoriety of the case due to the importance of the interests at stake, and the exceptional features that attended its course to a final decision in the Supreme Court of the United States, will probably make it a leading authority on the point. See 9 HARVARD LAW REVIEW, 198.

CONTRACTS — CERTIFICATE OF ARCHITECT. — *Held*, that, notwithstanding the stipulation in a building contract that prior to payment the architect's certificate must be obtained, the builders are entitled to the balance due on their account, although no certificate is obtained, the unsatisfied claims of sub-contractors being the only objection to granting certificate, although same had been provided for by builders to be paid out of the amount due. *Mahoney et al.* v. *Rector, etc. of St. Paul's Church*, 17 So. Rep. 484 (La.).

Such a stipulation as we find in a contract of this kind is an express condition, which the English courts enforce with logical rigor. The present case illustrates the general American rule, which is based on equitable grounds and followed in the different States, with varying degrees of leniency. The court here pronounces the objection

of the architect purely technical, unreasonable, and possibly the result of undue influence on the part of the defendant, although it does not deem the fact of collusion essential to its decision.

CONTRACTS — CONSIDERATION — SUCCESSIVE PROMISES OF SAME PERFORMANCE. *Held*, (1) the promise of a party to a contract to do, or the doing of, that which he is already bound to do, is not a good consideration for the promise of the other party to pay an additional sum; (2) a rescission of the former contract will not be inferred except where the party to whom the promise of an additional sum is made, has refused to perform because of difficulties in the way of performance not anticipated by the parties when the original contract was made; the difficulties encountered need not be such as to furnish a legal defence for non-performance. *King* v. *Ry. Co.*, 63 N. W. Rep. 1105 (Minn.).

The holding on the first point is thoroughly sound. *Bryant* v. *Lord*, 19 Minn. 396 at 404 *contra*. On the second point American courts have generally inferred a rescission of the original contract, from defendant's act in entering into the second agreement. The Minnesota Court refuses to make this inference of a rescission from the mere existence of the second agreement, except in a very narrow class of cases. Not even in this narrow class of cases, as it seems to us, does the defendant's part in making the second agreement indicate that he at any time intended to forego his right to require performance under the original contract. See 8 HARVARD LAW REVIEW, 27.

CONTRACTS — PARTNERSHIP — NOVATION. — A., B. and C. were partners and indebted to plaintiff. A. and B. bought out C., and as part of consideration agreed to assume debt to plaintiff. Plaintiff sued A. and B. for this debt, alleging in his declaration a request for the money and a refusal. Defendants demurred on ground of no privity of contract. *Held*, that while novation could only exist by consent of all the parties interested, yet plaintiff's assent was sufficiently shown by the alleged demand on the new firm and the institution of suit, which would operate as an estoppel of any claim against the old firm. *Tyson* v. *Somerville*, 17 So. Rep. 567 (Fla.).

While the question of whether there was a novation or not is properly for the jury, *Harris v. Farwell*, 15 Beav. 31; *Backus* v. *Fobes*, 20 N. Y. 204; yet when a new firm assumes the debts of its predecessor, slight circumstances will support the inference of the creditor's assent. *Shaw* v. *McGregory*, 105 Mass. 96; *Ex parte Williams*, Buck. 13. A demand on the new firm, followed by suit therefor, seems abundant evidence of assent, and the above decision quite right.

CONTRACTS — VALIDITY — CONSIDERATION. — The plaintiff was under an engagement to marry her present husband, when the defendant offered to pay her an annuity, provided the marriage took place within three months. *Held*, on the authority of *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159, that with the satisfaction of the terms of the offer, a valid contract arose. *Skeete* v. *Silberberg*, 11 *The Times* Law Rep. 491 (Q. B. Div., Wills, J.).

Although already bound by her engagement to perform a portion of the defendant's proviso, the plaintiff was under no obligation to marry before a reasonable time had elapsed, so that a marriage within three months leaves no difficulty regarding a detriment to the plaintiff in this case. Whether that detriment was suffered at the request of the defendant, whether compliance with his proviso is the thing in exchange for which his promise was given, or merely a condition to his gift, is the real point at issue. The truth should be gathered from all the circumstances, benefit to the promisor being well nigh determinative. The English Court, however, passes lightly over such debatable ground, merely recognizing as stronger than this the case of *Shadwell* v. *Shadwell*.

CRIMINAL LAW — HOMICIDE IN SELF-DEFENCE — DUTY TO RETREAT. — *Held*, that in case of felonious assault where assailant is killed, it is error to charge that if prisoner could have retreated safely, he should have done so. *Beard* v. *United States*, 15 U. S. Sup. Ct. Rep. 962. See NOTES.

CRIMINAL LAW — LARCENCY — CONSENT. — One Leech gave the prisoner a £ 10 note, both supposing it at the time to be a £1 note. A substantial period of time after this, the prisoner discovered the mistake and appropriated the whole of the note. *Held*, by five judges to four, that the prisoner was not guilty of larceny, as the taking was with the consent of Leach. *Reg.* v. *Hehir*, 29 Ir. L. T. 323. See NOTES.

CRIMINAL PROCEDURE — EFFECT OF ERRONEOUS SENTENCE. — Defendant was tried and convicted of a criminal offence, for which the District Court imposed a sentence different from that authorized by law. Defendant brought writ of error to the United States Circuit Court, where the judgment was reversed and the cause remanded. On objection to District Court's further jurisdiction in the matter, it was *held* that the

Court had power to resentence the prisoner notwithstanding that part of the void sentence had been executed. *United States* v. *Harmon*, 68 Fed. Rep. 472.

The effect at common law of the reversal of an erroneous sentence is a question upon which authorities have divided very evenly. The earlier and more orthodox view was that it discharged the prisoner completely. *Bourne* v. *Rex*, 7 A. & E. 58, 2, Nev. & P. 248; *Sumner* v. *Commonwealth*, 3 Cush. (57 Mass.) 521; *McDonald* v. *State*, 49 Md. 90; *Elliott* v. *People*, 13 Mich. 365; *Howell* v. *State*, 1 Or. 241; *State* v. *Child*, 42 Kan. 611; *People* v. *Taylor*, 3 Den. (N. Y.) 91. In England, Massachusetts, and New York this has now been changed by statute to correspond with the view of the principal case, which is also the common law ruling of *Kelly* v. *State*, 11 Miss. 518; *Terr* v. *Conrad*, 1 Dak. 363; *Beale* v. *Comm.* 25 Pa. 11; *People* v. *Riley*, 48 Cal. 549; *State* v. *Shaw*, 23 Iowa, 316; *Brown* v. *State*, 13 Ark. 96; *State* v. *Nicholson*, 14 La. 785. See also *Re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, controlling the principal case. The present tendency toward disregarding legal technicalities is likely to make cour s prefer the latter op nion where the point is yet open.

DAMAGES — EXEMPLARY ALLOWED IN CIVIL ACTIONS. — Defendant is sued in tort under a statute allowing suit by a wife for the wrongful sale of liquor to her husband. *Held*, exemplary damages should be awarded. *Mayer* v. *Frobe*, 22 S. E. Rep. 58 (W. Va.).

This decision overrules the cases of *Pegram* v. *Stortz*, 31 W. Va. 220, and *Beck* v. *Thompson*, 31 W. Va. 459, in so far as they hold that exemplary damages in a proper case, cannot be inflicted by way of punishment in a civil suit upon a wrongdoer, and places West Virginia among the list of States which allow exemplary damages.

DAMAGES — UNLAWFUL EXPULSION OF PASSENGER. — Plaintiff was evicted from a car because he would not pay his fare instead of his ticket, which the conductor thought bad. Plaintiff resisted. The ticket proved good, and plaintiff now sues the company and claims to recover damages for a nervous disorder brought on because of the force used by the conductor in overcoming plaintiff's resistance. *Held*, that plaintiff can recover damages for the injury, though caused by his resistance, because he rightly resisted. *Pittsburgh C., C. & St. L. Ry. Co.* v. *Russ*, 67 Fed. Rep. 662.

This decision rendered by the Circuit Court for the District of Indiana is manifestly fair, provided the plaintiff does not resist a wrong ul expulsion for the express purpose of increasing the amount of damages. The conductor committed a trespass in putting him off the train. If the plaintiff resists too much, then t e conductor may have an action for assault against him, but plaintiff's action will still remain, and the conductor be responsible for all natural consequences. In the case at bar no such unreasonable resistance was made, and the injury to the plaintiff was, as resistance was rightful, the natural consequence of the conductor's act. 2 Sedgwick on Damages, 865.

EQUITY — PARTNERSHIP — RIGHTS OF CREDITORS. — X, one of the partnership creditors, held a mortgage security for the payment of his claim, executed by one member of the firm and his wife on the property of the latter, who was in no way connected with or responsible for the partnership debts other than by the execution of this mortgage. *Held*, that X could not be compelled to first resort to his mortgage security and thus leave the partnership assets to the other creditors. *State Bank of Florida* v. *Roche et al.*, 17 S. E. Rep. 652 (Fla.).

It is a well established rule in Equity that where one creditor holds security on two funds, with liberty to resort to either, and another creditor has a junior security on only one of the funds, the former will be compelled to exhaust the fund which he alone can reach before resorting to the other fund. *Cheesborough* v. *Millard*, 1 Johns Ch. 409. In the principal case the court limits the rule and refuses to apply it where the effect would be to prejudice the rights of a third party. This limitation is an equitable one and supported by authority. *McCloskey* v. *O'Brien*, 16 W. Va. 791; *McArthur* v. *Martin*, 23 Minn. 74; *Aldrich* v. *Cooper*, 2 W. and T. Leading Cases in Equity, 82.

EVIDENCE — DECLARATIONS OF INTENTION — RES GESTA. — In an action for breach of contract of marriage, the plaintiff's intention, as showing consent on her part to the contract, was material. She offered evidence of a statement by her, that she was going to be married in October. *Held*, that it was not admissible because not part of the *res gestæ*. *Wilson* v. *Smelser*, 41 N. F. Rep. 76 (Ind.). See NOTES.

EVIDENCE — PHYSICIAN'S TESTIMONY. — Defendant-in-error told his physician that at the time of his injury he was leaning over the edge of a car-top. *Held*, that physician might give the statement in evidence, for it was not a communication made by a patient with reference to any physical disease nor know edge obtained by a personal examination of the patient, and as such privileged by the Kansas Code. *Kansas City, etc., R. R. Co.* v. *Murray*, 40 Pac. Rep. 646 (Kan.).

Communications are variously protected by statutes in the different States; but in any case, the courts are not disposed to protect communications unsuited to aid the physician in treating the patient. In the case of *Cooley* v. *Foltz*, 85 Mich. 47, a physician was allowed to testify that the plaintiff, on employing him, told him that she should need him as a witness. In N. Y., too, where the tendency of the courts has been to construe the privilege broadly as covering all communications to physicians made in the course of professional treatment, the case of *Hoyt* v. *Hoyt*, 112 N. Y. 493, 515, per Gray, J., points towards the more general doctrine. In that case, the testator's opinion of plaintiff's sanity communicated to his attending physician, was admitted in evidence.

EVIDENCE — PHYSICIAN'S TESTIMONY. — A physician who had treated the defendant, testified that the defendant told him that a piece of a nail had come out of his knee. No question of privilege of communications to a physician was involved. *Held*, that the evidence was hearsay and inadmissible. *B. & A. R. Co.* v. *O'Reilly*, 15 Sup. Ct. Rep. 830.

The decision is undoubtedly correct; but the case is to be sharply distinguished from those cases in which it is sought to introduce a patient's statements to his physician, not as evidence of the facts stated, but as evidence of the grounds on which the physician bases his opinion of the patient's condition. There is authority for admitting such statements for the latter purpose. *Barber* v. *Merriam*, 11 Allen, 322.

EVIDENCE — PRESUMPTION OF FAULT. — *Held*, that where one vessel is clearly shown guilty of a fault adequate to account for a collision, there is a presumption raised that the other vessel is free from contributing fault until rebutted by clear proof to the contrary. *The Oregon*, 15 Sup. Ct. Rep. 804.

The presumption laid down here is not new; it is stated in substantially the same way in 1 Parsons on Shipping and Admiralty, 529, in 5 How. 441, 465, and in Olcott Adm. 132, 138. The striking feature about the presumption — one not expressly noticed in the earlier cases — is the amount of evidence necessary to overcome it. It is not enough for the vessel whose fault is sufficient to account for the collision "to raise a doubt with regard to the management of the other vessel . . . and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." *The City of New York*, 147 U. S. 72, 85. The weight of the presumption entitles it to rank with the familiar presumptions of innocence and legitimacy.

EVIDENCE — SHOP-BOOKS — ORIGINAL ENTRIES. — Where a shop-keeper enters sales of goods on loose slips of paper, which items are transferred in the evening to a ledger, if these items consist merely of a general charge of merchandise and the amount for which it sold, *held*, such a ledger is inadmissible as a book of original entries. *Way et al.* v. *Cross et al*, 63 N. W. Rep. 691 (Iowa).

The Court appears to lay down a narrower rule than is held in many jurisdictions. It would not generally be held fatal to the admission of a shop-book that the entries did not specify the kind of goods purchased. A shop-book has been held admissible in Massachusetts, although the item for which it was put in contained neither measure, weight, nor quantity. *Pratt* v. *White*, 132 Mass. 477. Books which contain nothing more than marks or figures have been held admissible if other evidence is forthcoming which can explain these and show their connection with the main transaction. *Miller* v. *Shay*, 145 Mass. 162. The fact that the book offered in evidence is kept in ledger form, and that the entries have been posted each evening from memoranda made elsewhere during the day, has been also held not to bar its admissibility. *Faxon* v. *Hollis*, 13 Mass. 42.

INTERSTATE COMMERCE — STATE CONTROL. — Where a carrier has received excessive rates for carriage of goods from one State to another under a contract made before the enactment of the Interstate Commerce Law, *held*, that he cannot be compelled to refund the excess over a reasonable charge. *Catton* v. *C., K. I. & P. R. Co.*, 63 N. W. Rep. 589 (Iowa). See NOTES.

PERSONS — DIVORCE — CRUELTY. — Petition by the husband for divorce, on the ground of extreme cruelty, the wife having repeatedly accused him both in public and private of having committed sodomy. *Held*, that to constitute legal cruelty there must be a reasonable apprehension of danger, present or proximate, to life, limb, or health (Rigby, L. J., dissenting). *Russell* v. *Russell*, 11 *The Times* Law Rep. 579. (Court of Appeal).

The above doctrine of legal cruelty was approved in *Evans* v. *Evans*, 1 Hag. Con. 38 (1790), and has been closely followed ever since by the English Courts, the Courts having "always been jealous of the inconvenience of departing from it." Justice

Rigby's dissenting opinion is a strong argument for a relaxation of the doctrine, on the ground that a series of verbal indignities are capable of amounting to legal cruelty, independently of violence. In United States many of the courts have broken away from the physical injury test, and have granted relief in cases where there was no actual violence, by a more liberal interpretation of legal "cruelty." *Rosenfeld* v. *Rosenfeld*, 40 Pac. Rep. 49 (Col.) (Mere words); *Barnes* v. *Barnes*, 95 Cal. 171 (Facts almost identical with principal case); *Straus* v. *Straus*, 67 Hun, 491; *Palmer* v. *Palmer*, 45 Mich. 150; *Scoland* v. *Scoland*, 4 Wash. 118. See also *Robinson* v. *Robinson*, 66 N. H. 600, for a very able review of the subject by Judge Carpenter.

PERSONS — MARRIAGE OF SLAVES — EFFECT OF EMANCIPATION. — Plaintiff and one Henrietta Coleman, while slaves, began living together as husband and wife, a valid marriage being prohibited to them. After emancipation, they continued to cohabit until the death of the wife in 1894, but no legal marriage ceremony was ever performed. Before Henrietta's death she conveyed to defendant certain property, in executing the deeds of which plaintiff had not joined. He sued to recover this property. *Held*, plaintiff and his wife by continuing to cohabit after emancipation ratified the marriage relation, of which they were before legally incapable, and thus established a valid marriage between themselves. The wife was then incapable of conveying real estate alone. *Coleman* v. *Vollmer*, 31 S. W. Rep. 413 (Tex.).

This decision is in strict accordance with the opinion of Mr. Bishop (1 Bishop, Mar., Div., and Sep., §§ 660-669), who thinks that a slave marriage, being deemed good by custom so far as it did not conflict with the master's rights, could be affirmed or disaffirmed by the parties without further formality when emancipated. North Carolina is the only State in which a different view has been upheld. *Howard* v. *Howard*, 6 Jones, 235.

PROPERTY — ACCRETIONS — DEMURRER UPON EVIDENCE. — Plaintiff's land was a government patent bordering on the Missouri River. The river gradually changed its course until the main channel flowed over what had once been the plaintiff's land. An island then formed within the original limits of the patent. *Held*, on demurrer upon evidence that plaintiff had no title to the island. (Brace, C. J., dissenting.) *Cox* v. *Arnold*, 31 S. W. Rep. 592 (Mo.).

This seemingly harsh case finds its explanation in the rule that in the large western rivers the fee in the bed belongs to the State, and that adjacent land granted by the United States is bounded by the bank of the river. As all gradual accretions to the bank would accrue to the benefit of the riparian owner, he must take the opposite risk and yield to the State the fee of land gradually submerged. An island formed over this new bed would come within the general rule as to islands in navigable western streams, and would go to the State. Gould on Waters, §§ 42, 76.

PROPERTY — BOUNDARIES — COURSES AND DISTANCES. — The decision in an action of ejectment depended on the construction of a deed granting 10,240 acres, describing the boundaries as follows: "Beginning at a birch-tree and running south 360 chains to a stake supposed to be in D's line, and thence . . . " If the line was run south 360 chains, it would still be one mile and a quarter from D's line, where the stake was supposed to be. *Held*, the line should not be extended, but stop at a distance of 360 chains from the birch-tree. *Brown* v. *House*, 21 S. E. Rep. 938 (N. C.).

The decision seems sound. The court admits that natural objects or monuments govern courses and distances as a general rule, but say that the reason of the rule fails to apply here as the monument, "a stake supposed to be in D's line," is too indefinite, and would call for too great an extension of the line from the birch-tree. They also give weight to the fact that the area will be much nearer 10,240 acres if the course and distance govern. This is an argument for allowing course and distance to prevail, especially where the boundaries are as doubtful as in the case at bar. 3 Gray's Cases on Prop., 285, *et seq.*

PROPERTY — EMINENT DOMAIN — PUBLIC USE. — Plaintiff railway company sought to condemn, for its proposed road-bed, an unused portion of defendant railroad company's right of way. The proposed railroad, when built, would be used mainly by a few mine-owners, and but little by the public in general. From a judgment below, in favor of plaintiff, defendant appeals. *Held*, under the Constitution, Art. 15, § 5, the proposed road would be a public carrier, and the public would, therefore, have a right to use its facilities; the character of a road, whether public or private, is to be determined by the extent of the right to use it, and not by the extent to which that right will be exercised. *B., A. & P. Ry. Co.* v. *Montana Union Ry. Co.*, 41 Pac. Rep. 232 (Montana).

The point here decided is well established. Randolph on Eminent Domain, § 56; Lewis on Eminent Domain, § 171. The opinion contains a rather interesting discus-

sion — unnecessary for the decision of the case at bar — as to the interpretation of the term public use in connection with the law of Eminent Domain.

PROPERTY — INNKEEPER'S LIEN — GOODS OF THIRD PARTY. — *Held*, that an innkeeper has a lien on all the baggage of a guest which he is bound to take in, even where he has notice that it is not the property of the guest. *Robins & Co.* v. *Gray*, 11 *The Times*, Law Rep. 569. See NOTES.

SALES — RETENTION OF POSSESSION BY VENDOR. — Plaintiff, an indorser on a note made by a shoe company, bought from the company a lot of goods in return for a promise to assume the note. The company was allowed to keep possession of the goods; later it became insolvent. Plaintiff recovered in detinue against the assignee. The lower court sat without a jury, and the upper court affirmed the judgment. *King* v. *Levy*, 22 S. E. Rep. 492 (Va.).

Here is another refreshing stand against the doctrine that retention of possession by the vendor is fraud in law. The doctrine, however, has a hold in over one-third of the American jurisdictions. See Bennett's note in Benjamin on Sales, 6th ed., 458.

TORTS — DEATH BY WRONGFUL ACT — SURVIVAL OF ACTIONS. — *Held*, an administrator cannot maintain two actions for negligence resulting in death, — one as trustee for next of kin of deceased under Lord Campbell's Act, and another for damage to the person of deceased under a statute for the survival of actions. *Lubrano* v. *Atlantic Mills*, 32 Atl. Rep. 205 (R. I.).

In general a person may sue in different capacities to obtain redress for the same wrongful act. Freeman on Judgments, § 235 *a*, Black on Judgments, §§ 536, 745. The construction of the act for survival, that it is intended to embrace only damages to the person other than those which result in death, and that it was not intended to give a remedy additional to Lord Campbell's Act, has been the construction commonly given to similar statutes in other States. See cases cited in the opinion. In Massachusetts, however, both actions may be maintained. *Bowes* v. *City of Boston*, 155 Mass. 344.

TORTS — DECEIT — HONEST INTENTIONS. — Defendant wrote a letter which would be reasonably understood to warrant a certain title unencumbered. Plaintiff sustained loss by relying upon this interpretation of the letter. *Held*, that defendant might prove in defence that its letter was intended to convey a different meaning. *Nash* v. *Minnesota Title Insurance and Trust Co.*, 40 N. E. Rep. 1039 (Mass.). See NOTES.

TORTS — LEGAL DUTIES. — *Held*, that in an action against a railroad company for an injury received through negligence an action of tort lies, whether a contract exist or not, or whether it be negligence of commission or omission. *Kelly* v. *Railway*, [1895] 1 Q. B. 944. See NOTES.

TORTS — NEGLIGENCE — DUTY TO THIRD PARTIES. — Defendant placed an elevator on trial in the building where plaintiff was an employee. Before it was accepted by his employer, and while still under supervision of the defendant, owing to its defective and improper construction, the elevator fell, severely injuring the plaintiff, who was near by *Held*, that, there being no contractual relation between the parties, nor any invitation by defendant to plaintiff, there was no liability on his part. *Zeeman* v. *Kieckheffer Elevator Mnfg. Co.*, 63 N. W. Rep. 1021 (Wis.).

While the court in this case seems clearly right in denying liability on the grounds of contract or invitation, it seems as clearly wrong in denying liability on other grounds. The defendant in building the elevator owed it as a duty to all persons rightfully in the building that it should be properly and safely erected. This it confessedly was not, to the damage of the plaintiff, for which damage the defendant's breach should render him liable. Recourse need not be had to the extreme doctrine of *Blood Balm Co.* v. *Cooper*, 83 Ga. 457, to support this decision which seems to follow from the general doctrine of liability for negligent injury.

TRUSTS — BEQUEST — CHARITABLE TRUST. — *Held*, that a bequest of a fund to a yacht-racing association to apply the income to purchase annually a cup "to be presented to the most successful yacht," etc., is void. It is not a charitable trust. *In re Nottage, Jones* v. *Palmer*, 11 *The Times* Law Rep. 519 (Court of Appeal).

The case presents an interesting and novel question. The object of the testator was "to encourage the sport of yacht-racing;" and the court based their decision on the ground that if there was any benefit to the community at large, it was too remote to warrant their establishing the gift as a charitable trust.

TRUSTS — CHARITIES. — *Held*, societies for the suppression of vivisection of animals are charities within the technical sense in which the term charity is used in law. 11 *The Times* Law Rep. 540. (Chan. Div., Chitty, J.)

If these societies had for their object merely the protection of the lower animals, though they might be benevolent, they could hardly be called philanthropic, or charitable. But the court considered that the advancement of morals among men was also involved in their object, and that they were therefore brought within the term charity. So, a Society for the Prevention of Cruelty to Animals, a Home for Lost Dogs, a Society for Protection of Animals liable to Vivisection, (35 Ch. D. 472), and an institution for studying and curing diseases of beasts and birds useful to man, (1 De G. & Jo. 72), have been held charitable.

TRUSTS — FRAUDULENT SALE — FOLLOWING PROCEEDS. — Plaintiff was induced by the fraud of B to sell him sugar on credit. B resold on credit and later made an assignment for the benefit of creditors. Plaintiff then, on discovering the fraud, sued B's assignee for the proceeds of the resales. The particular proceeds could be identified. *Held*, plaintiff has an equitable lien on the proceeds. *American Sugar-Refining Co.* v. *Fancher*, 40 N. E. Rep. 206 (N. Y.).

The case is interesting as involving a constructive trust of the proceeds of personal property, where the trustee was neither a fiduciary nor a wrongdoer who lacked title *ab initio*. The trust was, however, properly implied because of the fraud, and equity "makes use of the machinery of a trust for the purpose of affording redress in cases of fraud." Bispham on Equity, § 91. Given the trust, the proceeds, if identified, can be followed. *Newton* v. *Porter*, 69 N. Y. 133.

REVIEWS.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By Seymour D. Thompson, LL. D. San Francisco: Bancroft-Whitney Co. 1895. 8vo. 6 vol.

It is unsatisfactory to make comment upon a work of such importance and magnitude as Thompson on Corporations, before the work is given to the public in its completeness; for any judgment passed on the scope and thoroughness of the treatment of the Law of Corporations, when two of the six volumes have yet to appear, must necessarily lack finality. Therefore it has been deemed best to postpone consideration of this publication until it can be reviewed as a whole. The last volume is announced for publication in November.

MUNICIPAL HOME RULE. A Study in Administration. By Frank J. Goodnow, A. M., LL. B., Professor of Administrative Law in Columbia College. New York and London: Macmillan & Co. 1895. 8vo. pp. xxiv, 283.

The only objectionable thing about this book is its title, which gives no adequate idea of the nature or value of the contents. The author has given the reader not only a thoughtful treatise on the proper sphere of municipal action, but also an admirable summary of the present state of the law. There is no other book which contains so valuable a statement, in so small a space, of the law on certain elementary points relative to municipal corporations. Chapters VI. to XI. (both inclusive) fully justify the hope modestly expressed in the Preface, that the book may be useful from the legal as well as from the political point of view. These chapters discuss the liability of municipal corporations for torts, and the degree of protection afforded to municipal property by the constitutional provisions respecting private property. This part of the book forms an admirable introduction to what Professor Goodnow aptly terms the "great work" of

Addendum G

A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

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SIXTH EDITION,

WITH LARGE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES,

By ALEXIS C. ANGELL,

OF THE DETROIT BAR.

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CHAPTER XI.

OF THE PROTECTION TO PROPERTY BY "THE LAW OF THE LAND."

THE protection of the subject in the free enjoyment of his life, his liberty, and his property, except as they might be declared by the judgment of his peers or the law of the land to be forfeited, was guaranteed by the twenty-ninth chapter of Magna Charta, "which alone," says Sir William Blackstone, "would have merited the title that it bears of the *Great* Charter." [1] The people of the American States, holding the sovereignty in their own hands, have no occasion to exact pledges from any one for a due observance of individual rights; but the aggressive tendency of power is such, that they have deemed it of no small importance, that, in framing the instruments under which their governments are to be administered by their agents, they should repeat and re-enact this guaranty, and thereby adopt it as a principle of constitutional protection. In some form of words, it is to be found in each of the State constitutions; [2] and though verbal differences

[1] 4 Bl. Com. 424. The chapter, as it stood in the original charter of John, was: "Ne corpus liberi hominis capiatur nec imprisonetur nec disseisietur nec utlagetur nec exuletur, nec aliquo modo destruatur, nec rex eat vel mittat super eum vi, nisi per judicium parium suorum, vel per legem terræ." No freeman shall be taken or imprisoned or disseised or outlawed or banished, or any ways destroyed, nor will the king pass upon him, or commit him to prison, unless by the judgment of his peers, or the law of the land. In the charter of Henry III. it was varied slightly, as follows: "Nullus liber homo capiatur vel imprisonetur, aut disseisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terræ." See Blackstone's Charters. The Petition of Right — 1 Car. I. c. 1 — prayed, among other things, "that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent, by act of Parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command, without any charge." The Bill of Rights — 1 Wm. and Mary, § 2, c. 2 — was confined to an enumeration and condemnation of the illegal acts of the preceding reign; but the Great Charter of Henry III. was then, and is still, in force.

[2] The following are the constitutional provisions in the several States: —

Alabama: "That, in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, or be deprived of his life, liberty, or property, but by due course of law." Art. 1, § 7. — *Arkansas:* "That no person shall . . . be deprived of his life, liberty, or property, without due process of law." Art. 1, § 9. — *California:* Similar to that of Alabama. Art. 1, § 8. — *Connecticut:* Same as Alabama, Art. 1, § 9. — *Delaware:* Like that of Alabama, substituting for "course of law," "the judgment of his peers, or the law of the land." Art. 1,

appear in the several provisions, no change in language, it is thought, has in any case been made with a view to essential change in legal effect; and the differences in phraseology will not, therefore, be of importance in our discussion. Indeed, the language employed is generally nearly identical, except that the phrase "due process [or course] of law" is sometimes used, sometimes "the law of the land," and in some cases both; but the meaning is the same in every case.[1] And, by the fourteenth amendment, the guaranty is now incorporated in the Constitution of the United States.[2]

§ 7. — *Florida:* Similar to that of Alabama. Art. 1, § 9. — *Georgia:* "No person shall be deprived of life, liberty, or property, except by due process of law." Art. 1, § 3. — *Illinois:* "No person shall be deprived of life, liberty, or property, without due process of law." Art. 1. § 2. — *Colorado:* The same. Art. 1, § 25 — *Iowa:* The same. Art. 1, § 9 — *Kentucky:* "Nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." Art. 13, § 12 — *Maine:* "Nor be deprived of his life, liberty, property, or privileges, but by the judgment of his peers, or the law of the land." Art. 1, § 6. — *Maryland:* "That no man ought to be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Declaration of Rights, § 23. — *Massachusetts:* "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Declaration of Rights, Art. 12. — *Michigan:* "No person shall . . . be deprived of life, liberty, or property, without due process of law." Art. 6, § 32 — *Minnesota:* Like that of Michigan. Art. 1, § 7. — *Mississippi:* The same. Art. 1, § 2. — *Missouri:* Same as Delaware. Art. 1, § 18. — *Nevada:* "Nor be deprived of life, liberty, or property, without due process of law." Art. 1, § 8. — *New Hampshire:* Same as Massachusetts. Bill of Rights, Art. 15. — *New York:* Same as Nevada. Art. 1, § 6. — *North Carolina:* "That no person ought to be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." Declaration of Rights, § 17. — *Pennsylvania:* Like Delaware. Art. 1, § 9 — *Rhode Island:* Like Delaware. Art. 1, § 10. — *South Carolina:* Like that of Massachusetts, substituting "person" for "subject." Art. 1, § 14 — *Tennessee:* "That no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Art. 1, § 8. — *Texas:* "No citizen of this State shall be deprived of life, liberty, property, or privileges, outlawed, exiled, or in any manner disfranchised, except by due course of the law of the land." Art. 1, § 16. — *West Virginia:* "No person, in time of peace, shall be deprived of life, liberty, or property, without due process of law." Art. 2, § 6. Under each of the remaining constitutions, equivalent protection to that which these provisions give is believed to be afforded by fundamental principles recognized and enforced by the courts.

[1] 2 Inst. 50; Bouv. Law Dic. "Due process of Law," "Law of the land;" State *v.* Simons, 2 Speers, 767; Vanzant *v.* Waddell, 2 Yerg. 260; Wally's Heirs *v.* Kennedy, 2 Yerg. 554; s. c. 24 Am. Dec. 511; Greene *v.* Briggs, 1 Curt. 311; Murray's Lessee *v.* Hoboken Land Co., 18 How. 272, 276, per *Curtis*, J.; Parsons *v.* Russell, 11 Mich. 113, 129, per *Manning*, J.; Ervine's Appeal, 16 Pa. St. 256; Banning *v.* Taylor, 24 Pa. St. 289, 292; State *v.* Staten, 6 Cold. 244; Huber *v.* Reily, 53 Pa. St. 112.

[2] See *ante*, p. 14.

If now we shall ascertain the sense in which the phrases "due process of law" and "the law of the land" are employed in the several constitutional provisions which we have referred to, when the protection of rights in property is had in view, we shall be able, perhaps, to indicate the rule, by which the proper conclusion may be reached in those cases in which legislative action is objected to, as not being "the law of the land;" or judicial or ministerial action is contested as not being "due process of law," within the meaning of these terms as the Constitution employs them.

If we examine such definitions of these terms as are met with in the reported cases, we shall find them so various that some difficulty must arise in fixing upon one which shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising, when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another.

Perhaps no definition is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land."[1]

The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they "proceed upon inquiry" and "render judgment only after trial." It is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land. "The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction

[1] Dartmouth College *v.* Woodward, 4 Wheat. 519; Works of Webster, Vol. V. p. 487. And he proceeds: "If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" [1] When the law of the land is spoken of, "undoubtedly a pre-existing rule of conduct" is intended, "not an *ex post facto* rescript or decree made for the occasion. The design" is "to exclude arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute." [2] There are nevertheless many cases in which the title to property may pass from one person to another, without the intervention of judicial proceedings, properly so called;

[1] Per *Bronson*, J., in Taylor *v.* Porter, 4 Hill, 140, 145. See also Jones *v.* Perry, 10 Yerg. 59; s. c. 30 Am. Dec. 430; Ervine's Appeal, 16 Pa. St. 256; Arrowsmith *v.* Burlingim, 4 McLean, 489; Lane *v.* Dorman, 4 Ill. 238; Reed *v.* Wright, 2 Greene (Iowa), 15; Woodcock *v.* Bennett, 1 Cow. 711; Kinney *v.* Beverley, 2 H. & M. 536; Commonwealth *v.* Byrne, 20 Gratt. 165; Rowan *v.* State, 30 Wis. 129; s. c. 11 Am. Rep. 559. "Those terms, 'law of the land,' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life, without crime? Yet all this he may suffer if an act of the assembly simply denouncing those penalties upon particular persons, or a particular class of persons, be in itself a law of the land within the sense of the Constitution; for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts. In reference to the infliction of punishment and divesting the rights of property, it has been repeatedly held in this State, and it is believed in every other of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode, and usages of the common law, as derived from our forefathers, are not effectually 'laws of the land' for those purposes." Hoke *v.* Henderson, 4 Dev. 15; s. c. 25 Am. Dec. 677. In Bank of Michigan *v.* Williams, 5 Wend. 478, 486, Mr. Justice *Sutherland* says, vested rights "are protected under general principles of paramount, and, in this country, of universal authority." Mr. Broom says: "It is indeed an essential principle of the law of England, 'that the subject hath an undoubted property in his goods and possessions; otherwise there shall remain no more industry, no more justice, no more valor; for who will labor? who will hazard his person in the day of battle for that which is not his own?' The Banker's Case, by *Turnor*, 10. And therefore our customary law is not more solicitous about anything than 'to preserve the property of the subject from the inundation of the perogative.' Ibid." Broom's Const. Law, 228.

[2] *Gibson*, Ch. J., in Norman *v.* Heist, 5 W. & S. 171, 173. There is no power which can authorize the dispossession by force of an owner whose property has been sold for taxes, without giving him opportunity for trial. Calhoun *v.* Fletcher, 63 Ala. 574.

and in preceding pages it has been shown that special legislative acts designed to accomplish the like end, are allowable in some cases. The necessity for "general rules," therefore, is not such as to preclude the legislature from establishing special rules for particular cases, provided the particular cases range themselves under some general rule of legislative power; nor is there any requirement of judicial action which demands that, in every case, the parties interested shall have a hearing in court.[1]

On the other hand, we shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land. Mr. Justice *Edwards* has said in one case: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."[2] And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following, from an opinion by Mr. Justice *Johnson* of the Supreme Court of the United States: "As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, — that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained

[1] See Wynehamer *v.* People, 13 N. Y. 378, 432, per *Selden*, J. In Janes *v.* Reynolds, 2 Tex. 250, Chief Justice *Hemphill* says: "The terms 'law of the land' . . are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." And see Vanzant *v.* Waddell, 2 Yerg. 260, per *Peck*, J.; Hard *v.* Nearing, 44 Barb. 472. Nevertheless there are many cases, as we have shown, *ante*, pp 116, 128, in which private laws may be passed in entire accord with the general public rules which govern the State; and we shall refer to more cases further on.

[2] Westervelt *v.* Gregg, 12 N. Y. 202, 209 See, also, State *v.* Staten, 6 Cold. 233; McMillen *v.* Anderson, 95 U. S. 37; Pearson *v.* Yewdall, 95 U. S. 294; Pennoyer *v.* Neff, 95 U. S. 714; Davidson *v.* New Orleans, 96 U. S. 97; and cases in notes pp. 15, 16, *ante*, in which the true meaning of due process of law is considered. Also San Mateo County *v.* Southern Pacific R R. Co., 13 Fed. Rep. 722.

by the established principles of private rights and distributive justice."[1]

The principles, then, upon which the process is based are to determine whether it is "due process" or not, and not any considerations of mere form. Administrative and remedial process may be changed from time to time, but only with due regard to the landmarks established for the protection of the citizen.[2] When the government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have become established in our system of laws, and not generally by rules that pertain to forms of procedure merely. In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession;[3] but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[4]

[1] Bank of Columbia *v.* Okely, 4 Wheat. 235, 244. "What is meant by 'the law of the land'? In this State, taking as our guide Zylstra's Case, 1 Bay, 382; White *v.* Kendrick, 1 Brev. 469; State *v.* Coleman & Maxcy, 1 McMull. 502, there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of our constitution. Altogether they constitute a body of law prescribing the course of justice to which a free man is to be considered amenable for all time to come." Per *O'Neill*, J., in State *v.* Simons, 2 Speers, 761, 767. See, also, State *v.* Doherty, 60 Me. 509. It must not be understood from this, however, that it would not be competent to change either the common law or the statute law, so long as the principles therein embodied, and which protected private rights, were not departed from.

[2] Hurtado *v.* California, 110 U. S. 516.

[3] Vanzant *v.* Waddell, 2 Yerg. 260; Lenz *v.* Charlton, 23 Wis. 478; Pennoyer *v.* Neff, 95 U. S. 714.

[4] See Wynehamer *v.* People, 13 N. Y. 378, 432, per *Selden*, J.; Kalloch *v.* Superior Court, 56 Cal. 229; Baltimore *v.* Scharf, 54 Md. 499. In State *v.* Allen, 2 McCord, 56, the court, in speaking of process for the collection of taxes, say: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" To the same effect are *In re* Hackett, 53 Vt. 354; Weimer *v.* Bunbury, 30 Mich. 201. And see Hard *v.* Nearing, 44 Barb. 472; New Orleans *v.* Cannon, 10 La. Ann. 764; McCarrol *v.* Weeks, 5 Hayw. 246; Sears

Private rights may be interfered with by either the legislative, executive, or judicial department of the government. The executive department in every instance must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action. Elsewhere we shall consider the police power of the State, and endeavor to show how completely all the property, as well as all the people within the State, are subject to control under it, within certain limits, and for the purposes for which that power is exercised. The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions divesting individuals of their property against their will, and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid; and in other cases property can only be taken for the support of the government, and each citizen can only be required to contribute his proportion to that end. But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment.[1] The purpose must be public, and must have

v. Cottrell, 5 Mich. 250; Gibson *v.* Mason, 5 Nev. 283. The fourteenth amendment has not enlarged the meaning of the words "due process of law." Whatever was such in a State before that amendment, is so still. Hence, a statute is good which allows execution on judgments against a town to be levied on the goods of individual inhabitants. Eames *v.* Savage, 77 Me. 212. Taking property under the taxing power is due process of law. Davidson *v.* New Orleans, 96 U. S. 97; Kelly *v.* Pittsburgh, 104 U. S. 78; High *v.* Shoemaker, 22 Cal. 363. See, also, Cruikshanks *v.* Charleston, 1 McCord, 360; State *v.* Mayhew, 2 Gill, 487; Harper *v.* Commissioners, 23 Ga. 566; Myers *v.* Park, 8 Heisk. 550. So is the seizure and sale under proceedings prescribed by law, of stray beasts. Knoxville *v.* King, 7 Lea, 441; Hamlin *v.* Mack, 33 Mich. 103; Stewart *v.* Hunter, 16 Oreg. 62. That the owner should have notice of the sale, see Varden *v.* Mount, 78 Ky. 86. An act allowing an agent of a humane society to condemn and kill an animal and fix its value conclusively without notice is not due process of law. King *v.* Hayes, 80 Me. 206. But a health officer may be empowered to kill a diseased beast, if the owner may afterwards contest the existence of conditions which made the beast a nuisance, and obtain redress, if such conditions are not shown to have existed. Newark & S. O. Co. *v.* Hunt, 50 N. J. L. 308. It is no violation of this principle to exclude from the State debauched women who are being imported for improper purposes. Matter of Ah Fook, 49 Cal. 403.

[1] Lebanon Sch. Dist. *v.* Female Sem.,

reference to the needs or convenience of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights.[1]

Nevertheless, in many cases and many ways remedial legislation may affect the control and disposition of property, and in some cases may change the nature of rights, give remedies where none existed before, and even divest legal titles in favor of substantial equities where the legal and equitable rights do not chance to concur in the same persons.

The chief restriction upon this class of legislation is, that vested rights must not be disturbed; but in its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions, and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm."[2]

12 Atl. Rep. 857 (Pa.); People *v.* O'Brien, 111 N. Y. 1. The latter case is with reference to the transfer to a receiver of the assets of a dissolved corporation. It is not competent to provide that the claimant or purchaser of property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer, and confined to his action on the bond as his only remedy. Foule *v.* Mann, 53 Iowa, 42; Sunberg *v.* Babcock, 61 Iowa, 601. See, also, Ehlers *v.* Stoeckle, 37 Mich. 261. *Contra*, Hein *v.* Davidson, 96 N. Y. 175. Compare Dodd *v.* Thomas, 69 Mo. 364. A lien may be created by statute in favor of a laborer for a contractor, as against the owner of logs, between whom and the laborer there is no privity of contract. Reilly *v.* Stephenson, 62 Mich. 509. But such laborer may not enforce a lien in spite of any contract between the contractor and owner, or of payment by the latter. John Spry Lumber Co. *v.* Sault Sav. Bank, 43 N. W. Rep. 778 (Mich.). Nor can the owner's failure to enjoin the labor be made conclusive evidence of his assent to it. Meyer *v.* Berlandi, 39 Minn. 448. A mechanic's lien may be made applicable to buildings in process of erection. Colpetzer *v.* Trinity Church, 37 N. W. Rep. 931 (Neb.).

[1] Taylor *v.* Porter, 4 Hill, 140; Osborn *v.* Hart, 24 Wis. 89, 91; s. c. 1 Am. Rep. 161. In Matter of Albany Street, 11 Wend. 149, s. c. 25 Am. Dec. 618, it is intimated that the clause in the Constitution of New York, withholding private property from public use except upon compensation made, of itself implies that it is not to be taken *in invitum* for individual use. And see Matter of John & Cherry Streets, 19 Wend. 659. A different opinion seems to have been held by the Supreme Court of Pennsylvania, when they decided in Harvey *v.* Thomas, 10 Watts, 63, that the legislature might authorize the laying out of private ways over the lands of unwilling parties, to connect the coal-beds with the works of public improvement, the constitution not in terms prohibiting it. See note to p. 653, *post*.

[2] Arg. Nightingale *v.* Bridges, Show. 138. See also Case of Alton Woods, 1 Rep. 45 *a*; Alcock *v.* Cooke, 5 Bing. 340; Bowman *v.* Middleton, 1 Bay, 252; Kennebec Purchase *v.* Laboree, 2 Me. 275;

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.[1]

And it may be well at this point to examine in the light of the reported cases the question, What is a vested right in the constitutional sense? and when we have solved that question, we may be the better able to judge under what circumstances one may be justified in resisting a change in the general laws of the State affecting his interests, and how far special legislation may control his rights without coming under legal condemnation. In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws;[2] but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense.[3] In many cases the courts, in

s. c. 11 Am. Dec. 79; *ante*, p. 49 and note, p. 208 and note. Any one may acquire and hold any species of property, and the acquisition cannot be taxed as a privilege. But the use may be regulated to prevent injury to others. Stevens *v.* State, 2 Ark. 291; s. c. 35 Am. Dec. 72.

[1] The evidences of a man's rights — the deeds, bills of sale, promissory notes, and the like — are protected equally with his lands and chattels, or rights and franchises of any kind; and the certificate of registration and right to vote may be properly included in the category. State *v.* Staten, 6 Cold. 233. See Davies *v.* McKeeby, 5 Nev. 369.

[2] The interest acquired in the practice of learned professions, that is, "the right to continue their prosecution," is property which cannot be arbitrarily taken away. *Field*, J., in Dent *v.* West Virginia, 129 U. S. 114. The office of an attorney is property, and he cannot be deprived of it except for professional misconduct or proved unfitness. The public discussion of the official conduct of a judge is not professional misconduct, unless it is designed to acquire an influence over the conduct of the judge in the exercise of his judicial functions by the instrumentality of popular prejudice. *Ex parte* Steinman, 95 Pa. St. 220. But see State *v.* McClaugherty, 10 S. E. Rep. 407 (W. Va.).

[3] "A person has no property, no vested interest, in any rule of the common law . . . Rights of property, which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may

the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with "the law of the land;" and the right of one man is devested by way of enforcing a higher and better right in another. Of these cases we do not propose to speak: constitutional questions cannot well arise concerning them, unless they are attended by circumstances of irregularity which are supposed to take them out of the general rule. All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become devested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order. What we desire to reach in this connection is the true meaning of the term "vested rights" when employed for the purpose of indicating the interests of which one cannot be deprived by the mere force of legislative enactment, or by any other than the recognized modes of transferring title against the consent of the owner, to which we have alluded.

Interests in Expectancy.

First, it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.[1] Acts of the legislature, as has been well said by Mr. Justice *Woodbury*, cannot be regarded as opposed to fundamental axioms of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may

be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations." *Waite*, Ch. J., in Munn *v.* Illinois, 94 U. S. 113, 134. See Railroad Co. *v.* Richmond, 96 U. S. 521; Transportation Co *v.* Chicago, 99 U. S. 635; Newton *v.* Commissioners, 100 U. S. 548; *post*, 473, note. The State may take away rights in a public fishery by appropriating the water to some other use. Howes *v.* Grush, 131 Mass. 207.

[1] Weidenger *v.* Spruance, 101 Ill. 278. See Wanser *v.* Atkinson, 43 N. J. 571.

always revoke before an interest is perfected in the donee."[1] And Chancellor *Kent*, in speaking of retrospective statutes, says that while such a statute, "affecting and changing vested rights, is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void," yet that "this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights."[2]

And it is because a mere expectation of property in the future is not considered a vested right, that the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir presumptive has no other reason to rely upon succeeding to the property than the promise held out by the statute of descents. But this promise is no more than a declaration of the legislature as to its present view of public policy as regards the proper order of succession,—a view which may at any time change, and then the promise may properly be withdrawn, and a new course of descent be declared. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the ancestor's death, when the statute of descents comes in, and for reasons of general public policy transfers the estate to persons occupying particular relations to the deceased in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir, to be protected by the Constitution. An anticipated interest in property cannot be said to be vested in any person so long as the owner of the interest in possession has full power, by virtue of his ownership, to cut off the expectant right by grant or devise.[3]

[1] Merrill *v.* Sherburne, 1 N. H. 199, 213; s. c. 8 Am. Dec. 52. See Rich *v.* Flanders, 39 N. H. 304. And cases *ante*, p. 343, note 2.

[2] 1 Kent, Com. 455. See Briggs *v.* Hubbard, 19 Vt. 86; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; Baugher *v.* Nelson, 9 Gill, 299; Gilman *v.* Cutts, 23 N. H. 376, 382; Foule *v.* Mann, 53 Iowa, 42.

[3] *In re* Lawrence, 1 Redfield, Sur. Rep. 310. But after property has once vested under the laws of descent, it cannot be devested by any change in those laws. Norman *v.* Heist, 5 W. & S. 171. And the right to change the law of descents in

If this be so, the nature of estates must, to a certain extent, be subject to legislative control and modification.[1] In this country estates tail have been very generally changed into estates in fee-simple, by statutes the validity of which is not disputed.[2] Such statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not therefore open to objection by him.[3] But no other person in these cases has any vested right, either in possession or expectancy, to be affected by such change; and the expectation of the heir presumptive must be subject to the same control as in other cases.[4]

The cases of rights in property to result from the marriage relation must be referred to the same principle. At the common law the husband immediately on the marriage succeeded to certain rights in the real and personal estate which the wife then possessed. These rights became vested rights at once, and any subsequent alteration in the law could not take them away.[5] But other interests were merely in expectancy. He could have a right as tenant by the courtesy initiate in the wife's estates of inheritance the moment a child was born of the marriage, who might by possibility become heir to such estates. This right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, no more subject to legislative interference than other expectant interests which have ceased to be mere contingencies and become fixed. But while this interest remains in expectancy merely, — that is to say, until it becomes initiate, — the legislature must have full right to modify or even to abolish it.[6] And the same rule will

the case of the estate of a person named without his consent being had, was denied in Beall *v.* Beall, 8 Ga. 210. See *post*, pp. 465, 466, and notes.

[1] Smith on Stat. and Const. Construction, 412.

[2] De Mill *v.* Lockwood, 3 Blatch. 56. The legislature may by special act confirm a conveyance in fee simple by a tenant in tail. Comstock *v.* Gay, 51 Conn. 45.

[3] On the same ground it has been held in Massachusetts that statutes converting existing estates in joint tenancy into estates in common were unobjectionable. They did not impair vested rights, but rendered the tenure more beneficial. Holbrook *v.* Finney, 4 Mass. 565; s. c. 3 Am. Dec. 243; Miller *v.* Miller, 16 Mass. 59; Annable *v.* Patch, 3 Pick. 360; Burghardt *v.* Turner, 12 Pick. 533. Moreover, such statutes do no more than either tenant at the common law has a right to do, by conveying his interest to a stranger. See Bombaugh *v.* Bombaugh, 11 S. & R. 192; Wildes *v.* Vanvoorhis, 15 Gray, 139.

[4] See 1 Washb. Real Pr. 81–84 and notes. The exception to this statement, if any, must be the case of tenant in tail after possibility of issue extinct; where the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested.

[5] Westervelt *v.* Gregg, 12 N. Y. 202. See Mr. Bishop's criticism of this case — which, however, does not reach the general principle above stated — in 2 Bishop, Law of Married Women, § 46, and note. Rights under an ante-nuptial contract, which become vested by the marriage, cannot be impaired by subsequent legislation. Desnoyer *v.* Jordan, 27 Minn. 295.

[6] Hathon *v.* Lyon, 2 Mich. 93; Tong

apply to the case of dower; though the difference in the requisites of the two estates are such that the inchoate right to dower does not become property, or anything more than a mere expectancy at any time before it is consummated by the husband's death.[1] In neither of these cases does the marriage alone give a

v. Marvin, 15 Mich. 60. And see the cases cited in the next note. The right of a tenant by the courtesy initiate is vested, and it cannot be taken away to the injury of the husband's creditors. Wyatt *v.* Smith, 25 W. Va. 813. See Hershizer *v.* Florence, 39 Ohio St. 516. But see to the contrary, Breeding *v.* Davis, 77 Va. 639; Alexander *v.* Alexander, 7 S. E. Rep. 335 (Va.).

[1] When dower is duly assigned it becomes a right not to be devested by subsequent legislation. Talbot *v.* Talbot, 14 R. I. 57. The law in force at the death of the husband is the measure of the right of the widow to dower. Noel *v.* Ewing, 9 Ind. 37; May *v.* Fletcher, 40 Ind. 575; Lucas *v.* Sawyer, 17 Iowa, 517; Sturdevant *v.* Norris, 30 Iowa, 65; Melizet's Appeal, 17 Pa. St. 449; Barbour *v.* Barbour, 46 Me. 9; Magee *v.* Young, 40 Miss. 164; Bates *v.* McDowell, 58 Miss. 815; Walker *v.* Deaver, 5 Mo. App. 139; Guerin *v.* Moore, 25 Minn. 462; Morrison *v.* Rice, 35 Minn. 436; Ware *v.* Owens 42 Ala. 212; Pratt *v.* Tefft, 14 Mich. 191; Bennett *v.* Harms, 51 Wis. 251. But if we apply this rule universally, we shall run into some absurdities, and most certainly in some cases encounter difficulties which will prove insurmountable. Suppose the land has been sold by the husband without relinquishment of dower, and the dower right is afterwards by statute enlarged, will the wife obtain the enlarged dower at the expense of the purchaser? Or suppose it is diminished; will the purchaser thereby acquire an enlarged estate which he never bought or paid for? These are important questions, and the authorities furnish very uncertain and unsatisfactory answers to them. In Illinois it is held that though the estate is contingent, the right to dower, when marriage and seisin unite, is vested and absolute, and is as completely beyond legislative control as is the principal estate. Russell *v.* Rumsey, 35 Ill. 362; Steele *v.* Gellatly, 41 Ill. 39. See Lawrence *v.* Miller, 2 N. Y. 245. But it is also held that after marriage a new right corresponding to dower may be conferred upon the husband, and that his homestead right depends on the law in force at the wife's death. Henson *v.* Moore, 104 Ill. 403. In North Carolina before 1867, the wife had dower only in the lands of which the husband died seised; the statute then restored the common-law right to dower. Held to be inapplicable to lands which the husband had previously acquired. Sutton *v.* Asken, 66 N. C. 172; s. c. 8 Am. Rep. 500; Hunting *v.* Johnson, 66 N. C. 189; Jenkins *v.* Jenkins, 82 N. C. 202; O'Kelly *v.* Williams, 84 N. C. 281. In Iowa it is held that when the law of dower is changed after the husband has conveyed lands subject to the inchoate right, the dower is to be measured by the law in force when the conveyance was made. Davis *v.* O'Ferrall, 4 Greene (Iowa), 168; Young *v.* Wolcott, 1 Iowa, 174; O'Ferrall *v.* Simplot, 4 Iowa, 381; Moore *v.* Kent, 37 Iowa, 20; Craven *v.* Winter, 38 Iowa, 471. In Indiana, on the other hand, a statute enlarging the right of dower to one-third of the land in fee simple was so applied as to deprive the widow, in cases where the husband had previously conveyed, of both the statutory dower and the dower at the common law, thereby enlarging the estate of the purchaser. Strong *v.* Clem, 12 Ind. 37; Logan *v.* Walton, 12 Ind. 839; Bowen *v.* Preston, 48 Ind. 367; Taylor *v.* Sample, 51 Ind. 423. See May *v.* Fletcher, 40 Ind. 575. A provision that upon a judicial sale of the husband's property the inchoate dower right shall vest does not apply to a mechanic's lien resting on the whole property before the act passed. Buser *v.* Shepard, 107 Ind. 417. In Missouri it is held that the widow takes dower according to the law in force at the husband's death, except as against those who had previously acquired specific rights in the estate, and as to them her right must depend on the law in force at the time their rights originated. Kennedy *v.*

vested right. It gives only a capacity to acquire a right. The same remark may be made regarding the husband's expectant interest in the after-acquired personalty of the wife; it is subject to any changes in the law made before his right becomes vested by the acquisition.[1]

Change of Remedies.

Again: *the right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases in which the remedy is part of the right itself.[2] As a general rule, every State has complete control over the remedies which it offers to suitors in its courts.[3] It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence.[4] And it may

Insurance Co., 11 Mo. 204. In Williams *v.* Courtney, 77 Mo. 587, it is held that, marriage and seisin concurring, dower cannot be barred by a guardian's sale of the husband's property. In Massachusetts doubt is expressed of the right of the legislature to cut off the inchoate right of dower. Dunn *v.* Sargent, 101 Mass. 336, 340. But in Hamilton *v.* Hirsch, 2 Wash. Terr. 223, such power is affirmed.

[1] Westervelt *v.* Gregg, 12 N. Y. 202; Norris *v.* Beyea, 13 N. Y. 273; Kelly *v.* McCarthy, 3 Bradf. 7. And see Plumb *v.* Sawyer, 21 Conn. 351; Clark *v.* McCreary, 12 S. & M. 347; Jackson *v.* Lyon 9 Cow. 664; *ante*, pp. 347–355. On the point whether the husband can be regarded as having an interest in the wife's choses in action, before he has reduced them to possession, see Bishop, Law of Married Women, Vol. II. §§ 45, 46. If the wife has a right to personal property subject to a contingency, the husband's contingent interest therein cannot be taken away by subsequent legislation. Dunn *v.* Sargent, 101 Mass. 336. It is competent to provide by statute that married women shall hold their property free from claims of husbands, and to make the law apply to those already married. Rugh *v.* Ottenheimer, 6 Oreg. 231; s. c. 25 Am. Rep. 513. See Pritchard *v.* Citizens' Bank, 8 La. 130; s. c. 28 Am. Dec. 132. But vested rights belonging to the husband *jure uxoris* cannot thus be devested. Hershizer *v.* Florence, 39 Ohio St. 516; Koehler *v.* Miller, 21 Ill. App. 557.

[2] See *ante*, p. 351, and cases cited. It has been held in some cases that the giving of a lien by statute does not confer a vested right, and it may be taken away by a repeal of the statute. See *ante*, 347, note 2.

[3] Rosier *v.* Hale, 10 Iowa, 470; Smith *v.* Bryan, 34 Ill. 364; Lord *v.* Chadbourne, 42 Me. 429; Rockwell *v.* Hubbell's Adm'rs, 2 Doug. (Mich.) 197; Cusic *v.* Douglas, 3 Kan. 123; Holloway *v.* Sherman, 12 Iowa, 282; McCormick *v.* Rusch, 15 Iowa, 127; McArthur *v.* Goddin, 12 Bush, 274; Grundy *v.* Commonwealth, 12 Bush, 350; Briscoe *v.* Anketell, 28 Miss. 361.

[4] Hope *v.* Johnson, 2 Yerg. 125; Foster *v.* Essex Bank, 16 Mass. 245; s. c. 9 Am. Dec. 168; Paschall *v.* Whitsett, 11 Ala. 472; Commonwealth *v.* Commissioners, &c., 6 Pick. 501; Whipple *v.* Farrar, 3 Mich. 436; United States *v.* Samperyac, 1 Hemp. 118; Sutherland *v.* De Leon, 1 Tex. 250; Anonymous, 2 Stew. 228. See also Lewis *v.* McElvain, 16 Ohio, 347; Trustees, &c. *v.* McCaughey, 2 Ohio St. 152; Hepburn *v.* Curts, 7 Watts, 300; Schenley *v.* Commonwealth, 36 Pa. St. 29; Bacon *v.* Callender, 6 Mass. 303; Brackett *v.* Norcross, 1 Me. 92; Ralston *v.* Lothain, 18 Ind. 303; White School House *v.* Post, 31 Conn. 241; Van Rensselaer *v.* Hayes, 19 N. Y. 68; Van Rensselaer *v.* Ball, 19 N. Y. 100; Sedgwick Co. *v.* Bunker, 16 Kan. 498; Danville *v.* Pace, 25 Gratt. 1. Thus it may give a legal remedy where before there was only one in equity. Bartlett *v.* Lang, 2 Ala. 401.

abolish old remedies and substitute new; or even without substituting any, if a reasonable remedy still remains.[1] If a statute providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined, unless the legislature shall otherwise provide;[2] and if it be amended instead of repealed, the judgment pronounced in such proceedings must be according to the law as it then stands.[3] And any rule or regulation in regard to the remedy which does not, under pretence of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation.[4]

But a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.[5] Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away.[6] And every man is entitled to a

In Bolton *v.* Johns, 5 Pa. St. 145, the extreme ground was taken that the legislature might give a lien on property for a prior debt, where no contract would be violated in doing so. In Towle *v.* Eastern Railroad, 18 N. H. 546, the power of the legislature to give retrospectively a remedy for consequential damages caused by the taking of property for a public use was denied. On the ground that the remedy only is affected, a judgment against a principal on an existing bond may be made conclusive on the surety. Pickett *v.* Boyd, 11 Lea, 498. So a resale on mortgage foreclosure, if the purchase price is inadequate, may be allowed as to an existing mortgage. Chaffe *v.* Aaron, 62 Miss. 29; and a foreclosure of a tax lien, if the title fails. Schoenheit *v.* Nelson, 16 Neb. 235.

[1] Stocking *v.* Hunt, 3 Denio, 274; Van Rensselaer *v.* Read, 26 N. Y. 558; Lennon *v.* New York, 55 N. Y. 361; Parker *v.* Shannohouse, 1 Phil. (N. C.) 209. An existing remedy may be modified and the modified remedy made applicable to existing rights. Phelps' Appeal, 98 Pa. St. 546.

[2] Bank of Hamilton *v.* Dudley, 2 Pet. 492; Ludlow *v.* Johnson, 3 Ohio, 553; s. c. 17 Am. Dec. 609; Yeaton *v.* United States, 5 Cranch, 281; Schooner Rachel *v.* United States, 6 Cranch, 329. If an act is repealed without any saving of rights, no judgment can afterwards be taken under it. State *v.* Passaic, 36 N. J. 382; Menard County *v.* Kincaid, 71 Ill. 587; Musgrove *v.* Vicksburg, &c. R. R. Co., 50 Miss. 677; Abbott *v.* Commonwealth, 8 Watts, 517; s. c. 34 Am. Dec. 492. But it is well said in Pennsylvania that before a statute should be construed to take away the remedy for a prior injury, it should clearly appear that it embraces the very case. Chalker *v.* Ives, 55 Pa. St. 81. And see Newsom *v.* Greenwood, 4 Oreg. 119.

[3] See cases cited in last note. Also Commonwealth *v.* Duane, 1 Binney, 601; s. c. 2 Am. Dec. 497; United States *v.* Passmore, 4 Dall. 372; Patterson *v.* Philbrook, 9 Mass. 151; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 95; State *v.* Daley, 29 Conn. 272; Rathbun *v.* Wheeler, 29 Ind. 601; State *v.* Norwood, 12 Md. 195; Bristol *v.* Supervisors, &c., 20 Mich. 95; Sumner *v.* Miller, 64 N. C. 688.

[4] See *ante*, pp. 347-355; Lennon *v.* New York, 55 N. Y. 361. The right to a particular mode of procedure is not a vested right. A statute allowing attorney's fees may affect pending causes. Drake *v.* Jordan, 73 Iowa, 707.

[5] It is not incompetent, however, to compel the party instituting a suit to pay taxes on the legal process as a condition. Harrison *v.* Willis, 7 Heisk. 35; s. c. 19 Am. Rep. 604.

[6] Dash *v.* Van Kleeck, 7 Johns. 477; s. c. 5 Am. Dec. 291; Streubel *v.* Milwaukee & M. R. R. Co., 12 Wis. 67; Clark *v.* Clark, 10 N. H. 380; Westervelt

certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows as a means of obtaining it.[1] Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be adjudged by legislative act, and confiscations without a judicial hearing after due notice would be void as not being due process of law.[2] Even Congress, it has

v. Gregg, 12 N. Y. 202; Thornton *v.* Turner, 11 Minn. 339; Ward *v.* Barnard, 1 Aik. 121; Keith *v.* Ware, 2 Vt. 174; Lyman *v.* Mower, 2 Vt. 517; Kendall *v.* Dodge, 3 Vt. 360; State *v.* Auditor, &c., 33 Mo. 287; Griffin *v.* Wilcox, 21 Ind. 370; Norris *v.* Doniphan, 4 Met. (Ky.) 385; Terrill *v.* Rankin, 2 Bush, 453; Williar *v.* Baltimore, &c. Association, 45 Md. 546; Dunlap *v.* Toledo, &c. Ry. Co., 50 Mich. 470. The legislature cannot interfere with the enforcement of a judgment by enactments subsequent to it. Strafford *v.* Sharon, 17 Atl. Rep. 793 (Vt.). An act of the Dominion Parliament of Canada, assuming to authorize a railroad company to issue bonds in substitution for others previously issued, and at a lower rate of interest, and declaring that the holders should be deemed to assent, was held void, because opposed to the fundamental principles of justice. Gebhard *v.* Railroad Co., 17 Blatch. 416. An equitable title to lands, of which the legal title is in the State, is under the same constitutional protection that the legal title would be. Wright *v.* Hawkins, 28 Tex. 452. Where an individual is allowed to recover a sum as a penalty, the right may be taken away at any time before judgment. Pierce *v.* Kimball, 9 Me. 54; s. c. 23 Am. Dec. 537; Oriental Bank *v.* Freeze, 18 Me. 109; Engle *v.* Schurtz, 1 Mich. 150; Confiscation Cases, 7 Wall. 454; Washburn *v.* Franklin, 35 Barb. 599; Welch *v.* Wadsworth, 30 Conn. 149; O'Kelly *v.* Athens Manuf. Co., 36 Ga. 51; United States *v.* Tynen, 11 Wall. 88; Chicago & Alton R. R. Co. *v.* Adler, 56 Ill. 344; Van Inwagen *v.* Chicago, 61 Ill. 31, Lyon *v.* Morris, 15 Ga. 480; *post*, p. 472. See also Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9; Coles *v.* Madison County, Breese, 115; s. c. 12 Am. Dec. 161; Parmelee *v.* Lawrence, 48 Ill. 331; *post*, pp. 461, 462. The legislature may remit penalties accruing to a county. State *v.* Baltimore, &c. R. R. Co., 12 Gill & J. 399; s. c. 38 Am. Dec. 317. Whether claims arising in tort are protected against State legislation by the federal Constitution, see State *v.* New Orleans, 32 La. Ann. 709; Langford *v.* Fly, 7 Humph. 585; Parker *v.* Savage, 6 Lea, 406; Griffin *v.* Wilcox, 21 Ind. 370; Johnson *v.* Jones, 44 Ill. 142; Drehman *v.* Stifel, 41 Mo. 184; 8 Wall. 595. See cases *ante*, p. 351, note 3.

[1] Thus, a person cannot be precluded by test oaths from maintaining suits. McFarland *v.* Butler, 8 Minn. 116; *ante*, p. 350, note. Before attacking a tax deed, payment of taxes and value of improvements may be required. Coats *v.* Hill, 41 Ark. 149. See Coonradt *v.* Myers, 31 Kan. 30; Lombard *v.* Antioch College, 60 Wis. 459. But free recourse to the courts is denied, if a deposit of double the amount of the purchase-money and all taxes, &c., is required before suit. Lassiter *v.* Lee, 68 Ala. 287. See *post*, pp. 452, 453, note.

[2] Griffin *v.* Mixon, 38 Miss. 424. See next note. Also Rison *v.* Farr, 24 Ark. 161; Woodruff *v.* Scruggs, 27 Ark. 26; Hodgson *v.* Millward, 3 Grant's Cas. 406; Ieck *v.* Anderson, 57 Cal. 251, a case of forfeiting nets for illegal fishing; Boorman *v.* Santa Barbara, 65 Cal. 313, a case of assessing benefits upon lands for improvements without notice. But no constitutional principle is violated by a statute which allows judgment to be entered up against a defendant who has been served with process, unless within a certain number of days he files an affidavit of merits. Hunt *v.* Lucas, 97 Mass. 404. Nor by an ordinance allowing a city, on default of the owner, to build a sidewalk and charge the property with the

been held, has no power to protect parties assuming to act under the authority of the general government, during the existence of a civil war, by depriving persons illegally arrested by them of all redress in the courts.[1] And if the legislature cannot confiscate property or rights, neither can it authorize individuals to assume at their option powers of police, which they may exercise in the condemnation and sale of property offending against their regulations, or for the satisfaction of their charges and expenses in its management and control, rendered or incurred without the consent of its owners.[2] And a statute which authorizes a party

expense, if when sued on the tax bill, he has his day in court. Kansas City *v.* Huling, 87 Mo. 203. An act subjecting a prisoner's property from the time of his arrest to a lien for the fine and costs, is valid. Silver Bow Co. *v.* Strombaugh, 22 Pac. Rep. 453 (Mont.).

[1] Griffin *v.* Wilcox, 21 Ind. 370. In this case the act of Congress of March 3, 1863, which provided "that any order of the President or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts, to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress" was held to be unconstitutional. The same decision was made in Johnson *v.* Jones, 44 Ill. 142. It was said in the first of these cases that "this act was passed to deprive the citizens of all redress for illegal arrests and imprisonment; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and imprisonments." And it may be added that those acts which are justified by military or martial law are equally legal with those justified by the common law. So in Hubbard *v.* Brainerd, 35 Conn. 563, it was decided that Congress could not take away a vested right to sue for and recover back an illegal tax which had been paid under protest to a collector of the national revenue. See also Bryan *v.* Walker, 64 N. C. 141. Nor can the right to have a void tax sale set aside be made conditional on the payment of the illegal tax. Wilson *v.* McKenna, 52 Ill. 43, and other cases cited, *post*, p. 454, note. The case of Norris *v.* Doniphan, 4 Met. (Ky.) 385, may properly be cited in this connection. It was there held that the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," in so far as it undertook to authorize the confiscation of the property of citizens as a punishment for treason and other crimes, by proceedings *in rem* in any district in which the property might be, without presentment and indictment by a grand jury, without arrest or summons of the owner, and upon such evidence of his guilt only as would be proof of any fact in admiralty or revenue cases, was unconstitutional and void, and therefore that Congress had no power to prohibit the State courts from giving the owners of property seized the relief they would be entitled to under the State laws. A statute which makes a constitutional right to vote depend upon an impossible condition is void. Davies *v.* McKeeby, 5 Nev. 369. See further, State *v.* Staten, 6 Cold. 233; Rison *v.* Farr, 24 Ark. 161; Hodgson *v.* Millward, 3 Grant, 406. Where no express power of removal is conferred on the executive, he cannot declare an office forfeited for misbehavior; but the forfeiture must be declared in judicial proceedings. Page *v.* Hardin, 8 B. Monr. 648; State *v.* Prichard, 36 N. J. 101. The legislature cannot declare the forfeiture of an official salary for misconduct. *Ex parte* Tully, 4 Ark. 220; s. c. 38 Am. Dec. 33.

[2] The log-driving and booming corporations, which were authorized to be formed under a general law in Michigan, were empowered, whenever logs or lumber were put into navigable streams without adequate force and means provided

to seize the property of another, without process or warrant, and to sell it without notification to the owner, for the punishment of a private trespass, and in order to enforce a penalty against the owner, can find no justification in the Constitution.[1]

for preventing obstructions, to take charge of the same, and cause it to be run, driven, boomed, &c., at the owner's expense; and it gave them a lien on the same to satisfy all just and reasonable charges, with power to sell the property for those charges and for the expenses of sale, on notice, either served personally on the owner, or posted as therein provided. In Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich. 139, 147, it was held that the power which this law assumed to confer was in the nature of a public office; and *Campbell*, J., says: "It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parcelled out by the Constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property. And it is plain that the exercise of such a power is an act in its nature public, and not private. The case, however, involves more than the assumption of control. The corporation, or rather its various agents, must of necessity determine when the case arises justifying interference; and having assumed possession it assesses its own charges; and having assessed them, proceeds to sell the property seized to pay them, with the added expense of such sale. These proceedings are all *ex parte*, and are all proceedings *in invitum*. Their validity must therefore be determined by the rules applicable to such cases. Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be devested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him, and be allowed to meet it on the law and the facts. When his property is wanted *in specie*, for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question; and all judicial functions are required by the Constitution to be exercised by courts of justice, or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination."

[1] A statute of New York authorized any person to take into his custody and possession any animal which might be trespassing upon his lands, and give notice of the seizure to a justice or commissioner of highways of the town, who should proceed to sell the animal after posting notice. From the proceeds of the sale, the officer was to retain his fees, pay the person taking up the animal fifty cents, and also compensation for keeping it, and the balance to the owner, if he should claim it within a year. In Rockwell *v.* Nearing, 35 N. Y. 307, 308, *Porter*, J., says of this statute: "The legislature has no authority either to deprive the citizen of his property for other than public purposes, or to authorize its seizure without process or warrant, by persons other than the owner, for the mere punishment of a private trespass. So far as the act in question relates to animals trespassing on the premises of the captor, the proceedings it authorizes have not even the mocking semblance of due process of law. The seizure may be privately made; the party making it is permitted to conceal the property on his own premises; he is protected, though the trespass was due to his own connivance or neglect; he is permitted to take what does not belong to him without notice to owner, though that owner is near and known; he is allowed to sell, through the intervention of an officer, and

Limitation Laws.

Notwithstanding the protection which the law gives to vested rights, it is possible for a party to debar himself of the right to assert the same in the courts, by his own negligence or laches. If one who is dispossessed "be negligent for a long and unreasonable time, the law refuses afterwards to lend him any assistance to recover the possession merely, both to punish his neglect(*nam leges vigilantibus, non dormientibus subveniunt*), and also because it is presumed that the supposed wrong-doer has in such a length of time procured a legal title, otherwise he would sooner have been sued."[1] Statutes of limitation are passed which fix upon a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no rights in the premises. Such a statute is a statute of repose.[2] Every government is under obligation to its citizens to afford them all needful legal remedies;[3] but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.[4]

without even the form of judicial proceedings, an animal in which he has no interest by way either of title, mortgage, pledge, or lien; and all to the end that he may receive compensation for detaining it without the consent of the owner, and a fee of fifty cents for his services as an informer. He levies without process, condemns without proof, and sells without execution." And he distinguishes these proceedings from those in distraining cattle *damage feasant*, which are always remedial, and under which the party is authorized to detain the property in pledge for the payment of his damages. See also opinion by *Morgan*, J., in the same case, pp. 314–317, and the opinions of the several judges in Wynehamer *v.* People, 13 N. Y. 395, 419, 434, and 468. Compare Campbell *v.* Evans, 45 N. Y. 356; Cook *v.* Gregg, 46 N. Y. 429; Grover *v.* Huckins, 26 Mich. 476; Campau *v.* Langley, 39 Mich. 451; s. c. 33 Am. Rep. 414.

[1] 3 Bl. Com. 188; Broom, Legal Maxims, 857.

[2] Such a statute was formerly construed with strictness, and the defence under it was looked upon as unconscionable, and not favored; but Mr. Justice *Story* has well said, it has often been matter of regret in modern times that the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that instead of being viewed in an unfavorable light as an unjust and discreditable defence, it had not received such support as would have made it what it was intended to be, emphatically a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation by reason of the death or removal of witnesses. Bell *v.* Morrison, 1 Pet. 351, 360. See Leffingwell *v.* Warren, 2 Black, 599; Toll *v.* Wright, 37 Mich. 93.

[3] Call *v.* Hagger, 8 Mass. 423.

[4] Beal *v.* Nason, 14 Me. 344; Bell *v.* Morrison, 1 Pet. 351; Stearns *v.* Gittings, 23 Ill. 387; State *v.* Jones, 21 Md. 432 See Biddle *v.* Hooven, 120 Pa. St. 221.

When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title.[1] It is vested as completely and perfectly, and is as safe from legislative interference as it would have been had it been perfected in the owner by grant, or by any species of assurance.[2]

[1] Brent *v.* Chapman, 5 Cranch, 358; Newby's Adm'rs *v.* Blakey, 3 H. & M. 57; Parish *v.* Eager, 15 Wis. 532; Bagg's Appeal, 43 Pa. St. 512; Leffingwell *v.* Warren, 2 Black, 599; Bicknell *v.* Comstock, 113 U. S. 149. See cases cited in next note.

[2] Although there is controversy on this point, we consider the text fully warranted by the following cases: Holden *v.* James, 11 Mass. 396; Wright *v.* Oakley, 5 Met. 400; Lewis *v.* Webb, 3 Me. 326; Atkinson *v.* Dunlap, 50 Me. 111; Davis *v.* Minor, 2 Miss. 183; s. c. 28 Am. Dec. 325; Hicks *v.* Steigleman, 49 Miss. 377; Knox *v.* Cleveland, 13 Wis 245; Sprecker *v.* Wakeley, 11 Wis. 432; Pleasants *v.* Rohrer, 17 Wis. 577; Moor *v.* Luce, 29 Pa. St. 260; Morton *v.* Sharkey, McCahon, 113; McKinney *v.* Springer, 8 Blackf. 506; Bradford *v.* Brooks, 2 Aik. 284; s. c. 16 Am. Dec. 715; Stipp *v.* Brown, 2 Ind. 647; Briggs *v.* Hubbard, 19 Vt. 86; Wires *v.* Farr, 25 Vt. 41; Woart *v.* Winnick, 3 N. H. 473; s. c. 14 Am. Dec. 384; Rockport *v.* Walden, 54 N. H. 167; s. c. 20 Am. Rep. 131; Thompson *v.* Caldwell, 3 Lit. 137; Couch *v.* McKee, 6 Ark. 495; Reynolds *v.* Baker, 6 Cold. 221; Trim *v.* McPherson, 7 Cold. 15; Girdner *v.* Stephens, 1 Heisk. 280; s. c. 2 Am. Rep. 700; Yancy *v.* Yancy, 5 Heisk. 353; s. c. 13 Am. Rep. 5; Bradford *v.* Shine's Ex'rs, 13 Fla. 393; s. c. 7 Am. Rep. 239; Lockhart *v.* Horn, 1 Woods, 628; Horbach *v.* Miller, 4 Neb. 31; Pitman *v.* Bump, 5 Oreg. 17; Thompson *v.* Read, 41 Iowa, 48; Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Union Savings Bank *v.* Taber, 13 R. I. 683; McDuffee *v.* Sinnott, 119 Ill. 449. In some cases an inclination has been manifested to distinguish between the case of property adversely possessed, and a claim not enforced; and while it is conceded that the title to the property cannot be disturbed after the statute has run, it is held that the claim, under new legislation, may still be enforced; the statute of limitations pertaining to the remedy only, and not barring the right. So it was held in Jones *v.* Jones, 18 Ala. 248, where the remedy on the claim in dispute had been barred by the statute of another State where the debtor then resided. And see Bentinck *v.* Franklin, 38 Tex. 458. In Campbell *v.* Holt, 115 U. S. 620, a similar ruling was made, though against vigorous dissent. It was held that one has no property in the bar of the statute as a defence to a promise to pay a debt, and that such bar may be removed by a statute in such case after it has become complete. But this last-mentioned doctrine is rejected in an opinion of much force by *Dixon*, Ch. J., in Brown *v.* Parker, 28 Wis. 21, 28. To like effect is McCracken Co. *v.* Merc. Trust Co., 84 Ky. 344. And see Rockport *v.* Walden, 54 N. H. 167; s. c. 20 Am. Rep. 131; McMerty *v.* Morrison, 62 Mo. 140; Goodman *v.* Munks, 8 Port. (Ala.) 84; Harrison *v.* Stacy, 6 Rob. (La.) 15; Baker *v.* Stonebraker's Adm'r, 36 Mo. 338; Shelby *v.* Guy, 11 Wheat. 361. The law of the forum governs as to limitations. Barbour *v.* Erwin, 14 Lea, 716; Stirling *v.* Winter, 80 Mo. 141. See Chevrier *v.* Robert, 6 Mont. 319; Thompson *v.* Reed, 75 Me. 404. But the statute of limitations may be suspended for a period as to demands not already barred. Wardlaw *v.* Buzzard, 15 Rich. 158; Caperton *v.* Martin, 4 W. Va. 138; s. c. 6 Am. Rep. 270; Bender *v.* Craw-

All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law.[1] Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession;[2] but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.[3]

All statutes of limitation, also, must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing right of claimants without affording this opportunity: if it should attempt to do so,

ford, 33 Tex. 745; s. c. 7 Am. Rep. 270; Pearsall *v.* Kenan, 79 N. C. 472; s. c. 28 Am. Rep. 336. A class of cases may be excepted from the operation of the statute, though barred when such excepting act was passed. Sturm *v.* Fleming, 8 S. E. Rep. 263 (W. Va.). The legislature may compel a county to pay a claim barred by the general statute. Caldwell Co. *v.* Harbert, 68 Tex. 321.

[1] Stearns *v.* Gittings, 23 Ill. 387, per *Walker*, J.; Sturges *v.* Crowninshield, 4 Wheat. 122, 207, per *Marshall*, Ch. J. Pearce *v.* Patton, 7 B. Monr. 162; Griffin *v.* McKenzie, 7 Ga. 163; Colman *v.* Holmes, 44 Ala. 124.

[2] Stearns *v.* Gittings, 23 Ill. 387; Hill *v.* Kricke, 11 Wis. 442.

[3] Groesbeck *v.* Seeley, 13 Mich. 329. In Case *v.* Dean, 16 Mich. 12, it was held that this statute could not be enforced as a limitation law in favor of the party in possession, inasmuch as it did not proceed on the idea of limiting the time for bringing suit, but by a conclusive rule of evidence sought to pass over the property to the claimant under the statutory sale in all cases, irrespective of possession. See also Baker *v.* Kelly, 11 Minn. 480; Eldridge *v.* Kuehl, 27 Iowa, 160, 173; Monk *v.* Corbin, 58 Iowa, 503; Farrar *v.* Clark, 85 Ind. 449; Dingey *v.* Paxton, 60 Miss. 1038. The case of Leffingwell *v.* Warren, 2 Black, 599, is *contra*. That case follows Wisconsin decisions. In the leading case of Hill *v.* Kricke, 11 Wis. 442, the holder of the original title was not in possession; and what was decided was that it was not necessary for the holder of the tax title to be in possession in order to claim the benefit of the statute; ejectment against a claimant being permitted by law when the lands were unoccupied. See also Barrett *v.* Holmes, 102 U. S. 651. To stop the running of the statute it is not necessary that the owner should be in continuous possession. Smith *v.* Sherry, 54 Wis. 114. This circumstance of possession or want of possession in the person whose right is to be extinguished seems to us of vital importance. How can a man justly be held guilty of laches in not asserting claims to property, when he already possesses and enjoys the property? The old maxim is, "That which was originally void cannot by mere lapse of time be made valid;" and if a void claim by force of an act of limitation can ripen into a conclusive title as against the owner in possession, the policy underlying that species of legislation must be something beyond what has been generally supposed.

it would be not a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action;[1] though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.[2]

Alterations in the Rules of Evidence.

It must also be evident that *a right to have one's controversies determined by existing rules of evidence is not a vested right.* These

[1] So held of a statute which took effect some months after its passage, and which, in its operation upon certain classes of cases, would have extinguished adverse claims unless asserted by suit before the act took effect. Price *v.* Hopkin, 13 Mich. 318. See also Koshkonong *v.* Burton, 104 U. S. 668; King *v.* Belcher, 30 S. C. 381; People *v.* Turner, 22 N. E. Rep. 1022 (N. Y.); Call *v.* Hagger, 8 Mass. 423; Proprietors, &c. *v.* Laboree, 2 Me. 294; Society, &c. *v.* Wheeler, 2 Gall. 141; Blackford *v.* Peltier, 1 Blackf. 36; Thornton *v.* Turner, 11 Minn. 336; State *v.* Messenger, 27 Minn. 119; Osborn *v.* Jaines, 17 Wis. 573; Morton *v.* Sharkey, McCahon (Kan.), 113; Berry *v.* Ransdell, 4 Met. (Ky.) 292; Ludwig *v.* Stewart, 32 Mich. 27; Hart *v.* Bostwick, 14 Fla. 162. In the case last cited it was held that a statute which only allowed thirty days in which to bring action on an existing demand was unreasonable and void. And see what is said in Auld *v.* Butcher, 2 Kan. 135. Compare Davidson *v.* Lawrence, 49 Ga. 335; Kimbro *v.* Bank of Fulton, 49 Ga. 419. In Terry *v.* Anderson, 95 U. S. 628, a statute which as to the demand sued upon limited the time to ten and a half months was held not unreasonable. In Krone *v.* Krone, 37 Mich. 308, the limitation which was supported was to one year where the general law gave six. In Pereless *v.* Watertown, 6 Biss. 79, Judge *Hopkins*, U. S. District Judge, decided that a limitation of one year for bringing suits on municipal securities of a class generally sold abroad was unreasonable and void. But a statute giving a new remedy against a railroad company for an injury, may limit to a short time, *e. g.* six months, the time for bringing suit. O'Bannon *v.* Louisville, &c. R. R. Co, 8 Bush, 348. So the remedy by suit against stockholders for corporate debts, it is held, may be limited to one year. Adamson *v.* Davis, 47 Mo. 268. It is always competent to extend the time for bringing suit before it has expired. Keith *v.* Keith, 26 Kan. 27. A statute fixing a time for taking out a sheriff's deed after sale applies to a prior sale if a reasonable time is left. Ryhiner *v.* Frank, 105 Ill. 326.

[2] Stearns *v.* Gittings, 23 Ill. 387; Call *v.* Hagger, 8 Mass. 423; Smith *v.* Morrison, 22 Pick. 430; Price *v.* Hopkin, 13 Mich. 318; De Moss *v.* Newton, 31 Ind. 219. But see Berry *v.* Ransdell, 4 Met. (Ky.) 292.

It may be remarked here, that statutes of limitation do not apply to the State unless they so provide expressly. Gibson *v.* Choteau, 13 Wall. 92; State *v.* Piland, 81 Mo. 519; State *v.* School Dist., 34 Kan. 237. And State limitation laws do not apply to the United States. United States *v.* Hoar, 2 Mas. 311; People *v.* Gilbert, 18 Johns. 227; Rabb *v.* Supervisors, 62 Miss. 589; United States *v.* Nashville, &c. Ry. Co., 118 U. S. 120. Nor to suits for the infringement of patents. May *v.* Logan Co, 30 Fed. Rep. 250. And it has been held that the right to maintain a public nuisance cannot be acquired under the statute. State *v.* Franklin Falls Co., 49 N. H. 240.

rules pertain to the remedies which the State provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature;[1] and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those States in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties in suits to testify, might lawfully apply to existing causes of action.[2] So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract;[3] and a statute making the protest of a promissory note evidence of the facts therein stated.[4] These and the like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgment will most completely subserve the ends of justice.[5]

A strong instance in illustration of legislative control over evidence will be found in the laws of some of the States in regard to conveyances of lands upon sales to satisfy delinquent taxes. Independent of special statutory rule on the subject, such conveyances would not be evidence of title. They are executed under a statutory power; and it devolves upon the claimant under them to show that the successive steps which under the statute lead to such conveyance have been taken. But it cannot be doubted that this rule may be so changed as to make a tax-deed *prima facie* evi-

[1] Kendall *v.* Kingston, 5 Mass. 524; Ogden *v.* Saunders, 12 Wheat. 213, 349; per *Marshall*, Ch. J.; Fales *v.* Wadsworth, 23 Me. 553; Karney *v.* Paisley, 13 Iowa, 89; Commonwealth *v.* Williams, 6 Gray, 1; Hickox *v.* Tallman, 38 Barb. 608; Webb *v.* Den, 17 How. 576; Pratt *v.* Jones, 25 Vt. 303. See *ante*, p. 349 and note.

[2] Rich *v.* Flanders, 39 N. H. 304. A very full and satisfactory examination of the whole subject will be found in this case. To the same effect is Southwick *v.* Southwick, 49 N. Y. 510. And see Cowan *v.* McCutchen, 43 Miss. 207; Carothers *v.* Hurly, 41 Miss. 71. The right to testify existing when a contract is made may be taken away. Goodlett *v.* Kelly, 74 Ala. 213.

[3] Gibbs *v.* Gale, 7 Md. 76.

[4] Fales *v.* Wadsworth, 23 Me. 553.

[5] Per *Marshall*, Ch. J., in Ogden *v.* Saunders, 12 Wheat. 213, 249; Webb *v.* Den, 17 How. 576; Delaplaine *v.* Cook, 7 Wis. 44; Kendall *v.* Kingston, 5 Mass. 524; Towler *v.* Chatterton, 6 Bing. 258; Himmelman *v.* Carpentier, 47 Cal. 42.

dence that all the proceedings have been regular, and that the purchaser has acquired under them a complete title.[1] The burden of proof is thereby changed from one party to the other; the legal presumption which the statute creates in favor of the purchaser being sufficient, in connection with the deed, to establish his case, unless it is overcome by countervailing testimony. Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void.[2] But they divest no title, and are not even retrospective in character. They merely establish what the legislature regards as a reasonable and just rule for the presentation by the parties of their rights before the courts in the future.

But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretence of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial;[3] and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore,

[1] Hand *v.* Ballou, 12 N. Y. 541; Forbes *v.* Halsey, 26 N. Y. 53; Delaplaine *v.* Cook, 7 Wis. 44; Allen *v.* Armstrong, 16 Iowa, 508; Adams *v.* Beale, 19 Iowa, 61; Amberg *v.* Rogers, 9 Mich. 332; Lumsden *v.* Cross, 10 Wis. 282; Lacey *v.* Davis, 4 Mich. 140; Wright *v.* Dunham, 13 Mich. 414; Abbott *v.* Lindenbower, 42 Mo. 162; s. c. 46 Mo. 291. The rule once established may be abolished, even as to existing deeds. Hickox *v.* Tallman, 38 Barb. 608; Strode *v.* Washer, 16 Pac. Rep. 926 (Or.); Gage *v.* Caraher, 125 Ill. 447.

[2] See Webb *v.* Den, 17 How. 576.

[3] Tift *v.* Griffin, 5 Ga. 185; Lenz *v.* Charlton, 23 Wis. 478; Conway *v.* Cable, 37 Ill. 82; *ante*, p. 443, note; *post*, pp. 469–471 and notes.

which should make a tax-deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.[1] And a statute which should make the certificate or opinion of an officer conclusive evidence of the illegality of an existing contract would be equally nugatory;[2] though perhaps if parties should enter into a contract in view of such a statute then existing, its provisions might properly be regarded as assented to and incorporated in their contract, and therefore binding upon them.[3]

[1] Groesbeck *v.* Seeley, 13 Mich. 329; Case *v.* Dean, 16 Mich. 12; White *v.* Flynn, 23 Ind. 46; Corbin *v.* Hill, 21 Iowa, 70; Abbott *v.* Lindenbower, 42 Mo. 162; s. c. 46 Mo. 291; Dingey *v.* Paxton, 60 Miss. 1038. And see the well-reasoned case of McCready *v.* Sexton, 29 Iowa, 356; Little Rock, &c. R. R. Co. *v.* Payne, 33 Ark. 816; s. c. 34 Am. Rep. 55. Also Wright *v.* Cradlebaugh, 3 Nev. 341. As to how far the legislature may make the tax-deed conclusive evidence that mere irregularities have not intervened in the proceedings, see Smith *v.* Cleveland, 17 Wis. 556; Allen *v.* Armstrong, 16 Iowa, 508. It may be conclusive as to matters not essential and jurisdictional. Matter of Lake, 40 La. Ann. 142; Ensign *v.* Barse, 107 N. Y. 329. Undoubtedly the legislature may dispense with mere matters of form in the proceedings as well after they have taken place as before; but this is quite a different thing from making tax-deeds conclusive on points material to the interest of the property owner. See further, Wantlan *v.* White, 19 Ind. 470; People *v.* Mitchell, 45 Barb. 212; McCready *v.* Sexton, *supra*. It is not competent for the legislature to compel an owner of land to redeem it from a void tax sale as a condition on which he shall be allowed to assert his title against it. Conway *v.* Cable, 37 Ill. 82; Hart *v.* Henderson, 17 Mich. 218; Wilson *v.* McKenna, 52 Ill. 43; Reed *v.* Tyler, 56 Ill. 288; Dean *v.* Borchsenius, 30 Wis. 236. But it seems that if the tax purchaser has paid taxes and made improvements, the payment for these may be made a condition precedent to a suit in ejectment against him. Pope *v.* Macon, 23 Ark. 644. See cases *ante*, 444, note 1. In Wright *v.* Cradlebaugh, 3 Nev. 341, 349, *Beatty*, Ch. J., says: "We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a good defence to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of the right of setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being incumbered with those of B. . . . Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity when in court to establish any fact which, according to the usages of the common law or the provisions of the constitution, would be a protection to him or his property." See Taylor *v.* Miles, 5 Kan. 498; s. c. 7 Am. Rep. 558.

[2] Young *v.* Beardsley, 11 Paige, 93. See also Howard Co. *v.* State, 22 N. E. Rep. 255 (Ind.). But a provision that six months after the passage of the act certain tax-deeds made on past sales should be conclusive evidence, has been upheld. People *v.* Turner, 22 N. E. Rep. 1022 (N. Y.). An act to authorize persons whose sheep are killed by dogs, to present their claim to the selectmen of the town for allowance and payment by the town, and giving the town after payment an action against the owner of the dog for the amount so paid, is void, as taking away trial by jury, and as authorizing the selectmen to pass upon one's rights without giving him an opportunity to be heard. East Kingston *v.* Towle, 48 N. H. 57; s. c. 2 Am. Rep. 174.

[3] See *post*, p. 496, note.

Retrospective Laws.

Regarding the circumstances under which a man may be said to have a vested right to a defence against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected.[1] In both cases the demand is gone, and to restore it would be to create a new contract for the parties, — a thing quite beyond the power of legislation.[2] So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment.[3] But there are many cases in which, by existing laws, defences based upon mere informalities are allowed in suits upon contracts, or in respect to legal proceedings, in some of which a regard to substantial justice would warrant the legislature in interfering to take away the defence if it possesses the power to do so.

In regard to these cases, we think investigation of the authorities will show that *a party has no vested right in a defence based upon an informality not affecting his substantial equities.* And this brings us to a particular examination of a class of statutes which is constantly coming under the consideration of the courts, and which are known as *retrospective laws*, by reason of their reaching back to and giving to a previous transaction some different legal effect from that which it had under the law when it took place.

[1] *Ante*, p. 448, note, and cases cited.

[2] Albertson *v.* Landon, 42 Conn. 209.

[3] In Medford *v.* Learned, 16 Mass. 215, it was held that where a pauper had received support from the parish, to which by law he was entitled, a subsequent legislative act could not make him liable by suit to refund the cost of the support. This case was approved and followed in People *v.* Supervisors of Columbia, 43 N. Y. 130. See *ante*, p. 444 and note; Towle *v.* Eastern R. R., 18 N. H. 547. A right of action may not be given against a husband to a creditor of the wife upon her contract. Addoms *v.* Marx, 50 N. J. L. 253. A railroad company cannot be made responsible for the coroner's inquest and burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, &c., irrespective of any wrong or negligence of the company or its servants. Ohio & M. R. R. Co. *v.* Lackey, 78 Ill. 55. Absolute liability, irrespective of negligence, cannot be imposed on a railroad company for stock killing. Cottrel *v.* Union Pac. Ry. Co., 21 Pac. Rep. 416 (Idaho); Bielenberg *v.* Montana N. Ry. Co., 20 Pac. Rep. 314 (Mont.). In Atchison, &c. R. R. Co. *v.* Baty, 6 Neb. 37; s. c. 29 Am. Rep. 356, it is held incompetent to make a railroad company liable to double the value of stock accidentally injured or destroyed on the railroad track. But the contrary was held in Missouri Pac. Ry. Co. *v.* Humes, 115 U. S. 512. In such cases attorney's fees may be allowed. Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. But see Wilder *v.* Chicago & W. M. Ry. Co., 38 N. W. Rep. 289 (Mich.). See cases on above points, *post*, 713, note, 1.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection, while in others they have been held to be void. The different decisions have been based upon diversities in the facts which make different principles applicable. There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State constitution, and provided further that no other objection exists to them than their retrospective character.[1] Nevertheless, legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively.[2] And some of the States have deemed it just and wise to forbid such laws altogether by their constitutions.[3]

[1] Thornton *v.* McGrath, 1 Duvall, 349; Aldridge *v.* Railroad Co., 2 Stew. & Port. 199; s. c. 23 Am. Dec. 307; State *v.* Squires, 26 Iowa, 340; Beach *v.* Walker, 6 Conn. 190; Schenley *v.* Commonwealth, 36 Pa. St. 57; Shonk *v.* Brown, 61 Pa. 320; Lane *v.* Nelson, 79 Pa. St. 407.

[2] Dash *v.* Van Kleeck, 7 Johns. 477; s. c. 5 Am. Dec. 291; Sayre *v.* Wisner, 8 Wend. 661; Watkins *v.* Haight, 18 Johns. 138; Bay *v.* Gage, 36 Barb. 447; Norris *v.* Beyea, 13 N. Y. 273; Drake *v.* Gilmore, 52 N. Y. 389; Quackenbush *v.* Danks, 1 Denio, 128; Hapgood *v.* Whitman, 13 Mass. 464; Medford *v.* Learned, 16 Mass. 215; Gerry *v.* Stoneham, 1 Allen, 319; Kelley *v.* Boston, &c. R. R. Co., 135 Mass. 448; Perkins *v.* Perkins, 7 Conn. 558; s. c. 18 Am. Dec. 120; Plumb *v.* Sawyer, 21 Conn. 351; Hubbard *v.* Brainerd, 35 Conn. 563; Sturgis *v.* Hull, 48 Vt. 302; Briggs *v.* Hubbard, 19 Vt. 86; Hastings *v.* Lane, 15 Me. 134; Torrey *v.* Corliss, 32 Me. 333; Atkinson *v.* Dunlop, 50 Me. 111; Rogers *v.* Greenbush, 58 Me. 395; Guard *v.* Rowan, 3 Ill. 499; Garrett *v.* Doe, 2 Ill. 335; Thompson *v.* Alexander, 11 Ill. 54; Conway *v.* Cable, 37 Ill. 82; *In re* Tuller, 79 Ill. 99; Knight *v.* Begole, 56 Ill. 122; McHaney *v.* Trustees of Schools, 68 Ill. 140; Hatcher *v.* Toledo, &c. R. R. Co., 62 Ill. 477; Harrison *v.* Metz, 17 Mich. 377; Thomas *v.* Collins, 58 Mich. 64; Danville *v.* Pace, 25 Gratt. 1; Cumberland, &c. R. R. Co. *v.* Washington Co. Court, 10 Bush, 564; State *v.* Barbee, 3 Ind. 258; State *v.* Atwood, 11 Wis. 422; Bartruff *v.* Remey, 15 Iowa, 257; Knoulton *v.* Redenbaugh, 40 Iowa, 114; Allbyer *v.* State, 10 Ohio St. 588; Colony *v.* Dublin, 32 N. H. 432; *Ex parte* Graham, 13 Rich. 277; Garrett *v.* Beaumont, 24 Miss. 377; Clark *v.* Baltimore, 29 Md. 277; Williams *v.* Johnson, 30 Md. 500; State *v.* The Auditor, 41 Mo. 25; State *v.* Ferguson, 62 Mo. 77; Merwin *v.* Ballard, 66 N. C. 398; Tyson *v.* School Directors, 51 Pa. St. 9; Haley *v.* Philadelphia, 68 Pa. St. 45; s. c. 8 Am. Rep. 153; Baldwin *v.* Newark, 38 N. J. 158; Warshung *v.* Hunt, 47 N. J. L. 256; McGeehan *v.* State Treasurer, 37 La. Ann. 156; State *v.* Pinckney, 22 S. C. 484; Richmond *v.* Supervisors, 83 Va. 204. This doctrine applies to amendments of statutes. Ely *v.* Holton, 15 N. Y. 595. If no vested right is disturbed, a retroactive effect may be given a statute, though the language does not render it necessary, provided such is the clear intent. People *v.* Spicer, 99 N. Y. 225.

[3] See the provision in the Constitution of New Hampshire, considered in Woart *v.* Winnick, 3 N. H. 473; s. c. 14 Am. Dec. 384; Clark *v.* Clark, 10 N. H. 380; Willard *v.* Harvey, 24 N. H. 344; Rich *v.* Flanders, 39 N. H. 304; and Simpson *v.* Savings Bank, 56 N. H. 466; and that in the Constitution of Texas, in De Cordova *v.* Galveston, 4 Tex. 470; and that in the Constitution of Missouri, in State *v.* Hernan, 70 Mo. 441; State *v.* Greer, 78 Mo. 188. The provision covers only civil, not criminal cases. State *v.* Johnson, 81 Mo.

A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon;[1] irregularities in the

60. A statute, passed after a municipality has levied a tax, may annul it before it becomes due and put the right to levy it in another body. State *v.* St. Louis, &c. Ry. Co., 79 Mo. 420. The Constitution of Ohio provides that "the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; provided, however, that the General Assembly may, by general laws, authorize the courts to carry into effect the manifest intention of parties and officers, by curing omissions, defects, and errors in instruments and proceedings, arising out of their want of conformity with the laws of this State, and upon such terms as shall be just and equitable." Under this clause it was held competent for the General Assembly to pass an act authorizing the courts to correct mistakes in deeds of married women previously executed, whereby they were rendered ineffectual. Goshorn *v.* Purcell, 11 Ohio St. 641. Under a provision in the Constitution of Tennessee that no retrospective law shall be passed, it has been held that a statute passed after a death cannot allow for the first time a recovery for the loss suffered by the children of deceased from the death. Railroad *v.* Pounds, 11 Lea, 127. But a law authorizing a bill to be filed by slaves, by their next friend, to emancipate them, although it applied to cases which arose before its passage, was held not a retrospective law within the meaning of this clause. Fisher's Negroes *v.* Dobbs, 6 Yerg. 119. So of a law making a judgment against the principal conclusive upon the surety. Pickett *v.* Boyd, 11 Lea, 498. An act for the payment of bounties for past services was held not retrospective, in State *v.* Richland, 20 Ohio St. 369. See further, Society *v.* Wheeler, 2 Gall. 105; Officer *v.* Young, 5 Yerg. 320; s. c. 26 Am. Dec. 268. Under like provision in the Colorado Constitution a statute is void which allows a writ of error on a judgment in respect to which an appeal was barred. Willoughby *v.* George, 5 Col. 80. Legislation may be ordered to take immediate effect notwithstanding retrospective laws are forbidden. Thomas *v.* Scott, 23 La. Ann. 689.

That the legislature cannot retrospectively construe statutes and bind parties thereby, see *ante*, p. 110 *et seq.*

[1] Butler *v.* Toledo, 5 Ohio St. 225; Strauch *v.* Shoemaker, 1 W. & S. 166; McCoy *v.* Michew, 7 W. & S. 386; Montgomery *v.* Meredith, 17 Pa. St. 42; Dunden *v.* Snodgrass, 18 Pa. St. 151; Williston *v.* Colkett, 9 Pa. St. 38; Boardman *v.* Beckwith, 18 Iowa, 292; The Iowa R. R. Land Co. *v.* Soper, 39 Iowa, 112; Lennon *v.* New York, 55 N. Y. 361; Smith *v.* Hard, 59 Vt. 13. Officers may be authorized to extend inquiries over years preceding; no new liability is imposed upon the taxpayer. Sturges *v.* Carter, 114 U. S. 511. It is not unconstitutional to prohibit the vacating of assessments for irregularities. Astor *v.* New York, 62 N. Y. 580. The limit of power in validating assessments is very clearly shown by *McKinstry*, J., in People *v.* Lynch, 51 Cal. 15. And see Walter *v.* Bacon, 8 Mass. 468; Locke *v.* Dane, 9 Mass. 360; Patterson *v.* Philbrook, 9 Mass. 151; Trustees *v.* McCaughy, 2 Ohio St. 152. Compare Forster *v.* Forster, 129 Mass. 559. Acts of officers void for jurisdictional defects cannot be validated. Houseman *v.* Kent Circ. Judge, 58 Mich. 364; Bartlett *v.* Wilson, 59 Vt. 23. Nor can irregularities be cured after a suit is brought to recover money received by a township on a sale of land for an illegal tax. Daniells *v.* Watertown, 61 Mich. 514. The right to provide for a reassessment of taxes irregularly levied is undoubted. See Brevoort *v.* Detroit, 24 Mich. 322; State *v.* Newark, 34 N. J. 236; Musselman *v.* Logansport, 29 Ind. 533; Street Railroad Co. *v.* Morrow, 87 Tenn. 406; Redwood Co. *v.* Winona &c. Co. 40 Minn. 512. But,

organization or elections of corporations;[1] irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause;[2] irregular proceedings in courts, &c.[3]

The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law.

A few of the decided cases will illustrate this principle. In Kearney *v.* Taylor[4] a sale of real estate belonging to infant tenants in common had been made by order of court in a partition suit, and the land bid off by a company of persons, who proposed subdividing and selling it in parcels. The sale was confirmed in their names, but by mutual arrangement the deed was made to one only, for convenience in selling and conveying. This deed failed to convey the title, because not following the sale. The legislature afterwards passed an act providing that, on proof being made to the satisfaction of the court or jury before which such deed was offered in evidence that the land was sold fairly and without fraud, and the deed executed in good faith and for a sufficient consideration, and with the consent of the persons reported as purchasers, the deed should have the same effect as though it had been made to the purchasers. That this act was unobjectionable in principle was not denied; and it cannot be

of course, if the vice is in the nature of the tax itself, it will continue and be fatal, however often the process of assessment may be repeated. See *post*, p. 470.

[1] Syracuse Bank *v.* Davis, 16 Barb. 188; Mitchell *v.* Deeds, 49 Ill. 416; People *v.* Plank Road Co., 86 N. Y. 1.

[2] See Menges *v.* Wertman, 1 Pa. St. 218; Yost's Report, 17 Pa. St. 524; Bennett *v.* Fisher, 26 Iowa, 497; Allen *v.* Archer, 49 Me. 346; Commonwealth *v.* Marshall, 69 Pa. St. 328; State *v.* Union, 33 N. J. 350; State *v.* Guttenberg, 38 N. J. 419; Mut. Ben. Life Ins. Co. *v.* Elizabeth, 42 N. J. 235; Rogers *v.* Stephens, 86 N. Y. 623; Unity *v.* Burrage, 103 U. S. 447. By the Constitution of Missouri, the legislature is forbidden to legalize the unauthorized or invalid acts of any officer or agent of the State, or of any county or municipality. Art. 4 § 53.

[3] Lane *v.* Nelson, 79 Pa. St. 407; Tilton *v.* Swift, 40 Iowa, 78; Supervisors *v.* Wisconsin Cent. R. R. Co., 121 Mass. 460; Cookerly *v.* Duncan, 87 Ind. 332; Muncie Nat. Bank *v.* Miller, 91 Ind. 441; Johnson *v.* Com'rs Wells Co., 107 Ind. 15. See cases *post*, 471, note 2.

[4] 15 How. 494. And see Boyce *v.* Sinclair, 3 Bush, 261; Weed *v.* Donovan, 114 Mass. 181.

doubted that a prior statute, authorizing the deed to be made to one for the benefit of all and with their assent, would have been open to no valid objection.[1]

In certain Connecticut cases it was insisted that sales made of real estate on execution were void, because the officer had included in the amount due, several small items of fees not allowed by law. It appeared, however, that, after the sales were made, the legislature had passed an act providing that no levy should be deemed void by reason of the officer having included greater fees than were by law allowable, but that all such levies, not in other respects defective, should be valid and effectual to transmit the title of the real estate levied upon. The liability of the officer for receiving more than his legal fees was at the same time left unaffected. In the leading case the court say: "The law, undoubtedly, is retrospective; but is it unjust? All the charges of the officer on the execution in question are perfectly reasonable, and for necessary services in the performance of his duty; of consequence they are eminently just, and so is the act confirming the levies. A law, although it be retrospective, if conformable to entire justice, this court has repeatedly decided is to be recognized and enforced."[2]

In another Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not empowered by the State law to perform that ceremony, and that the marriages were therefore invalid. The legislature had afterwards passed an act declaring all such marriages valid, and the court sustained the act. It was assailed as an exercise of the judicial power; but this it clearly was not, as it purported to settle no controversies, and merely sought to give effect to the desire of the parties, which they had ineffectually attempted to carry out by means of the ceremony which proved insufficient. And while it was not claimed that the act was void in so far as it made effectual the legal relation of matrimony between the parties, it was nevertheless insisted that rights of property dependent upon that relation could not be affected by it, inasmuch as, in order to give such rights, it must operate retrospectively. The

[1] See Davis *v.* State Bank, 7 Ind. 316; and Lucas *v.* Tucker, 17 Ind. 41, for decisions under statutes curing irregular sales by guardians and executors. In many of the States general laws will be found providing that such sales shall not be defeated by certain specified defects and irregularities.

[2] Beach *v.* Walker, 6 Conn. 190, 197. See Booth *v.* Booth, 7 Conn. 350; Mather *v.* Chapman, 6 Conn. 54; Norton *v.* Pettibone, 7 Conn. 319; Welch *v.* Wadsworth, 30 Conn. 149; Smith *v.* Merchand's Ex'rs, 7 S. & R. 260; Underwood *v.* Lilly, 10 S. & R. 97; Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Pa. St. 218; Weister *v.* Hade, 52 Pa. St. 474; Ahl *v.* Gleim, 52 Pa. St. 432; Selsby *v.* Redlon, 19 Wis. 17; Parmelee *v.* Lawrence, 48 Ill. 331.

court in disposing of the case are understood to express the opinion that, if the legislature possesses the power to validate an imperfect marriage, still more clearly does it have power to affect incidental rights. "The man and the woman were unmarried, notwithstanding the formal ceremony which passed between them, and free in point of law to live in celibacy, or contract marriage with any other persons at pleasure. It is a strong exercise of power to compel two persons to marry without their consent, and a palpable perversion of strict legal right. At the same time the retrospective law thus far directly operating on vested rights is admitted to be unquestionably valid, because it is manifestly just." [1]

It is not to be inferred from this language that the court understood the legislature to possess power to select individual members of the community, and force them into a relation of marriage with each other against their will. That complete control which the legislature is supposed to possess over the domestic relations can hardly extend so far. The legislature may perhaps divorce parties, with or without cause, according to its own view of justice or public policy; but for the legislature to marry parties against their consent, we conceive to be decidedly against "the law of the land." The learned court must be understood as speaking here with exclusive reference to the case at bar, in which the legislature, by the retrospective act, were merely removing a formal defect in certain marriages which the parties had assented to, and which they had attempted to form. Such an act, unless special circumstances conspired to make it otherwise, would certainly be "manifestly just," and therefore might well be held "unquestionably valid." And if the marriage was rendered valid, the legal incidents would follow of course. In a Pennsylvania case the validity of certain grading and paving assessments was involved, and it was argued that they were invalid for the reason that the city ordinance under which they had been made was inoperative, because not recorded as required by law. But the legislature had passed an act to validate this ordinance, and had declared therein that the omission to record the ordi-

[1] Goshen *v.* Stonington, 4 Conn. 209, 221, per *Hosmer*, J.; s. c. 10 Am. Dec. 121. And see State *v.* Adams, 65 N. C. 537, where it was held that the act validating the previous marriages of slaves was effectual, and a subsequent marriage in disregard of it would be bigamy. The legislature may remove after a marriage a disability created by its former action. Baity *v.* Cranfil, 91 N. C. 293. That the legislature may legitimize children, see Andrews *v.* Page, 3 Heisk. 653. The power to validate void marriages held not to exist in the legislature where, by the constitution, the whole subject was referred to the courts. White *v.* White, 105 Mass. 325.

nance should not affect or impair the lien of the assessments against the lot owners. In passing upon the validity of this act, the court express the following views: "Whenever there is a right, though imperfect, the constitution does not prohibit the legislature from giving a remedy. In Hepburn *v.* Curts,[1] it was said, 'The legislature, provided it does not violate the constitutional provisions, may pass retrospective laws, such as in their operation may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings.' What more has been done in this case? . . . While (the ordinance) was in force, contracts to do the work were made in pursuance of it, and the liability of the city was incurred. But it was suffered to become of no effect by the failure to record it. Notwithstanding this, the grading and paving were done, and the lots of the defendants received the benefit at the public expense. Now can the omission to record the ordinance diminish the equitable right of the public to reimbursement? It is at most but a formal defect in the remedy provided, — an oversight. That such defects may be cured by retroactive legislation need not be argued."[2]

On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power.

By statute of Ohio, all bonds, notes, bills, or contracts negotiable or payable at any unauthorized bank, or made for the purpose of being discounted at any such bank, were declared to be void. While this statute was in force a note was made for the purpose of being discounted at one of these institutions, and was actually discounted by it. Afterwards the legislature passed an act, reciting that many persons were indebted to such bank, by bonds, bills, notes, &c., and that owing, among other things, to doubts of its right to recover its debts, it was unable to meet its own obligations, and had ceased business, and for the purpose of winding up its affairs had made an assignment to a trustee;

[1] 7 Watts, 300.

[2] Schenley *v.* Commonwealth, 36 Pa. St. 29, 57. See also State *v.* Newark, 27 N. J. 185; Den *v.* Downam, 13 N. J. 135; People *v.* Seymour, 16 Cal. 332; Grim *v.* Weissenburg School District, 57 Pa. St. 433; State *v.* Union, 33 N. J. 350. The legislature has the same power to ratify and confirm an illegally appointed corporate body that it has to create a new one. Mitchell *v.* Deeds, 49 Ill. 416.

therefore the said act authorized the said trustee to bring suits on the said bonds, bills, notes, &c., and declared it should not be lawful for the defendants in such suits "to plead, set up, or insist upon, in defence, that the notes, bonds, bills, or other written evidences of such indebtedness are void on account of being contracts against or in violation of any statute law of this State, or on account of their being contrary to public policy." This law was sustained as a law "that contracts may be enforced," and as in furtherance of equity and good morals.[1] The original invalidity was only because of the statute, and that statute was founded upon reasons of public policy which had either ceased to be of force, or which the legislature regarded as overborne by countervailing reasons. Under these circumstances it was reasonable and just that the makers of such paper should be precluded from relying upon such invalidity.[2]

By a statute of Connecticut, where loans of money were made, and a bonus was paid by the borrower over and beyond the interest and bonus permitted by law, the demand was subject to a deduction from the principal of all the interest and bonus paid. A construction appears to have been put upon this statute by business men which was different from that afterwards given by the

[1] Lewis *v.* McElvain, 16 Ohio, 347. But where an act is forbidden by statute under penalty, and therefore illegal, the mere repeal of the statute will not legalize it. Roby *v.* West, 4 N. H. 285; s. c. 17 Am. Dec. 423.

[2] Trustees *v.* McCaughy, 2 Ohio St. 152; Johnson *v.* Bentley, 16 Ohio, 97. See also Syracuse Bank *v.* Davis, 16 Barb. 188. By statute, notes issued by unincorporated banking associations were declared void. This statute was afterwards repealed, and action was brought against bankers on notes previously issued. Objection being taken that the legislature could not validate the void contracts, the judge says: "I will consider this case on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihilated. The object of the [original] act was not to vest any right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers they were violators of the law, and objects not of protection but of punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the legislature pardon the crime, without consulting those who committed it? . . . How can the defendants say there was no contract, when the plaintiff produces their written engagement for the performance of a duty, binding in conscience if not in law? Although the contract, for reasons of policy, was so far void that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained; and it would be going very far to say that the legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction." Hess *v.* Werts, 4 S. & R. 356, 361. See also Bleakney *v.* Bank of Greencastle, 17 S. & R. 64; Menges *v.* Wertman, 1 Pa. St. 218; Boyce *v.* Sinclair, 3 Bush, 264.

courts; and a large number of contracts of loan were in consequence subject to the deduction. The legislature then passed a "healing act," which provided that such loans theretofore made should not be held, by reason of the taking of such bonus, to be usurious, illegal, or in any respect void; but that, if otherwise legal, they were thereby confirmed, and declared to be valid, as to principal, interest, and bonus. The case of Goshen *v.* Stonington[1] was regarded as sufficient authority in support of this act; and the principle to be derived from that case was stated to be "that where a statute is expressly retroactive, and the object and effect of it is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained."[2]

After the courts of the State of Pennsylvania had decided that the relation of landlord and tenant could not exist in that State under a Connecticut title, a statute was passed which provided that the relation of landlord and tenant "shall exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this Commonwealth, on the trial of any case now pending or hereafter to be brought within this Commonwealth, any law or usage to the contrary notwithstanding." In a suit which was pending and had been once tried before the statute was passed, the statute was sustained by the Supreme Court of that State, and afterwards by the Supreme Court of the United States, into which last-mentioned court it had been removed on the allegation that it violated the obligation of contracts. As its purpose and effect was to remove from contracts which the parties had made a legal impediment to their enforcement, there would seem to be no doubt, in the light of the other authorities we have referred to, that the conclusion reached was the only just and proper one.[3]

[1] 4 Conn. 209, 224; s. c. 10 Am. Dec. 121. See *ante*, pp. 458, 459.

[2] Savings Bank *v.* Allen, 28 Conn. 97, 102. See also Savings Bank *v.* Bates, 8 Conn. 505; Andrews *v.* Russell, 7 Blackf. 474; Grimes *v.* Doe, 8 Blackf. 371; Thompson *v.* Morgan, 6 Minn. 292; Parmelee *v.* Lawrence, 48 Ill. 331. In Curtis *v.* Leavitt, 17 Barb. 309, and 15 N. Y. 9, and in Woodruff *v.* Scruggs, 27 Ark. 26, s. c. 11 Am. Rep. 777, a statute forbidding the interposition of the defence of usury was treated as a statute repealing a penalty. See further, Lewis *v.* Foster, 1 N. H. 61; Wilson *v.* Hardesty, 1 Md. Ch. 66; Welch *v.* Wadsworth, 30 Conn. 149; Wood *v.* Kennedy, 19 Ind. 68; Washburn *v.* Franklin, 35 Barb. 599; Parmelee *v.* Lawrence, 48 Ill. 331; Danville *v.* Pace, 25 Gratt. 1. The case of Gilliland *v.* Phillips, 1 S. C. 152, is *contra*; but it discusses the point but little, and makes no reference to these cases. The legislature may impose interest at an increased rate on a debt past due, when the act takes effect. Cummings *v.* Howard, 63 Cal. 503.

[3] Satterlee *v.* Mathewson, 16 S. & R. 169, and 2 Pet. 380. And see Watson *v.* Mercer, 8 Pet. 88; Gross *v.* U.S. Mtge. Co.,

In the State of Ohio, certain deeds made by married women were ineffectual for the purposes of record and evidence, by reason of the omission on the part of the officer taking the acknowledgment to state in his certificate that, before and at the time of the grantor making the acknowledgment, he made the contents known to her by reading or otherwise. An act was afterwards passed which provided that "any deed heretofore executed pursuant to law, by husband and wife, shall be received in evidence in any of the courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed before or at the time she acknowledged the execution thereof." This statute, though with some hesitation at first, was held to be unobjectionable. The deeds with the defective acknowledgments were regarded by the legislature and by the court as being sufficient for the purpose of conveying at least the grantor's equitable estate; and if sufficient for this purpose, no vested rights would be disturbed, or wrong be done, by making them receivable in evidence as conveyances.[1]

Other cases go much farther than this, and hold that, although the deed was originally ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties by giving it effect.[2] At first sight these cases may seem

108 U. S. 477; Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Payne *v.* Treadwell, 16 Cal. 220; Maxey *v.* Wise, 25 Ind. 1.

[1] Chestnut *v.* Shane's Lessee, 16 Ohio, 599, overruling Connell *v.* Connell, 6 Ohio, 358; Good *v.* Zercher, 12 Ohio, 364; Meddock *v.* Williams, 12 Ohio, 377; and Silliman *v.* Cummins, 13 Ohio, 116. Of the dissenting opinion in the last case, which the court approve in 16 Ohio, 609–610, they say: "That opinion stands upon the ground that the act operates only upon that class of deeds where enough had been done to show that a court of chancery ought, in each case, to render a decree for a conveyance, assuming that the certificate was not such as the law required. And where the title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed, without subjecting an indefinite number to the useless expense of unnecessary litigation." See also Lessee of Dulany *v.* Tilghman, 6 G. & J. 461; Journeay *v.* Gibson, 56 Pa. St. 57; Grove *v.* Todd, 41 Md. 633; s. c. 20 Am. Rep. 76; Montgomery *v.* Hobson, Meigs, 437. But the legislature, it has been declared, has no power to legalize and make valid the deed of an insane person. Routsong *v.* Wolf, 35 Mo. 174. In Illinois it has been decided that a deed of release of dower executed by a married woman, but not so acknowledged as to be effectual, cannot be validated by retrospective statute, because to do so would be to take from the woman a vested right. Russell *v.* Rumsey, 35 Ill. 362.

[2] Lessee of Walton *v.* Bailey, 1 Binn. 470; Underwood *v.* Lilly, 10 S. & R. 97; Barnet *v.* Barnet, 15 S. & R. 72; s. c. 16 Am. Dec. 516; Tate *v.* Stooltzfoos, 16 S. & R. 35; s. c. 16 Am. Dec. 546; Watson *v.* Mercer, 8 Pet. 88; Carpenter *v.* Pennsylvania, 17 How. 456; Davis *v.* State Bank, 7 Ind. 316; Estate of Sticknoth, 7 Nev. 227; Ferguson *v.* Williams, 58 Iowa, 717; Johnson *v.* Taylor, 60 Tex. 360; Johnson *v.* Richardson, 44 Ark. 365; Goshorn *v.* Purcell, 11 Ohio St 641. In the last case the court say: "The act of the mar-

to go beyond the mere confirmation of a contract, and to be at least technically objectionable, as depriving a party of property without an opportunity for trial, inasmuch as they proceed upon the assumption that the title still remained in the grantor, and that the healing act was required for the purpose of devesting him of it, and passing it over to the grantee.[1] Apparently, therefore, there would seem to be some force to the objection that such a statute deprives a party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy could be afforded the other party in the courts. The right which the healing act takes away in such a case is *the right in the party to avoid his contract*, — a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect.[2] As the point is put by Chief Justice *Parker* of Massachusetts, a party cannot have a vested right to do wrong;[3] or, as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, cannot be considered as taking away vested rights. Courts do not regard rights as vested contrary to the justice and equity of the case."[4]

ried woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted on in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of that mistake; and she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of justice." Similar language is employed in the Pennsylvania cases. See further, Dentzel *v.* Waldie, 30 Cal. 138; Skellenger *v.* Smith, 1 Wash. Ter. 369.

[1] This view has been taken in some similar cases. See Russell *v.* Rumsey, 35 Ill. 362; Alabama, &c. Ins. Co. *v.* Boykin, 38 Ala. 510; Orton *v.* Noonan, 23 Wis. 102; Dale *v.* Medcalf, 9 Pa. St. 108.

[2] In Gibson *v.* Hibbard, 13 Mich. 214, a check, void at the time it was given for want of a revenue stamp, was held valid after being stamped as permitted by a subsequent act of Congress. A similar ruling was made in Harris *v.* Rutledge, 19 Iowa, 387. The case of State *v.* Norwood, 12 Md. 195, is still stronger. The curative statute was passed after judgment had been rendered against the right claimed under the defective instrument, and it was held that it must be applied by the appellate court. See *post*, p. 469.

[3] Foster *v.* Essex Bank, 16 Mass. 245. See also Lycoming *v.* Union, 15 Pa. St. 166, 170. There is no vested right in the statutory defence that a contract was made on Sunday. Berry *v.* Clary, 77 Me. 482.

[4] State *v.* Newark, 25 N. J. 185, 197. Compare Blount *v.* Janesville, 31 Wis. 648; Brown *v.* New York, 63 N. Y. 239; Hughes *v.* Cannon, 2 Humph. 594. A

The operation of these cases, however, must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities. A subsequent *bona fide* purchaser cannot be deprived of the property which he has acquired, by an act which retrospectively deprives his grantor of the title which he held when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid, and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to devest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity as strong as that which exists in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and as entitled to the usual protection which the law accords to vested interests.[1]

If, however, a grantor undertakes to convey more than he possesses, or contrary to the conditions or qualifications which, for the benefit of others, are imposed upon his title, or in fraud of the rights of others whose representative or agent he is, so that the defect in his conveyance consists not in any want of due formality, nor in any disability imposed by law, it is not in the power

law merely taking away an unconscionable defence is valid. Read *v.* Plattsworth, 107 U. S. 568. In New York, &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473, the right of the legislature to validate a void contract was denied on the ground that to validate it would be to take the property of the contracting party without due process of law. The cases which are *contra* are not examined in the opinion, or even referred to.

[1] Brinton *v.* Seevers, 12 Iowa, 389; Southard *v.* Central R. R. Co., 26 N. J. 13; Thompson *v.* Morgan, 6 Minn. 292; Meighen *v.* Strong, 6 Minn. 177; Norman *v.* Heist, 5 W. & S. 171; Greenough *v.* Greenough, 11 Pa. St. 489; Les Bois *v.* Bramell, 4 How. 449; McCarthy *v.* Hoffman, 23 Pa. St. 507; Sherwood *v.* Fleming, 25 Tex. 408; Wright *v.* Hawkins, 28 Tex. 452. See Fogg *v.* Holcomb, 64 Iowa, 621; McGehee *v.* McKenzie, 43 Ark. 156. The legislature cannot validate an invalid trust in a will, by act passed after the death of the testator, and after title vested in the heirs. Hilliard *v.* Miller, 10 Pa. St. 326. See Snyder *v.* Bull, 17 Pa. St. 54; McCarthy *v.* Hoffman, 23 Pa. St. 507; Bolton *v.* Johns, 5 Pa. St. 145; State *v.* Warren, 28 Md. 338. The cases here cited must not be understood as establishing any different principle from that laid down in Goshen *v.* Stonington, 4 Conn. 209, where it was held competent to validate a marriage, notwithstanding the rights of third parties would be incidentally affected. Rights of third parties are liable to be incidentally affected more or less in any case in which a defective contract is made good; but this is no more than might happen in enforcing a contract or decreeing a divorce. See *post*, p. 473. Also Tallman *v.* Janesville, 17 Wis. 71.

of the legislature to validate it retrospectively; and we may add, also, that it would not have been competent to authorize it in advance. In such case the rights of others intervene, and they are entitled to protection on the same grounds, though for still stronger reasons, which exist in the case of the *bona fide* purchasers above referred to.[1]

We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized, the case falls within the principle above laid down, and the right of the legislature to confirm it must be recognized.[2]

[1] In Shonk *v.* Brown, 61 Pa. St. 327, the facts were that a married woman held property under a devise, with an express restraint upon her power to alienate. She nevertheless gave a deed of the same, and a legislative act was afterwards obtained to validate this deed. Held void. *Agnew*, J.: "Many cases have been cited to prove that this legislation is merely confirmatory and valid, beginning with Barnet *v.* Barnet, 15 S. & R. 72, and ending with Journeay *v.* Gibson, 56 Pa. St. 57. The most of them are cases of the defective acknowledgments of deeds of married women. But there is a marked difference between them and this. In all of them there was a power to convey, and only a defect in the mode of its exercise. Here there is an absolute want of power to convey in any mode. In ordinary cases a married woman has both the title and the power to convey or to mortgage her estate, but is restricted merely in the manner of its exercise. This is a restriction it is competent for the legislature to remove, for the defect arises merely in the form of the proceeding, and not in any want of authority. Those to whom her estate descends, because of the omission of a prescribed form, are really not injured by the validation. It was in her power to cut them off, and in truth and conscience she did so, though she failed at law. They cannot complain, therefore, that the legislature intervenes to do justice. But the case before us is different. [The grantor] had neither the right nor the power during coverture to cut off her heirs. She was forbidden by the law of the gift, which the donor impressed upon it to suit his own purposes. Her title was qualified to this extent. Having done an act she had no right to do, there was no moral obligation for the legislature to enforce. Her heirs have a right to say, . . . 'The legislature cannot take our estate and vest it in another who bought it with notice on the face of his title that our mother could not convey to him.'" "The true principle on which retrospective laws are supported was stated long ago by *Duncan*, J., in Underwood *v.* Lilly, 10 S. & R. 101; to wit, where they impair no contract, or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted." In White Mountains R. R. Co *v.* White Mountains R. R. Co. of N. H., 50 N. H. 50, it was decided that the legislature had no power, as against non-assenting parties, to validate a fraudulent sale of corporate property. In Alter's Appeal, 67 Pa. St. 341, s. c. 5 Am. Rep. 433, the Supreme Court of Pennsylvania declared it incompetent for the legislature, after the death of a party, to empower the courts to correct a mistake in his will which rendered it inoperative, — the title having already passed to his heirs. But where it was not known that the decedent left heirs, it was held competent, as against the State, to cure defects in a will after the death, and thus prevent an escheat. Estate of Sticknoth, 7 Nev. 223.

[2] See Shaw *v.* Norfolk R. R. Corp., 5 Gray, 162, in which it was held that the legislature might validate an unauthorized assignment of a franchise. Also May *v.* Holdridge, 23 Wis. 93, and cases cited,

This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law, and the authority given was conferred by statute retrospectively.[1]

It has not usually been regarded as a circumstance of importance in these cases, whether the enabling act was before or after the corporation had entered into the contract in question; and if the legislature possesses that complete control over the subject of taxation by municipal corporations which has been declared in many cases, it is difficult to perceive how such a corporation can successfully contest the validity of a special statute, which only sanctions a contract previously made by the corporation, and which, though at the time *ultra vires*, was nevertheless for a public and local object, and compels its performance through an exercise of the power of taxation.[2]

in which statutes authorizing the reassessment of irregular taxes were sustained. In this case, *Paine*, J., says: "This rule must of course be understood with its proper restrictions. The work for which the tax is sought to be assessed must be of such a character that the legislature is authorized to provide for it by taxation. The method adopted must be one liable to no constitutional objection. It must be such as the legislature might originally have authorized had it seen fit. With these restrictions, where work of this character has been done, I think it competent for the legislature to supply a defect of authority in the original proceedings, to adopt and ratify the improvement, and provide for a reassessment of the tax to pay for it." And see Brewster *v.* Syracuse, 19 N. Y. 116; Kunkle *v.* Franklin, 13 Minn. 127; Boyce *v.* Sinclair, 3 Bush, 261; Dean *v.* Borchsenius, 30 Wis. 236; Stuart *v.* Warren, 37 Conn. 225. A city ordinance may be validated retrospectively. Truchelut *v.* Charleston, 1 N. & McC. 227; Morris *v.* State, 62 Tex. 728. Otherwise where the city had no power to annex territory as it tried to do. Strosser *v.* Fort Wayne, 100 Ind. 443.

[1] See, among other cases, McMillan *v.* Boyles, 6 Iowa, 304; Gould *v.* Sterling, 23 N. Y. 456; Thompson *v.* Lee County, 3 Wall. 327; Bridgeport *v.* Housatonic R. R. Co., 15 Conn. 475; Board of Commissioners *v.* Bright, 18 Ind. 93; Gibbons *v.* Mobile, &c. R. R. Co., 36 Ala. 410.

[2] In Hasbrouck *v.* Milwaukee, 13 Wis. 37, it appeared that the city of Milwaukee had been authorized to contract for the construction of a harbor, at an expense not to exceed $100,000. A contract was entered into by the city providing for a larger expenditure; and a special legislative act was afterwards obtained to ratify it. The court held that the subsequent legislative ratification was not sufficient, *proprio vigore*, and without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon or confirmed by it, to make the contract obligatory upon the city. The court say, per *Dixon*, Ch. J.: "The question is, can the legislature, by recognizing the existence of a previously void contract, and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the legislature, in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced. A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; it is as if no attempt at an agreement had ever been made. And to admit that the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it

Nor is it important in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance.

is within the scope of legislative authority to devest settled rights of property, and to take the property of one individual or corporation and transfer it to another." This reasoning is of course to be understood in the light of the particular case before the court; that is to say, a case in which the contract was to do something not within the ordinary functions of local government. See the case explained and defended by the same eminent judge in Mills *v.* Charlton, 29 Wis. 400. Compare Fisk *v.* Kenosha, 26 Wis. 23, 33; Knapp *v.* Grant, 27 Wis. 147; and Single *v.* Supervisors of Marathon, 38 Wis. 363, in which the right to validate a contract which might originally have been authorized was fully affirmed. And see Marshall *v.* Silliman, 61 Ill. 218, 225, opinion by Chief Justice *Lawrence*, in which, after referring to Harward *v.* St. Clair, &c. Drainage Co., 51 Ill. 130; People *v.* Mayor of Chicago, 51 Ill. 17; Hessler *v.* Drainage Com'rs, 53 Ill. 105; and Lovingston *v.* Wider, 53 Ill. 302, it is said, "These cases show it to be the settled doctrine of this court, that, under the constitution of 1848, the legislature could not compel a municipal corporation to incur a debt for merely local purposes, against its own wishes, and this doctrine, as already remarked, has received the sanction of express enactment in our existing constitution. That was the effect of the curative act under consideration, and it was therefore void." The cases of Guilford *v.* Supervisors of Chenango, 18 Barb. 615, and 13 N. Y. 143; Brewster *v.* Syracuse, 19 N. Y. 116; and Thomas *v.* Leland, 24 Wend. 65, especially go much further than is necessary to sustain the text. See also Bartholomew *v.* Harwinton, 33 Conn. 408; People *v.* Mitchell, 35 N. Y. 551; Barbour *v.* Camden, 51 Me 608; Weister *v.* Hade, 52 Pa. St. 474; State *v.* Sullivan, 43 Ill. 412; Johnson *v.* Campbell, 49 Ill. 316 In Brewster *v.* Syracuse, parties had constructed a sewer for the city at a stipulated price which had been fully paid to them. The charter of the city forbade the payment of extra compensation to contractors in any case. The legislature afterwards passed an act empowering the Common Council of Syracuse to assess, collect, and pay over the further sum of $600 in addition to the contract price; and this act was held constitutional. In Thomas *v.* Leland, certain parties had given bond to the State, conditioned to pay into the treasury a certain sum of money as an inducement to the State to connect the Chenango Canal with the Erie at Utica, instead of at Whitestown as originally contemplated, — the sum mentioned being the increased expense in consequence of the change. Afterwards the legislature, deeming the debt thus contracted by individuals unreasonably partial and onerous, passed an act, the object of which was to levy the amount on the owners of real estate in Utica. This act seemed to the court unobjectionable. "The general purpose of raising the money by tax was to construct a canal, a public highway, which the legislature believed would be a benefit to the city of Utica as such; and independently of the bond, the case is the ordinary one of local taxation to make or improve a highway. If such an act be otherwise constitutional, we do not see how the circumstance that a bond had before been given securing the same money can detract from its validity. Should an individual volunteer to secure a sum of money, in itself properly leviable, by way of tax on a town or county, there would be nothing in the nature of such an arrangement which would preclude the legislature from resorting, by way of tax, to those who are primarily and more justly liable. Even should he pay the money, what is there in the constitution to preclude his being reimbursed by a tax?" Here, it will be perceived, the corporation was compelled to assume an obligation which it had not even attempted to incur, but which private persons, for considerations which seemed to them sufficient, had taken upon their own shoulders. We have expressed doubts of the correctness of this decision, *ante*, p. 285, note, where a number of cases are cited, bearing upon the point.

The bringing of suit vests in a party no right to a particular decision;[1] and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered.[2] It has been held that a statute allowing amendments to indictments in criminal cases might constitutionally be applied to pending suits;[3] and even in those States in which retrospective laws are forbidden, a cause must be tried under the rules of evidence existing at the time of the trial, though different from those in force when the suit was commenced.[4] And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered.[5]

But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized.

[1] Bacon *v.* Callender, 6 Mass. 303; Butler *v.* Palmer, 1 Hill, 324; Cowgill *v.* Long, 15 Ill. 202; Miller *v.* Graham, 17 Ohio St. 1; State *v.* Squires, 26 Iowa, 340; Patterson *v.* Philbrook, 9 Mass. 151.

[2] Watson *v.* Mercer, 8 Pet. 88; Mather *v.* Chapman, 6 Conn. 54; People *v.* Supervisors, &c., 20 Mich. 95; Satterlee *v.* Matthewson, 16 S. & R. 169, and 2 Pet. 380, Excelsior Mfg. Co. *v.* Keyser, 62 Miss. 155; Phenix Ins. Co. *v.* Pollard, 63 Miss. 641; M'Lane *v.* Bonn, 70 Iowa, 752; Johnson *v.* Richardson, 44 Ark. 365. See cases, p. 464, note 1, *ante*. A statute giving a wife a right to recover in her own name for personal injury, may apply to a pending action. McLimans *v.* Lancaster, 63 Wis. 596, following Weldon *v.* Winslow, L. R. 13 Q. B. D. 784. But an act which is penal as to a plaintiff cannot apply to a pending suit. Powers *v.* Wright, 62 Miss. 35. After an appeal bond was signed by an attorney, the court held such bonds void, and then the legislature attempted to validate all existing bonds so signed. This was held bad as against the appellee in the case. Andrews *v.* Beane, 15 R. I. 451. See Thweatt *v.* Bank, 81 Ky. 1.

[3] State *v.* Manning, 14 Tex. 402.

[4] Rich *v.* Flanders, 39 N. H. 304.

[5] State *v.* Norwood, 12 Md. 195. *Contra*, Wright *v.* Graham, 42 Ark. 140. In Yeaton *v.* United States, 5 Cranch, 281, a vessel had been condemned in admiralty, and pending an appeal the act under which the condemnation was declared was repealed. The court held that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some special provision of statute was made for that purpose. See also Schooner Rachel *v.* United States, 6 Cranch, 329; Commonwealth *v.* Duane, 1 Binney, 601; United States *v.* Passmore, 4 Dall. 372; Commonwealth *v.* Marshall, 11 Pick. 350; Commonwealth *v.* Kimball, 21 Pick. 373; Hartung *v.* People, 22 N. Y. 95; Union Iron Co. *v.* Pierce, 4 Biss. 327; Norris *v.* Crocker, 13 How. 429; Insurance Co. *v.* Ritchie, 5 Wall. 541; *Ex parte* McCardle, 7 Wall. 506; United States *v.* Tynen, 11 Wall. 88; Engle *v.* Shurts, 1 Mich. 150. In the McCardle Case the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending. Per *Chase*, Ch. J.: "Jurisdiction is power to declare the law; and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." But where a State has jurisdiction of a subject, *e. g.* pilotage, until Congress establishes regulations, and penalties are incurred under a State act, and afterwards Congress legislates on the subject, this does not repeal, but only suspends the State law; and a penalty previously incurred may still be collected. Sturgis *v.* Spofford, 45 N. Y. 446. And see People *v.* Hobson, 48 Mich. 27.

It cannot make good retrospectively acts or contracts which it had and could have no power to permit or sanction in advance.[1] There lies before us at this time a volume of statutes of one of the States, in which are contained acts declaring certain tax-rolls valid and effectual, notwithstanding the following irregularities and imperfections: a failure in the supervisor to carry out separately, opposite each parcel of land on the roll, the taxes charged upon such parcel, as required by law; a failure in the supervisor to sign the certificate attached to the roll; a failure in the voters of the township to designate, as required by law, in a certain vote by which they had assumed the payment of bounty moneys, whether they should be raised by tax or loan; corrections made in the roll by the supervisor after it had been delivered to the collector; the including by the supervisor of a sum to be raised for township purposes without the previous vote of the township, as required by law; adding to the roll a sum to be raised which could not lawfully be levied by taxation without legislative authority; the failure of the supervisor to make out the roll within the time required by law; and the accidental omission of a parcel of land which should have been embraced by the roll. In each of these cases, except the last, the act required by law, and which failed to be performed, might by previous legislation have been dispensed with; and perhaps in the last case there might be question whether the roll was rendered invalid by the omission referred to, and, if it was, whether the subsequent act could legalize it.[2] But if township officers should assume to do acts under the power of taxation which could not lawfully be justified as an exercise of that power, no subsequent legislation could make them good. If, for instance, a part of the property in a taxing district should be assessed at one rate, and a part at another, for a burden resting equally upon all, there would be no such apportionment as is essential to taxation, and the roll would be beyond the reach of curative legislation.[3] And if persons or property

[1] Kimball *v.* Rosendale, 42 Wis. 407; Maxwell *v.* Goetschius, 40 N. J. 383; s. c. 29 Am. Rep. 242.

[2] See Weeks *v.* Milwaukee, 10 Wis. 242; Dean *v.* Gleason, 16 Wis. 1; *post*, p. 633, note.

[3] This is clearly shown by *McKinstry*, J., in People *v.* Lynch, 51 Cal. 15. And see Billings *v.* Detten, 15 Ill. 218, Conway *v.* Cable, 37 Ill. 82, and Thames Manufacturing Co. *v.* Lathrop, 7 Conn. 550, for cases where curative statutes were held not effectual to reach defects in tax proceedings. As to what defects may or may not be cured by subsequent legislation, see Allen *v.* Armstrong, 16 Iowa, 508; Smith *v.* Cleveland, 17 Wis. 556, and Abbott *v.* Lindenbower, 42 Mo. 162. In Tallman *v.* Janesville, 17 Wis. 71, the constitutional authority of the legislature to cause an irregular tax to be reassessed in a subsequent year, where the rights of *bona fide* purchasers had intervened, was disputed; but the court sustained the authority as "a salutary and highly beneficial feature of our systems of taxation," and "not to be abandoned because in some instances it produces individual

should be assessed for taxation in a district which did not include them, not only would the assessment be invalid, but a healing statute would be ineffectual to charge them with the burden.[1] In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it.[2]

Statutory Privileges and Exemptions.

The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned, — exemptions from the performance of public duty upon juries, or in the militia, and the like; exemptions of property or person from assessment for the purposes of taxation; exemptions of property from being seized on attachment, or execution, or for the payment of taxes; exemption from highway labor, and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require. The State demands the performance of military duty by those persons only who are within certain specified ages; but if, in the opinion of the legislature, the public exigencies should demand military service from all other persons capable of bearing arms, the privilege of exemption might be recalled, without violation of any constitutional principle. The fact that a party had passed the legal age under an existing

hardships." Certainly *bona fide* purchasers, as between themselves and the State, must take their purchases subject to all public burdens justly resting upon them. The case of Conway *v.* Cable is instructive. It was there held, among other things, — and very justly, as we think, — that the legislature could not make good a tax sale effected by fraudulent combination between the officers and the purchasers. The general rule is undoubted, that a sale for illegal taxes cannot be validated. Silsbee *v.* Stockel, 44 Mich. 561; Brady *v.* King, 53 Cal. 44; Harper *v.* Rowe, 53 Cal. 233 In Miller *v.* Graham, 17 Ohio St. 1, a statute validating certain ditch assessments was sustained, notwithstanding the defects covered by it were not mere irregularities; but that statute gave the parties an opportunity to be heard as to these defects.

[1] See Wells *v.* Weston, 22 Mo. 384; People *v.* Supervisors of Chenango, 11 N. Y. 563; Hughey's Lessee *v.* Horrel, 2 Ohio, 231; Covington *v.* Southgate, 15 B. Monr. 491; Morford *v.* Unger, 8 Iowa, 82; *post*, pp. 615, 616.

[2] So held in McDaniel *v.* Correll, 19 Ill. 226, where a statute came under consideration which assumed to make valid certain proceedings in court which were void for want of jurisdiction of the persons concerned. A void appeal bond cannot be validated so as to give to an appellate court jurisdiction which has failed by reason of such defective bond. Andrews *v.* Beane, 15 R. I. 451. See also Israel *v* Arthur, 7 Col. 5; Yeatman *v.* Day, 79 Ky. 186; Roche *v.* Waters, 18 Atl. Rep. 866 (Md.); Denny *v.* Mattoon, 2 Allen, 361; Nelson *v.* Rountree, 23 Wis. 367; Griffin's Ex'r *v.* Cunningham, 20 Gratt. 31, 109, per *Joynes*, J.; Richards *v.* Rote, 68 Pa. St. 248; State *v.* Doherty 60 Me. 504; Pryor *v.* Downey, 50 Cal. 388; s. c. 19 Am. Rep. 656. If land is assessed for taxation in a town where it does not lie, it is not competent to make the tax-deed evidence of title. Smith *v.* Sherry, 54 Wis. 114. Compare Walpole *v.* Elliott, 18 Ind. 258, in which there was not a failure of jurisdiction, but an irregular exercise of it.

law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require them.[1] In like manner, exemptions from taxation are always subject to recall, when they have been granted merely as a privilege, and not for a consideration received by the public; as in the case of exemption of buildings for religious or educational purposes, and the like.[2] So, also, are exemptions of property from execution.[3] So, a license to carry on a particular trade for a specified period, may be recalled before the period has elapsed.[4] So, as before stated, a penalty given by statute may be taken away by statute at any time before judgment is recovered.[5] So, an offered bounty may be recalled, except as to so much as was actually earned while the offer was a continuing one; and the fact that a party has purchased property or incurred expenses in preparation for earning the bounty cannot preclude the recall.[6] A franchise granted by the State with a reservation of a right of repeal must be regarded as a mere privilege while it is suffered to continue, but the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchises granted to them solely upon the faith of the sovereign grantor.[7] A statutory right to have

[1] Commonwealth *v.* Bird, 12 Mass. 443; Swindle *v.* Brooks, 34 Ga. 67; Mayer, *Ex parte*, 27 Tex. 715; Bragg *v.* People, 78 Ill. 328; Moore *v.* Cass, 10 Kan. 288; Murphy *v.* People, 37 Ill. 447; State *v.* Miller, 2 Blackf. 35; State *v.* Quimby, 51 Me. 395; State *v.* Wright, 53 Me. 328; State *v.* Forshner, 43 N. H. 89; Dunlap *v.* State, 76 Ala. 460; *Ex parte* Thompson, 20 Fla. 887. And see Dale *v.* The Governor, 3 Stew. 387.

[2] See *ante*, pp. 337, 338, and notes. All the cases concede the right in the legislature to recall an exemption from taxation, when not resting upon contract. The subject was considered in People *v.* Roper, 35 N. Y. 629, in which it was decided that a limited immunity from taxation, tendered to the members of voluntary military companies, might be recalled at any time. It was held not to be a contract, but "only an expression of the legislative will for the time being, in a matter of mere municipal regulation." And see Christ Church *v.* Philadelphia, 24 How. 300; Lord *v.* Litchfield, 36 Conn. 116; East Saginaw Salt Mfg. Co. *v.* East Saginaw, 19 Mich. 259; s. c. in error, 13 Wall. 373.

[3] Bull *v.* Conroe, 13 Wis. 233.

[4] See *ante*, pp. 340–342, notes.

[5] Oriental Bank *v.* Freeze, 18 Me. 109. The statute authorized the plaintiff, suing for a breach of a prison bond, to recover the amount of his judgment and costs. This was regarded by the court as in the nature of a penalty; and it was therefore held competent for the legislature, even after breach, to so modify the law as to limit the plaintiff's recovery to his actual damages. See *ante*, p. 443, note 2, and cases cited.

[6] East Saginaw Salt Mfg. Co. *v.* East Saginaw, 19 Mich, 259; s. c. 2 Am. Rep. 82, and 13 Wall. 373. But as to so much of the bounty as was actually earned before the change in the law, the party earning it has a vested right which cannot be taken away. People *v.* Auditor-General, 9 Mich. 327. And it has been held competent in changing a county seat to provide by law for compensation, through taxation, to the residents of the old site. Wilkinson *v.* Cheatham, 43 Ga. 258.

[7] Per *Smith*, J., in Pratt *v.* Brown, 3 Wis. 603, 611. See *post*, pp. 710–712.

cases reviewed on appeal may be taken away, by a repeal of the statute, even as to causes which had been previously appealed.[1] A mill-dam act which confers upon the person erecting a dam the right to maintain it, and flow the lands of private owners on paying such compensation as should be assessed for the injury done, may be repealed even as to dams previously erected.[2] These illustrations must suffice under the present head.

Consequential Injuries.

It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others.[3] This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or State capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interests would be injuriously affected, enjoin the act or claim compensation from the public.[4] The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment.[5] The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can constitute no obstacle.[6] But indeed it seems idle to specify instances,

[1] *Ex parte* McCardle, 7 Wall. 506. See State *v.* Slevin, 16 Mo. App. 541. And that the right to an appeal, if not expressly given by constitution, need not be provided for. Kundinger *v.* Saginaw, 59 Mich. 325; Minneapolis *v.* Wilkin, 30 Minn. 140; La Croix *v.* Co. Com'rs, 50 Conn. 321. Time may be shortened during a period of disability, in which one may bring an appeal after such disability is removed. Rupert *v.* Martz, 116 Ind. 72.

[2] Pratt *v.* Brown, 3 Wis. 603. But if the party maintaining the dam had paid to the other party for the permanent flowing of his land a compensation assessed under the statute, it might be otherwise.

[3] For the doctrine *damnum absque injuria*, see Broom's Maxims, 185; Sedgwick on Damages, 30, 112; Cooley on Torts, 93.

[4] See *ante*, p. 253, and cases cited in note. Also Wilkinson *v.* Cheatham, 43 Ga. 258; Fearing *v.* Irwin, 55 N. Y. 486; Newton *v.* Commissioners, 100 U. S. 548; Howes *v.* Grush, 131 Mass. 207; Heller *v.* Atchison, &c. R. R. Co., 28 Kan. 625.

[5] Goshen *v.* Richmond, 4 Allen, 458; Bridgewater *v.* Plymouth, 97 Mass. 382.

[6] The State of Massachusetts granted to a corporation the right to construct a toll-bridge across the Charles River, under a charter which was to continue for forty years, afterwards extended to seventy, at

inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

We have now endeavored to indicate what are and what are not to be regarded as vested rights, and to classify the cases in which individual interests, in possession or expectancy, are protected against being devested by the direct interposition of legislative authority. Some other cases may now be considered, in which legislation has endeavored to control parties as to the manner in which they should make use of their property, or has permitted claims to be created against it through the action of other parties against the will of the owners. We do not allude now to the control which the State may possess through an exercise of the police power, — a power which is merely one of regulation with a view to the best interests and the most complete enjoyment of rights by all, — but to that which, under a claim of State policy, and without any reference to wrongful act or omission by the owner, would exercise a supervision over his enjoyment of undoubted rights, or which, in some cases, would compel him to recognize and satisfy demands upon his property which have been created without his assent.

In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government.[1] But the ideas which

the end of which period the bridge was to become the property of the Commonwealth. During the term the corporation was to pay 200*l.* annually to Harvard College. Forty-two years after the bridge was opened for passengers, the State incorporated a company for the purpose of erecting another bridge over the same river, a short distance only from the first, and which would accommodate the same passengers. The necessary effect would be to decrease greatly the value of the first franchise, if not to render it altogether worthless. But the first charter was not exclusive in its terms; no contract was violated in granting the second; the resulting injury was incidental to the exercise of an undoubted right by the State, and as all the vested rights of the first corporation still remained, though reduced in value by the new grant, the case was one of damage without legal injury. Charles River Bridge *v.* Warren Bridge, 7 Pick. 344, and 11 Pet. 420. See also Turnpike Co. *v.* State, 3 Wall. 210; Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35; Hollister *v.* Union Co., 9 Conn. 436; s. c. 25 Am. Dec. 36; English *v.* New Haven, &c. Co., 32 Conn. 240; Binghamton Bridge Case, 27 N. Y. 87, and 3 Wall. 51; Lehigh Valley Water Co's. App., 102 Pa. St. 515; Rockland Water Co. *v.* Camden & R. W. Co., 80 Me. 544; Montjoy *v.* Pillow, 64 Miss. 705.

[1] Montesq. Sp. of the Laws, B. 7. Such laws, though common in some countries, have never been numerous in England. See references to the legislation of this character, 4 Bl. Com. 170. Some of these statutes prescribed the number of courses permissible at dinner or other meal, while others were directed to restraining extravagance in dress. See Hallam, Mid. Ages, c. 9, pt. II.; and as to Roman sumptuary laws, Encyc. Metrop. Vol. X. p. 110. Adam Smith said of such laws,

suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law. The instances of attempt to interfere with it have not been numerous since the early colonial days. A notable instance of an attempt to substitute the legislative judgment for that of the proprietor, regarding the manner in which he should use and employ his property, may be mentioned. In the State of Kentucky at an early day an act was passed to compel the owners of wild lands to make certain improvements upon them within a specified time, and it declared them forfeited to the State in case the statute was not complied with. It would be difficult to frame, consistently with the general principles of free government, a plausible argument in support of such a statute. It was not an exercise of the right of eminent domain, for that appropriates property to some specific public use on making compensation. It was not taxation, for that is simply an apportionment of the burden of supporting the government. It was not a police regulation, for that could not go beyond preventing an improper use of the land with reference to the due exercise of rights and enjoyment of legal privileges by others. It was purely and simply a law to forfeit a man's property, if he failed to improve it according to a standard which the legislature had prescribed. To such a power, if possessed by the government, there could be no limit but the legislative discretion; and if defensible on principle, then a law which should authorize the officer to enter a man's dwelling and seize and confiscate his furniture if it fell below, or his food if it exceeded an established legal standard, would be equally so. But in a free country such laws when mentioned are condemned instinctively.[1]

But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought on grounds of strict equity to constitute a charge upon the land improved. If they have been made in good faith, and under a reasonable expectation on the part of the person making them, that he was to reap the benefit of them, and if the owner has stood by and suffered them

"It is the highest impertinence and presumption in kings and ministers to pretend to watch over the economy of private people, and to restrain their expense, either by sumptuary laws, or by prohibiting the importation of foreign luxuries." Wealth of Nations, B. 2, c. 3. As to prohibitory liquor laws, see *post*, pp. 716–720.

[1] The Kentucky statute referred to was declared unconstitutional in Gaines *v.* Buford, 1 Dana, 484. See also Violett *v.* Violett, 2 Dana, 325.

to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures, and perhaps no sufficient reason why provision should not be made by law for their recovery.

Accordingly in the several States statutes will be found which undertake to provide for these equitable claims. These statutes are commonly known as *betterment laws*; and as an illustration of the whole class, we give the substance of that adopted in Vermont. It provided that after recovery in ejectment, where he or those through whom he claimed had purchased or taken a lease of the land, supposing at the time that the title purchased was good, or the lease valid to convey and secure the title and interest therein expressed, the defendant should be entitled to recover of the plaintiff the full value of the improvements made by him or by those through whom he claimed, to be assessed by jury, and to be enforced against the land, and not otherwise. The value was ascertained by estimating the increased value of the land in consequence of the improvements; but the plaintiff at his election might have the value of the land without the improvements assessed, and the defendant should purchase the same at that price within four years, or lose the benefit of his claim for improvements. But the benefit of the law was not given to one who had entered on land by virtue of a contract with the owner, unless it should appear that the owner had failed to fulfil such contract on his part.[1]

This statute, and similar ones which preceded it, have been adjudged constitutional by the Supreme Court of Vermont, and have frequently been enforced. In an early case the court explained the principle of these statutes as follows: "The action for betterments, as they are termed in the statute, is given on the supposition that the legal title is found to be in the plaintiff in ejectment, and is intended to secure to the defendant the fruit of his labor, and to the plaintiff all that he is justly entitled to, which is his land in as good a situation as it would have been if no labor had been bestowed thereon. The statute is highly equitable in all its provisions, and would do exact justice if the value either of the improvements or of the land was always correctly estimated. The principles upon which it is founded are taken from the civil law, where ample provision was made for reimbursing to the *bona fide* possessor the expense of his improvements, if he was removed from his possession by the legal owner. It gives

[1] Revised Statutes of Vermont of 1839, p. 216.

to the possessor not the expense which he has laid out on the land, but the amount which he has increased the value of the land by his betterments thereon; or, in other words, the difference between the value of the land as it is when the owner recovers it, and the value if no improvement had been made. If the owner takes the land together with the improvements, at the advanced value which it has from the labor of the possessor, what can be more just than that he should pay the difference? But if he is unwilling to pay this difference, by giving a deed as the statute provides, he receives the value as it would have been if nothing had been done thereon. The only objection which can be made is, that it is sometimes compelling the owner to sell when he may have been content with the property in its natural state. But this, when weighed against the loss to the *bona fide* possessor, and against the injustice of depriving him of the fruits of his labor, and giving it to another, who, by his negligence in not sooner enforcing his claim, has in some measure contributed to the mistake under which he has labored, is not entitled to very great consideration."[1]

The last circumstance stated in this opinion — the negligence of the owner in asserting his claim — is evidently deemed important in some States, whose statutes only allow a recovery for improvements by one who has been in possession a certain number of years. But a later Vermont case dismisses it from consideration as not being a necessary ground on which to base the right of recovery. "The right of the occupant to recover the value of his improvements," say the court, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity; viz., that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money; is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements without compensation to him who made them. This principle of natural justice has been very widely — we may say universally — recognized."[2]

[1] Brown *v.* Storm, 4 Vt. 37. This class of legislation was also elaborately examined and defended by *Trumbull*, J., in Ross *v.* Irving, 14 Ill. 171, and in some of the other cases referred to in the succeeding note. See also Bright *v.* Boyd, 1 Story, 478; s. c. 2 Story, 605.

[2] Whitney *v.* Richardson, 31 Vt. 300, 306. For other cases in which similar laws have been held constitutional, see Armstrong *v.* Jackson, 1 Blackf. 374; Fowler *v.* Halbert, 4 Bibb, 54; Withington *v.* Corey, 2 N. H. 115; Bacon *v.* Callender, 6 Mass. 303; Pacquette *v.* Pickness, 19 Wis. 219; Childs *v.* Shower, 18 Iowa, 261; Scott *v.* Mather, 14 Tex. 235; Saun-

Betterment laws, then, recognize the existence of an equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed *in statu quo*, and the statute accomplishes justice as nearly as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as nearly as possible according to natural justice.[1]

ders *v.* Wilson, 19 Tex. 194; Brackett *v.* Norcross, 1 Me. 89; Hunt's Lessee *v.* McMahan, 5 Ohio, 132; Longworth *v.* Worthington, 6 Ohio, 9; Stump *v.* Hornback, 94 Mo. 26. See further, Jones *v.* Carter, 12 Mass. 314; Coney *v.* Owen, 6 Watts, 435; Steele *v.* Spruance, 22 Pa. St. 256; Lynch *v.* Brudie, 63 Pa. St. 206; Dothage *v.* Stuart, 35 Mo. 251; Fenwick *v.* Gill, 38 Mo. 510; Howard *v.* Zeyer, 18 La. Ann. 407; Pope *v.* Macon, 23 Ark. 644; Marlow *v.* Adams, 24 Ark. 100; Ormond *v.* Martin, 37 Ala. 598; Love *v.* Shartzer, 31 Cal. 487; Griswold *v.* Bragg, 48 Conn. 577; s. c. 18 Blatch. 202; Kidd *v.* Guild, 48 Mich. 307. For a contrary ruling, see Nelson *v.* Allen, 1 Yerg. 360, in which, however, Judge *Catron* in a note says the question was really not involved. Mr. Justice *Story* held, in Society, &c. *v.* Wheeler, 2 Gall. 105, that such a law could not constitutionally be made to apply to improvements made before its passage; but this decision was made under the New Hampshire Constitution, which forbade retrospective laws. The principles of equity upon which such legislation is sustained would seem not to depend upon the time when the improvements were made. See Davis's Lessee *v.* Powell, 13 Ohio, 308. In Childs *v.* Shower, 18 Iowa, 261, it was held that the legislature could not constitutionally make the value of the improvements a personal charge against the owner of the land, and authorized a personal judgment against him. The same ruling was had in McCoy *v.* Grandy, 3 Ohio St. 463. A statute had been passed authorizing the occupying claimant at his option, after judgment rendered against him for the recovery of the land, to demand payment from the successful claimant of the full value of his lasting and valuable improvements, or to pay to the successful claimant the value of the land without the improvements, and retain it. The court says: "The occupying claimant act, in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, goes to the utmost stretch of the legislative power touching this subject. And the statute . . . providing for the transfer of the fee in the land to the occupying claimant, without the consent of the owner, is a palpable invasion of the right of private property, and clearly in conflict with the Constitution."

[1] In Harris *v.* Inhabitants of Marblehead, 10 Gray, 40, it was held that the betterment law did not apply to a town which had appropriated private property for the purposes of a school-house, and erected the house thereon. The law, it was said, did not apply "where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the schoolhouse, or any other building erected

Unequal and Partial Legislation.

In the course of our discussion of this subject, it has been seen that some statutes are void though general in their scope, while others are valid though establishing rules for single cases only. An enactment may therefore be the law of the land without being a general law. And this being so, it may be important to consider in what cases constitutional principles will require a statute to be general in its operation, and in what cases, on the other hand, it may be valid without being general. We speak now in reference to general constitutional principles, and not to any peculiar rules which may have become established by special provisions in the constitutions of individual States.

The cases relating to municipal corporations stand upon peculiar grounds from the fact that those corporations are agencies of government, and as such are subject to complete legislative control. Statutes authorizing the sale of property of minors and other persons under disability are also exceptional, in that they are applied for by the parties representing the interests of the owners, and are remedial in their character. Such statutes are supported by the presumption that the parties in interest would consent if capable of doing so; and in law they are to be considered as assenting in the person of the guardians or trustees of their rights. And perhaps in any other case, if a party petitions for legislation and avails himself of it, he may justly be held estopped from disputing its validity;[1] so that the great bulk of private legislation which is adopted from year to year may at once be dismissed from this discussion.

Laws public in their objects may, unless express constitutional provision forbids,[2] be either general or local in their application;

upon it." But as a matter of constitutional authority, we see no reason to doubt that the legislature might extend such a law even to the cases of this description.

[1] This doctrine was applied in Ferguson *v.* Landram, 5 Bush, 230, to parties who had obtained a statute for the levy of a tax to refund bounty moneys, which statute was held void as to other persons. And see Motz *v.* Detroit, 18 Mich. 495; Dewhurst *v.* Allegheny, 95 Pa. St. 437; Andrus *v.* Board of Police, 6 Sou. Rep. 603 (La.). A man may be bound by his assent to an act changing the rules of descent in his particular case, though it would be void if not assented to. Beall *v.* Beall, 8 Ga. 210.

[2] See *ante*, pp. 149–151, notes, and cases cited. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act. State *v.* County Commissioners of Baltimore, 29 Md. 516. See Pollock *v.* McClurken, 42 Ill. 370; Haskel *v.* Burlington, 30 Iowa, 232; Unity *v.* Burrage, 103 U. S. 447. Liquor sales may be forbidden in the country and permitted in the towns. State *v.* Berlin, 21

they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like.[1] The authority that legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid.[2] These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle. The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens.[3] The business of common carriers, for instance,

S. C. 292; Howell *v.* State, 71 Ga. 324. See Marmet *v.* State, 45 Ohio St. 63. Compare Hatcher *v.* State, 12 Lea, 368. An act may be made a misdemeanor in certain counties only. Davis *v.* State, 68 Ala. 58; State *v.* Moore, 10 S. E. Rep. 143 (N. C.). But a law is void which makes pool selling innocent under certain circumstances, while it is generally an offence. Daly *v.* State, 13 Lea, 228.

[1] See the Iowa R. R. Land Co. *v.* Soper, 39 Iowa, 112; Matter of Goodell, 39 Wis. 232; s. c. 20 Am. Rep. 42; Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383.

[2] The constitutional requirement of equal protection of the laws does not make necessary the same local regulations, municipal powers, or judicial organization or jurisdiction. Missouri *v.* Lewis, 101 U. S. 22. See Strauder *v.* W. Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339.

[3] The prohibition of special legislation for the benefit of individuals does not preclude laws for the benefit of particular classes; as, for example, mechanics and other laborers. Davis *v.* State, 3 Lea, 376. But under it peculiar provisions as to liens cannot be made applicable to but two counties. Woodard *v.* Brien, 14 Lea, 520. A statute exempting from taxation property to the amount of $500 of widows and maids held unconstitutional because unequal. State *v.* Indianapolis, 69 Ind. 375; s. c. 35 Am. Rep. 223; Warner *v.* Curran, 75 Ind. 309.

It is not competent to except from right to recover for injury from defective sidewalk all who do not reside in States where similar injuries constitute right of action. Pearson *v.* Portland, 69 Me. 278; s. c. 31 Am. Rep. 276. The rule of non-liability of the master to a servant for injury suffered through a fellow-servant's negligence may be abrogated as to railroad companies. Missouri Pac Ry. Co. *v.* Mackey, 33 Kan. 298. A police regulation, affecting all railroads, to enforce a quicker delivery of freight is valid. Little Rock, &c. Ry. Co. *v.* Hanniford, 49 Ark. 291. So one forbidding burying an animal killed by a train. Bannon *v.* State, 49 Ark. 167. An at-

or of bankers, may require special statutory regulations for the general benefit, and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge.

But a statute would not be constitutional which should proscribe a class or a party for opinion's sake,[1] or which should

torney fee, as a penalty, may be allowed for non-compliance with fencing law if animal is so killed. Peoria, D. & E. Ry. Co. *v.* Duggan, 109 Ill. 537. *Contra*, Wilder *v.* Chicago, &c. Ry. Co., 38 N. W. Rep. 289 (Mich.); South, &c. R. R. Co. *v.* Morris, 65 Ala. 193; as class legislation.

[1] The sixth section of the Metropolitan Police Law of Baltimore (1859) provided that "no Black Republican, or indorser or supporter of the Helper book, shall be appointed to any office" under the Board of Police which it established. This was claimed to be unconstitutional, as introducing into legislation the principle of proscription for the sake of political opinion, which was directly opposed to the cardinal principles on which the Constitution was founded. The court dismissed the objection in the following words: "That portion of the sixth section which relates to Black Republicans, &c., is obnoxious to the objection urged against it, if we are to consider that class of persons as proscribed on account of their political or religious opinions. But we cannot understand, officially, who are meant to be affected by the proviso, and therefore cannot express a judicial opinion on the question." Baltimore *v.* State, 15 Md. 376, 468. See also p. 484. This does not seem to be a very satisfactory disposition of so grave a constitutional objection to a legislative act. That courts may take judicial notice of the fact that the electors of the country are divided into parties with well-known designations cannot be doubted; and when one of these is proscribed by a name familiarly applied to it by its opponents, the inference that it is done because of political opinion seems to be too conclusive to need further support than that which is found in the act itself. And we know no reason why courts should decline to take notice of these facts of general notoriety, which, like the names of political parties, are a part of the public history of the times A statute requiring causes in which the venue has been changed to be remanded on the affidavits of three unconditional Union men, that justice can be had in the courts where it originated, held void, on the principles stated in the text, in Brown *v.* Haywood, 4 Heisk. 357

It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution. State *v.* Jackson, 80 Mo. 175; State *v* Gibson, 36 Ind. 389; s. c. 10 Am. Rep. 42; State *v.* Hairston, 63 N. C. 451; State *v.* Kenney, 76 N. C. 251; s. c. 22 Am. Rep. 683; Ellis *v.* State, 42 Ala. 525; Green *v.* State, 58 Ala. 190; s. c. 29 Am. Rep. 739; Kinney's Case, 30 Gratt. 858; Frasher *v.* State, 3 Tex. App. 263; s. c. 30 Am. Rep. 131; Lonas *v.* State, 3 Heisk. 287; s. c. 1 Green, Cr. R. 452; *Ex rel.* Hobbs & Johnson, 1 Woods, 537; *Ex parte* Kinney, 3 Hughes, 9; *Ex parte* Francois, 3 Woods, 367. It is also said colored children may be required to attend separate schools, if impartial provision is made for their instruction. State *v.* Duffy, 7 Nev. 342; s. c. 8 Am. Rep. 713; Cory *v.* Carter, 48 Ind. 327; Ward *v.* Flood, 48 Cal. 36; State *v.* McCann, 21 Ohio St. 198; People *v.* Gallagher, 93 N. Y. 438; Bertonneau *v.* School Directors, 3 Woods, 177. But some States forbid this. People

select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt.[1]

The legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities.[2] Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriæ*, when not forbidden, may grant authority to the guardians or trustees of

v. Board of Education, 18 Mich. 400; Clark *v.* Board of Directors, 24 Iowa, 266; Dove *v.* School District, 41 Iowa, 689; Chase *v.* Stephenson, 71 Ill. 383; People *v.* Board of Education of Quincy, 101 Ill. 308; Board of Education *v.* Tinnon, 26 Kan. 1; Pierce *v.* Union Dist., 46 N. J. L. 76; Kaine *v.* Com., 101 Pa. St. 490. See Dawson *v.* Lee, 83 Ky. 49. And when separate schools are not established for colored children, they are entitled to admission to the other public schools. State *v.* Duffy, *supra*. Where separate schools are allowed, property of whites cannot be taxed for white schools alone, and of negroes for negro schools. Puitt *v.* Com'rs, 94 N. C. 709; Claybrook *v.* Owensboro, 16 Fed. Rep. 297.

[1] Lin Sing *v.* Washburn, 20 Cal. 534; Brown *v.* Haywood, 4 Heisk. 357. A San Francisco ordinance required every male person imprisoned in the county jail to have his hair cut to an uniform length of one inch. This was held invalid, as being directed specially against the Chinese. Ah Kow *v.* Nunan, 5 Sawyer, 552. See Yick Wo *v.* Hopkins, 118 U. S. 356. In Louisiana an ordinance forbidding the sale of goods on Sunday, but excepting from its operation those keeping their places of business closed on Saturday, was held partial and therefore unconstitutional. Shreveport *v.* Levy, 26 La. Ann. 671; s. c. 21 Am. Rep. 553. A Sunday closing law is not unequal because it excepts certain business as necessary. Lieberman *v.* State, 42 N. W. Rep. 419 (Neb.). A liquor seller may not be forbidden to sign the bond of another liquor seller. Kuhn *v.* Common Council, 70 Mich. 534. Nor may the right to sell liquor, where a lawful business, be made dependent on the caprice or private judgment of the board which approves the sellers' bond. People *v.* Haug, 37 N. W. Rep. 21 (Mich.). Keeping open after legal hours cannot be declared a breach of the peace for which an arrest may be made without a warrant. *Id.* There is no reason, however, why the law should not take notice of peculiar views held by some classes of people, which unfit them for certain public duties, and excuse them from the performance of such duties; as Quakers are excused from military duty, and persons denying the right to inflict capital punishment are excluded from juries in capital cases. These, however, are in the nature of exemptions, and they rest upon considerations of obvious necessity.

[2] The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. Holden *v.* James, 11 Mass. 396; Davison *v.* Johonnot, 7 Met. 388. See *ante*, p. 448, note. The general exemption laws cannot be varied for particular cases or localities. Bull *v.* Conroe, 13 Wis. 233, 244. The legislature, when forbidden to grant divorces, cannot pass special acts authorizing the courts to grant divorces in particular cases for causes not recognized in the general law. Teft *v.* Teft, 3 Mich. 67; Simonds *v.* Simonds, 103 Mass. 572. See, for the same principle, Alter's Appeal, 67 Pa. St. 341. The authority in emergencies to suspend the civil laws in a part of the State only, by a declaration of martial law, we do not call in question by anything here stated. Nor in what we have here said do we have any reference to suspensions of the laws generally, or of any particular law, under the extraordinary circumstances of rebellion or war.

incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the discharge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough."[1] This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.[2]

[1] Locke on Civil Government, § 142; State *v.* Duffy, 7 Nev. 349; Strauder *v.* W. Virginia, 100 U. S. 303; Bernier *v.* Russell, 89 Ill. 60.

[2] In Lewis *v.* Webb, 3 Me. 326, the validity of a statute granting an appeal from a decree of the Probate Court in a particular case came under review. The court say: "On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that, if the legislature should pass a general law, and add a section by way of proviso, that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation." See also Durham *v.* Lewiston, 4 Me. 140; Holden *v.* James, 11 Mass. 396; Piquet, Appellant, 5 Pick. 65; Budd *v.* State, 3 Humph. 483; Van Zant *v.* Waddell, 2 Yerg. 260; People *v.* Frisbie, 26 Cal. 135; Davis *v.* Menasha, 21 Wis. 491; Lancaster *v.* Barr, 25 Wis. 560; Brown *v.* Haywood, 4 Heisk. 357; Wally's Heirs *v.* Kennedy, 2 Yerg. 554; s. c. 24 Am. Dec. 511. In the last case it is said: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals and corporations would be governed by one law; the mass of the community and those who made the law, by another; whereas the like general law affecting the whole community equally could not have been passed." Special burdens cannot be laid upon a particular class in the community. Millett *v.* People, 117 Ill. 294. Miners and manufacturers alone cannot be forbidden to pay in store orders. State *v.* Goodwill, 10 S. E. Rep. 285 (W. Va.). See, also, Godcharles *v.* Wigeman, 113 Pa. St. 431; State *v.* Fire Creek, &c. Co., 10 S. E. Rep. 288 (W. Va.). Recovery against newspaper publishers for libel cannot be limited to actual damage provided a retraction is published and the libel was published in good faith. Park *v.* Detroit

Special courts cannot be created for the trial of the rights and obligations of particular parties;[1] and those cases in which legislative acts granting new trials or other special relief in judicial proceedings, while they have been regarded as usurpations of judicial authority, have also been considered obnoxious to the objection that they undertook to suspend general laws in special cases. The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, — like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their "pursuit of happiness;"[2] and those who should claim a

Free Press Co., 40 N. W. Rep. 731 (Mich.). Otherwise in Minnesota. Allen *v.* Pioneer Press Co., 40 Minn. 117. See further, Officer *v.* Young, 5 Yerg. 320; Griffin *v.* Cunningham, 20 Gratt. 31 (an instructive case); Dorsey *v.* Dorsey, 37 Md. 64; s. c. 11 Am. Rep. 528; Trustees *v.* Bailey, 10 Fla. 238; Lawson *v.* Jeffries, 47 Miss. 686; s. c. 12 Am. Rep. 342; Arnold *v.* Kelley, 5 W. Va. 446; *ante*, pp. 113–115. But an act was sustained in Minnesota which gave one individual a right of appeal from the legal tribunal and denied it to others. Dike *v.* State, 38 Minn. 366. And physicians who have not a diploma and have not practised a certain time in the State may be required to take out a license. State *v.* Green, 112 Ind. 462; People *v.* Phippen, 37 N. W. Rep. 888. *Contra* in New Hampshire, State *v.* Pennoyer, 18 Atl. Rep. 878; State *v.* Hinman, *id.* 194. See further cases, p. 745, note 4, *post*.

[1] As, for instance, the debtors of a particular bank. Bank of the State *v.* Cooper, 2 Yerg. 599; s. c. 24 Am. Dec. 517. Compare Durkee *v.* Janesville, 28 Wis. 464, in which it was declared that a special exemption of the city of Janesville from the payment of costs in any proceeding against it to set aside a tax or tax sale was void. And see Memphis *v.* Fisher, 9 Bax. 240. In Matter of Nichols, 8 R. I. 50, a special act admitting a tort debtor committed to jail to take the poor debtor's oath and be discharged, was held void. The legislature cannot confer upon a corporation privileges or exemptions which it could not confer constitutionally upon a private person. Gordon *v.* Building Association, 12 Bush, 110. As to what is not a violation of this principle, see United States *v.* Union Pac. R. R. Co., 98 U. S. 569.

[2] Burlamaqui (Politic. Law, c. 3, § 15) defines *natural liberty* as the right which nature gives to all mankind of disposing of their persons and property after the

right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.

Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government.[1]

The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or

manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights by other men. See 1 Bl. Com. 125. Lieber says: "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of, or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being." Civil Liberty and Self-Government. "Legal Liberty," says Mackintosh, in his essay on the Study of the Law of Nature and of Nations, "consists in every man's security against wrong."

[1] In the Case of Monopolies, Darcy *v.* Allain, 11 Rep. 84, the grant of an exclusive privilege of making playing cards was adjudged void, inasmuch as "the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects; *for the end* of all these monopolies is for the private gain of the patentees." And see Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; State *v.* Cincinnati, &c. Gas Co., 18 Ohio St. 262. Compare with these, State *v.* Milwaukee Gas Light Co., 29 Wis. 454. On this ground it has been denied that the State can exercise the power of taxation on behalf of corporations who undertake to make or to improve the thoroughfares of trade and travel for their own benefit. The State, it is said, can no more tax the community to set one class of men up in business than another; can no more subsidize one occupation than another; can no more make donations to the men who build and own railroads in consideration of expected incidental benefits, than it can make them to the men who build stores or manufactories in consideration of similar expected benefits. People *v.* Township Board of Salem, 20 Mich. 452. See further, as to monopolies, Chicago *v.* Rumpff, 45 Ill. 90; Gale *v.* Kalamazoo, 23 Mich. 344. In State *v.* Mayor, &c. of Newark, 35 N. J. 157, s. c. 10 Am. Rep. 223, the doctrine of the text was applied to a case in which by statute the property of a society had been exempted from "taxes and assessments;" and it was held that only the ordinary public taxes were meant, and the property might be subjected to local assessments for municipal purposes. State grants are not exclusive unless made so in express terms. Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42; s. c. 36 Am. Dec. 374; Gaines *v.* Coates, 51 Miss. 335; Wright *v.* Nagle, 101 U. S. 791. Where monopolies are forbidden, it is nevertheless competent to give exclusive rights to a water company to supply a city for a term of years. Memphis *v.* Water Co., 5 Heisk. 495. A corporation formed under a general law allowing formation of gas companies cannot as part of its corporate purposes include the purchase and holding of shares of existing gas companies, thus creating a monopoly. People *v.* Chicago Gas Trust Co., 22 N. E. Rep. 798 (Ill.). See People *v.* Refining Co., 7 N. Y. Supp. 406.

designed. It has been held that a statute requiring attorneys to render services in suits for poor persons without fee or reward, was to be confined strictly to the cases therein prescribed, and if by its terms it expressly covered civil cases only, it could not be extended to embrace defences of criminal prosecutions.[1] So where a constitutional provision confined the elective franchise to "*white* male citizens," and it appeared that the legislation of the State had always treated of negroes, mulattoes, and *other colored persons* in contradistinction to white, it was held that although quadroons, being a recognized class of colored persons, must be excluded, yet that the rule of exclusion would not be carried further.[2] So a statute making parties witnesses against themselves cannot be construed to compel them to disclose facts which would subject them to criminal punishment.[3] And a statute which authorizes summary process in favor of a bank against debtors who have by express contract made their obligations payable at such bank, being in derogation of the ordinary principles of private right, must be subject to strict construction.[4] These cases are only illustrations of a rule of general acceptance.[5]

There are unquestionably cases in which the State may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all;[6] and if it is important that they should exist, the proper State authority must be left to select the grantees.[7] Of this class are grants of the franchise to be a corporation.[8] Such grants, however, which con-

[1] Webb *v.* Baird, 6 Ind. 13.

[2] People *v.* Dean, 14 Mich. 406. See Bailey *v.* Fiske, 34 Me. 77; Monroe *v.* Collins, 17 Ohio St. 665. The decisions in Ohio were still more liberal, and ranked as white persons all who had a preponderance of white blood. Gray *v.* State, 4 Ohio, 353; Jeffres *v.* Ankeny, 11 Ohio, 372; Thacker *v.* Hawk, 11 Ohio, 376; Anderson *v.* Millikin, 9 Ohio St. 568. But see Van Camp *v.* Board of Education, 9 Ohio St. 406. Happily all such questions are now disposed of by constitutional amendments. It seems, however, in the opinion of the Supreme Court of California, that these amendments do not preclude a State denying to a race, *e. g.* the Chinese, the right to testify against other persons. People *v.* Brady, 40 Cal. 198; s. c. 6 Am. Rep. 604.

[3] Broadbent *v.* State, 7 Md. 416. See Knowles *v.* People, 15 Mich. 408.

[4] Bank of Columbia *v.* Okely, 4 Wheat. 235.

[5] See 1 Bl. Com. 89 and note.

[6] Mason *v.* Bridge Co., 17 W. Va. 396. But a franchise is not necessarily exclusive so long as there is nothing to prevent granting like power to another corporation. Matter of Union Ferry Co., 98 N. Y. 139.

[7] In Gordon *v.* Building Association, 12 Bush, 110, it is decided that a special privilege granted to a particular corporation to take an interest on its loans greater than the regular interest allowed by law is void; it not being granted in consideration of any obligation assumed by the corporation to serve the public.

[8] That proper grants of this sort are not to be regarded as partial legislation, see Tipton *v.* Locomotive Works, 103 U. S. 523; s. c. 1 Am. & Eng. R. R. Cas. 517; North and S. Ala. R. R. Co. *v.* Morris, 65 Ala. 193.

fer upon a few persons what cannot be shared by the many, and which, though supposed to be made on public grounds, are nevertheless frequently of great value to the corporators, and therefore sought with avidity, are never to be extended by construction beyond the plain terms in which they are conferred. No rule is better settled than that charters of incorporation are to be construed strictly against the corporators.[1] The just presumption in every such case is, that the State has granted in express terms all that it designed to grant at all. "When a State," says the Supreme Court of Pennsylvania, "means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy to say so, that we will never believe it to be meant when it is not said. . . . In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending [its privileges], let the legislature see to it, but let it be remembered that nothing but plain English words will do it."[2] This is sound doctrine, and should be vigilantly observed and enforced.

[1] Providence Bank *v.* Billings, 4 Pet. 514; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 544; Perrine *v.* Chesapeake & Delaware Canal Co., 9 How. 172; Richmond, &c. R. R. Co. *v.* Louisa R. R. Co., 13 How. 71; Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294; Parker *v.* Sunbury & Erie R. R. Co., 19 Pa. St. 211; Wales *v.* Stetson, 2 Mass. 143; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, and 3 Wall. 51; State *v.* Krebs, 64 N. C. 604.

[2] Pennsylvania R. R. Co. *v.* Canal Commissioners, 21 Pa. St. 9, 22. And see Commonwealth *v.* Pittsburg, &c. R. R. Co., 24 Pa. St. 159; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87, 93, per *Wright*, J.; Baltimore *v.* Baltimore, &c. R. R. Co., 21 Md. 50; Tuckahoe Canal Co. *v.* Railroad Co., 11 Leigh, 42; s. c. 36 Am. Dec. 374; Richmond *v.* Richmond & Danville R. R. Co., 21 Gratt. 604; Holyoke Co. *v.* Lyman, 15 Wall. 500; Delancey *v.* Insurance Co., 52 N. H. 581; Spring Valley Water Works *v.* San Francisco, 52 Cal. 111; Gaines *v.* Coates, 51 Miss. 335. We quote from the Supreme Court of Connecticut in Bradley *v.* N. Y. & N. H. R. R. Co., 21 Conn. 294, 306: "The rules of construction which apply to general legislation, in regard to those subjects in which the public at large are interested, are essentially different from those which apply to private grants to individuals, of powers or privileges designed to be exercised with special reference to their own advantage, although involving in their exercise incidental benefits to the community generally. The former are to be expounded largely and beneficially for the purposes for which they were enacted, the latter liberally, in favor of the public, and strictly as against the grantees. The power in the one case is original and inherent in the State or sovereign power, and is exercised solely for the general good of the community; in the other it is merely derivative, is special if not exclusive in its character, and is in derogation of common right, in the sense that it confers privileges to which the members of the community at large are not entitled. Acts of the former kind, being dictated solely by a regard to the benefit of the public generally, attract none of that prejudice or jealousy towards them which naturally would arise towards those of the other description, from the consideration that the latter were obtained with a view to the benefit of particular individuals, and the apprehension that

And this rule is not confined to the grant of a corporate franchise, but it extends to all grants of franchises or privileges by the State to individuals, in the benefits of which the people at large cannot participate. "Private statutes," says *Parsons*, Ch. J., "made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words or from necessary implication." [1] And the grant of ferry rights, or the right to erect a toll-bridge, and the like, is not only to be construed strictly against the grantees, but it will not be held to exclude the grant of a similar and competing privilege to others, unless the terms of the grant render such construction imperative.[2]

their interests might be promoted at the sacrifice or to the injury of those of others whose interests should be equally regarded. It is universally understood to be one of the implied and necessary conditions upon which men enter into society and form governments, that sacrifices must sometimes be required of individuals for the general benefit of the community, for which they have no rightful claim to specific compensation; but, as between the several individuals composing the community, it is the duty of the State to protect them in the enjoyment of just and equal rights. A law, therefore, enacted for the common good, and which there would ordinarily be no inducement to pervert from that purpose, is entitled to be viewed with less jealousy and distrust than one enacted to promote the interests of particular persons, and which would constantly present a motive for encroaching on the rights of others."

[1] Coolidge *v.* Williams, 4 Mass. 140. See also Dyer *v.* Tuscaloosa Bridge Co., 2 Port. (Ala.) 296; s. c. 27 Am. Dec. 655; Grant *v.* Leach, 20 La. Ann. 329. In Sprague *v.* Birdsall, 2 Cow. 419, it was held that one embarking upon the Cayuga Lake six miles from the bridge of the Cayuga Bridge Co., and crossing the lake in an oblique direction, so as to land within sixty rods of the bridge, was not liable to pay toll under a provision in the charter of said company which made it unlawful for any person to cross within three miles of the bridge without paying toll. In another case arising under the same charter, which authorized the company to build a bridge across the lake *or* the outlet thereof, and to rebuild in case it should be destroyed or carried away by the ice, and prohibited all other persons from erecting a bridge within three miles of the place where a bridge should be erected by the company, it was held, after the company had erected a bridge across the lake and it had been carried away by the ice, that they had no authority afterwards to rebuild across the *outlet* of the lake, two miles from the place where the first bridge was built, and that the restricted limits were to be measured from the place where the first bridge was erected. Cayuga Bridge Co. *v.* Magee, 2 Paige, 116; s. c. 6 Wend. 85. In Chapin *v.* The Paper Works, 30 Conn. 461, it was held that statutes giving a preference to certain creditors over others should be construed with reasonable strictness, as the law favored equality. In People *v.* Lambier, 5 Denio, 9, it appeared that an act of the legislature had authorized a proprietor of lands lying in the East River, which is an arm of the sea, to construct wharves and bulkheads in the river, in front of his land, and there was at the time a public highway through the land, terminating at the river. Held, that the proprietor could not, by filling up the land between the shore and the bulkhead, obstruct the public right of passage from the land to the water, but that the street was, by operation of law, extended from the former terminus over the newly made land to the water. Compare Commissioners of Inland Fisheries *v.* Holyoke Water Power Co., 104 Mass. 446; s. c. 6 Am. Rep. 247; Kingsland *v.* Mayor, &c., 35 Hun, 458; Detroit *v.* Backus, 49 Mich. 110.

[2] Mills *v.* St. Clair County, 8 How.

The Constitution of the United States contains provisions which are important in this connection. One of these is, that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States,[1] and all persons born or naturalized in the United States, and subject to its jurisdiction, are declared to be citizens thereof, and of the State wherein they reside.[2] The States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States,[3] or to deprive any person of life, liberty,

569; Mohawk Bridge Co. *v.* Utica & S. R. R. Co., 6 Paige, 554; Chenango Bridge Co. *v.* Binghamton Bridge Co., 27 N. Y. 87; s. c. 3 Wall. 51; Montjoy *v.* Pillow, 64 Miss. 705. See cases, *ante*, p. 473, note 6. Compare Hackett *v.* Wilson, 12 Oreg. 25. A ferry franchise may be limited to carrying one way, and another granted for carrying the other. Power *v.* Athens, 99 N. Y. 592. An exclusive ferry franchise over a river within certain limits does not prevent carrying up and down the river from a point within the limits. Broadnax *v.* Baker, 94 N. C. 675. See Hunter *v.* Moore, 44 Ark. 184.

[1] Const. of United States, art. 4, § 2 See *ante*, pp. 24, 25.

[2] Const. of United States, 14th Amendment.

[3] "The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of the respective governments. A citizen of the United States, as such, has the right to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws. Story on Const. 4th ed. § 1937. These, therefore, are among the privileges of citizens of the United States. So every citizen may petition the federal authorities which are set over him, in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege: Crandall *v.* Nevada, 6 Wall. 35; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas or within the jurisdiction of a foreign government. Slaughter House Cases, 16 Wall. 36. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship.

"One very plain and unquestionable immunity is exemption from any tax, burden, or imposition under State laws, as a condition to the enjoyment of any right or privilege under the laws of the United States. A State, therefore, cannot require one to pay a tax as importer, under the laws of Congress, of foreign merchandise: Ward *v.* Maryland, 12 Wall. 163; nor impose a tax upon travellers passing by public conveyances out of the State: Crandall *v.* Nevada, 6 Wall. 35; nor impose conditions to the right of citizens of other States to sue its citizens in the federal courts. Insurance Co. *v.* Morse, 20 Wall. 445. These instances sufficiently indicate the general rule. Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. Slaughter House Cases, 16 Wall. 36. And such a right or privilege is abridged whenever the State law interferes with any legitimate opera-

or property, without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws.[1] Although the precise meaning of "privileges and immunities" is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to, and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights; and the right to be exempt, in property and person, from taxes or burdens which the property, or persons, of citizens of the same State are not subject to.[2] To this extent, at least, discriminations could not be made by State laws against them. But it is unquestionable that many other rights and privileges may be made — as they usually are — to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident.[3] The protection by due process of law has already been considered. It was not within the power of the States before the adoption of the fourteenth amendment, to deprive citizens of the equal protection of the laws; but there were servile classes not thus shielded, and when these were made freemen, there were some who disputed their claim to citizenship, and some State laws were in force which established discriminations against them. To settle doubts and preclude all such laws,

tion of the federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal Constitution or Laws." Cooley, Principles of Const. Law, 246. See United States *v.* Reese, 92 U. S. 214; United States *v.* Cruikshank, 92 U. S. 542; Hall *v.* De Cuir, 95 U. S. 485; Kirkland *v.* Hotchkiss, 100 U. S. 491.

[1] Const. of United States, 14th Amendment. See cases pp. 14-16, *ante*. The fourteenth amendment is violated by a statute which allows the overseers of the poor to commit paupers and vagrants to the work-house without trial. Portland *v.* Bangor, 65 Me. 120; Dunn *v.* Burleigh, 62 Me. 24. It does not confer the right of suffrage upon females. Van Valkenburgh *v.* Brown, 43 Cal. 43; Bradwell *v.* State, 16 Wall. 130; Minor *v.* Happersett, 21 Wall. 162. See *ante*, pp. 481, 482, notes.

Granting licenses for the sale of intoxicating drinks to males only does not violate a constitutional provision which forbids the grant of special privileges or immunities. Blair *v.* Kilpatrick, 40 Ind. 315.

[2] Corfield *v.* Coryell, 4 Wash. 380; Campbell *v.* Morris, 3 H. & McH. 554; Crandall *v.* State, 10 Conn. 339; Oliver *v.* Washington Mills, 11 Allen, 268.

[3] Campbell *v.* Morris, 3 H. & McH. 554; State *v.* Medbury, 3 R. I. 138. And see generally the cases cited, *ante*, p. 25, note. Exemption from garnishment does not apply to a non-resident debtor except by express provision. Kile *v.* Montgomery, 73 Ga. 337.

the fourteenth amendment was adopted; and the same securities which one citizen may demand, all others are now entitled to.

Judicial Proceedings.

Individual citizens require protection against judicial action as well as against legislative; and perhaps the question, what constitutes due process of law, arises as often when judicial action is in question as in any other cases. But it is not so difficult here to arrive at satisfactory conclusions, since the bounds of the judicial authority are much better defined than those of the legislative, and each case can generally be brought to the test of definite and well-settled rules of law.

The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, *first*, of the subject-matter; and, *second*, of the persons whose rights are to be passed upon.[1]

A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be devested by means of them.

It is a maxim in the law that consent can never confer jurisdiction:[2] by which is meant that the consent of parties cannot empower a court to act upon subjects which are not submitted to its determination and judgment by the law. The law creates courts, and upon considerations of general public policy defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the act of the parties.

Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought

[1] "Jurisdiction is a power constitutionally conferred upon a court, a single judge, or a magistrate, to take cognizance and decide causes according to law, and to carry their sentence into execution. The tract of land within which a court, judge, or magistrate has jurisdiction is called his *territory;* and his power in relation to his territory is called his *territorial jurisdiction.*" 3 Bouv. Inst. 71.

[2] Coffin *v.* Tracy, 3 Caines, 129; Blin *v.* Campbell, 14 Johns. 432; Cuyler *v.* Rochester, 12 Wend. 165; Dudley *v.* Mayhew, 3 N. Y. 9; Preston *v.* Boston, 12 Pick. 7; Chapman *v.* Morgan, 2 Greene, (Iowa), 374; Thompson *v.* Steamboat Morton, 2 Ohio St. 26; Gilliland *v.* Administrator of Sellers, 2 Ohio St. 223; Dicks *v.* Hatch, 10 Iowa, 380; McCall *v.* Peachey, 1 Call, 55; Bents *v.* Graves, 3 McCord, 280; Overstreet *v.* Brown, 4 McCord, 79; Green *v.* Collins, 6 Ired. 139; Bostwick *v.* Perkins, 4 Ga. 47; Georgia R. R., &c. *v.* Harris, 5 Ga. 527; State *v.* Bonney, 34 Me. 223; Little *v.* Fitts, 33 Ala. 343; Ginn *v.* Rogers, 9 Ill. 131; Neill *v.* Keese, 5 Tex. 23; Ames *v.* Boland, 1 Minn. 365; Brady *v.* Richardson, 18 Ind. 1; White *v.* Buchanan, 6 Cold. 32; Andrews *v.* Wheaton, 23 Conn. 112; Collamer *v.* Page, 35 Vt. 387.

to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory.[1]

In regard to private controversies, the law always encourages voluntary arrangements;[2] and the settlements which the parties may make for themselves, it allows to be made for them by arbitrators mutually chosen. But the courts of a country cannot have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then the decision could not be binding as a judgment, but only as an award; and a mere neglect by either party to object to the want of jurisdiction could not make the decision binding upon him either as a judgment or as an award. Still less could consent in a criminal case bind the defendant; since criminal charges are not the subject of arbitration, and any infliction of criminal punishment upon an individual, except in pursuance of the law of the land, is a wrong done to the State, whether the individual assented or not. Those cases in which it has been held that the constitutional right of trial by jury cannot be waived are strongly illustrative of the legal view of this subject.[3]

If the parties cannot confer jurisdiction upon a court by consent, neither can they by consent empower any individual other

[1] Bostwick *v.* Perkins, 4 Ga. 47; Hill *v.* People, 16 Mich. 351; White *v.* Buchanan, 6 Cold. 32; Collins *v.* Collins, 37 Pa. St. 387; Green *v.* Creighton, 18 Miss. 159.

[2] Moore *v.* Detroit Locomotive Works, 14 Mich. 266; Coyner *v.* Lynde, 10 Ind. 282.

[3] Brown *v.* State, 8 Blackf. 561; Work *v.* Ohio, 2 Ohio St. 296; Cancemi *v.* People, 18 N. Y. 128; People *v.* Smith, 9 Mich. 193; Hill *v.* People, 16 Mich. 351; Whorton *v.* Morange, 62 Ala. 201; Fleishman *v.* Walker, 91 Ill. 318; Shissler *v.* People, 93 Ill. 472. See also State *v.* Turner, 1 Wright, 20.

than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purposes of the hearing.[1]

Sometimes jurisdiction of the subject-matter will depend upon considerations of locality, either of the thing in dispute or of the parties. At law certain actions are local, and others are transitory. The first can only be tried where the property which is the subject of the controversy, or in respect to which the controversy has arisen, is situated. The United States courts take cognizance of certain causes by reason only of the fact that the parties are residents of different States or countries.[2] The question of jurisdiction in these cases is sometimes determined by the common law, and sometimes is matter of statutory regulation. But there is a class of cases in respect to which the courts of the several States of the Union are constantly being called upon to exercise authority, and in which, while the jurisdiction is conceded to rest on considerations of locality, there has not, unfortunately, at all times been entire harmony of decision as to what shall confer jurisdiction. We refer now to suits for divorce from the bonds of matrimony.

The courts of one State or country have no general authority to grant divorce, unless for some reason they have control over the particular marriage contract which is sought to be annulled. But what circumstance gives such control? Is it the fact that the marriage was entered into in such country or State? Or that the alleged breach of the marriage bond was within that jurisdiction? Or that the parties resided within it either at the time of the marriage or at the time of the offence? Or that the parties now reside in such State or country, though both marriage and offence may have taken place elsewhere? Or must marriage, offence, and residence, all or any two of them, combine to confer the authority? These are questions which have frequently demanded the thoughtful attention of the courts, who have sought to establish a rule at once sound in principle, and that shall protect as far as possible the rights of the parties, one or the other

[1] Winchester *v.* Ayres, 4 Greene (Iowa), 104. See *post*, 504, note.

[2] See a case where a judgment of a United States court was treated as of no force, because the court had not jurisdiction in respect to the plaintiff. Vose *v.* Morton, 4 Cush. 27. As to third persons, a judgment against an individual may sometimes be treated as void, when he was not suable in that court or in that manner, notwithstanding he may have so submitted himself to the jurisdiction as to be personally bound. See Georgia R. R. &c. *v.* Harris, 5 Ga. 527; Hinchman *v.* Town, 10 Mich. 508.

of whom, unfortunately, under the operation of any rule which can be established, it will frequently be found has been the victim of gross injustice.

We conceive the true rule to be that the actual, *bona fide* residence of either husband or wife within a State will give to that State authority to determine the *status* of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offence; and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.[1]

[1] There are a number of cases in which this subject has been considered. In Inhabitants of Hanover *v.* Turner, 14 Mass. 227, instructions to a jury were sustained, that if they were satisfied the husband, who had been a citizen of Massachusetts, removed to Vermont merely for the purpose of procuring a divorce, and that the pretended cause for divorce arose, if it ever did arise, in Massachusetts, and that the wife was never within the jurisdiction of the court of Vermont, then and in such case the decree of divorce which the husband had obtained in Vermont must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage between the parties. See also Vischer *v.* Vischer, 12 Barb. 640; and McGiffert *v.* McGiffert, 31 Barb. 69. In Chase *v.* Chase, 6 Gray, 157, the same ruling was had as to a foreign divorce, notwithstanding the wife appeared in and defended the foreign suit. In Clark *v.* Clark, 8 N. H. 21, the court refused a divorce on the ground that the alleged cause of divorce (adultery), though committed within the State, was so committed while the parties had their domicile abroad. This decision was followed in Greenlaw *v.* Greenlaw, 12 N. H. 200. The court say: "If the defendant never had any domicile in this State, the libellant could not come here, bringing with her a cause of divorce over which this court had jurisdiction. If at the time of the [alleged offence] the domicile of the parties was in Maine, and the facts furnished no cause for a divorce there, she could not come here and allege those matters which had already occurred, as a ground for a divorce under the laws of this State. Should she under such circumstances obtain a decree of divorce here, it must be regarded as a mere nullity elsewhere." In Frary *v.* Frary, 10 N. H. 61, importance was attached to the fact that the *marriage* took place in New Hampshire; and it was held that the court had jurisdiction of the wife's application for a divorce, notwithstanding the offence was committed in Vermont, but during the time of the wife's residence in New Hampshire. See also Kimball *v.* Kimball, 13 N. H 222; Batchelder *v.* Batchelder, 14 N. H. 380; Payson *v.* Payson, 34 N. H. 518; Hopkins *v.* Hopkins, 35 N. H. 474; Foss *v.* Foss, 58 N. H. 283; Norris *v.* Norris, 64 N. H. 523. See Trevino *v.* Trevino, 54 Tex. 261. In Wilcox *v.* Wilcox, 10 Ind. 436, it was held that the residence of the libellant at the time of the application for a divorce was sufficient to confer jurisdiction, and a decree dismissing the bill because the cause for divorce arose out of the State was reversed. And see Tolen

But to render the jurisdiction of a court effectual in any case, it is necessary that the thing in controversy, or the parties in-

v. Tolen, 2 Blackf. 407. Compare Jackson *v.* Jackson, 1 Johns. 424; Barber *v.* Root, 10 Mass. 260; Borden *v.* Fitch, 15 Johns. 121; Bradshaw *v.* Heath, 13 Wend. 407. In any of these cases the question of actual residence will be open to inquiry whenever it becomes important, notwithstanding the record of proceedings is in due form, and contains the affidavit of residence required by the practice. Leith *v.* Leith, 39 N. H. 20. And see McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; Hoffman *v.* Hoffman, 46 N. Y. 30; People *v.* Dawell, 25 Mich. 247; Reed *v.* Reed, 52 Mich. 117; Gregory *v.* Gregory, 78 Me. 187; Neff *v.* Beauchamp, 74 Iowa, 92; Chaney *v.* Bryan, 15 Lea, 589. In a purely collateral civil action, jurisdiction is conclusively presumed. Waldo *v.* Waldo, 52 Mich. 94. And see Van Orsdal *v.* Van Orsdal, 67 Iowa, 35. The Pennsylvania cases agree with those of New Hampshire, in holding that a divorce should not be granted unless the cause alleged occurred while the complainant had domicile within the State. Dorsey *v.* Dorsey, 7 Watts, 349; Hollister *v.* Hollister, 6 Pa. St. 449; McDermott's Appeal, 8 W. & S. 251. And they hold also that the injured party in the marriage relation must seek redress in the forum of the defendant, unless where such defendant has removed from what was before the common domicile of both. Calvin *v.* Reed, 35 Pa. St. 375; Elder *v.* Reel, 62 Pa. St. 308; s. c. 1 Am. Rep. 414. If a divorce is procured on publication in another State from that of the husband's domicile, where the offence was committed, it is a nullity in the latter State. Flower *v.* Flower, 42 N. J. Eq. 152. See Cook *v.* Cook, 56 Wis. 195. If one is in good faith a resident, his motive in coming to the State is immaterial. Colburn *v.* Colburn, 70 Mich. 647; Gregory *v.* Gregory, 76 Me. 535. But residence must be actual, not merely legal. Tipton *v.* Tipton, 87 Ky. 243. For cases supporting to a greater or less extent the doctrine stated in the text, see Harding *v.* Alden, 9 Greenl. 140; Ditson *v.* Ditson, 4 R. I. 87; Pawling *v.* Bird's Ex'rs, 13 Johns. 192; Kerr *v.* Kerr, 41 N. Y. 272; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Cooper *v.* Cooper, 7 Ohio, 594; Mansfield *v.* McIntyre, 10 Ohio, 28; Smith *v.* Smith, 4 Greene (Iowa), 266; Yates *v.* Yates, 13 N. J. Eq. 280; Maguire *v.* Maguire, 7 Dana, 181; Waltz *v.* Waltz, 18 Ind. 449; Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Gleason *v.* Gleason, 4 Wis. 64; Hare *v.* Hare, 10 Tex. 355; D'Auvilliers *v.* De Livaudais, 32 La. Ann. 605; Gettys *v.* Gettys, 3 Lea, 260; Smith *v.* Smith, 19 Neb. 706. And see Story, Confl. Laws, § 230 *a;* Bishop on Mar. and Div. (1st ed.) § 727 *et seq.;* Ibid. (4th ed.) Vol. II. § 155 *et seq.* The cases of Hoffman *v.* Hoffman, 46 N. Y. 30; s. c. 7 Am. Rep. 299; Elder *v.* Reel, 62 Pa. St. 308; s. c. 1 Am. Rep. 414; People *v.* Dawell, 25 Mich. 247; Strait *v.* Strait, 3 McArthur, 415; State *v.* Armington, 25 Minn. 29; Sewall *v.* Sewall, 122 Mass. 156; s. c. 23 Am. Rep. 299; Hood *v.* State, 56 Ind. 263; s. c. 26 Am. Rep. 21; Litowich *v.* Litowich, 19 Kan. 451; s. c. 27 Am. Rep. 145, are very explicit in declaring that where neither party is domiciled within a particular State, its courts can have no jurisdiction in respect to their marital *status*, and any decree of divorce made therein must be nugatory. A number of the cases cited hold that the wife may have a domicile separate from the husband, and may therefore be entitled to a divorce, though the husband never resided in the State. These cases proceed upon the theory that, although in general the domicile of the husband is the domicile of the wife, yet that if he be guilty of such act or dereliction of duty in the relation as entitles her to have it partially or wholly dissolved, she is at liberty to establish a separate jurisdictional domicile of her own. Ditson *v.* Ditson, 4 R. I. 87; Harding *v.* Alden, 9 Me. 140; Maguire *v.* Maguire, 7 Dana, 181; Hollister *v.* Hollister, 6 Pa. St. 449; Derby *v.* Derby, 14 Ill. App. 645. The doctrine in New York seems to be, that a divorce obtained in another State, without personal service of process or appearance of the defendant, is absolutely void: Vischer *v.* Vischer, 12

terested, be subjected to the process of the court. Certain cases are said to proceed *in rem*, because they take notice rather of the thing in controversy than of the persons concerned; and the process is served upon that which is the object of the suit, without specially noticing the interested parties; while in other cases the parties themselves are brought before the court by process. Of the first class, admiralty proceedings are an illustration; the court acquiring jurisdiction by seizing the vessel or other thing to which the controversy relates. In cases within this class, notice to all concerned is required to be given, either personally or by some species of publication or proclamation; and if not given, the court which had jurisdiction of the property will have none to render judgment.[1] Suits at the common law, however, proceed against the parties whose interests are sought to be affected; and only those persons are concluded by the adjudication who are served with process, or who voluntarily appear.[2] Some

Barb. 640; McGiffert *v.* McGiffert, 31 Barb. 69; Todd *v.* Kerr, 42 Barb. 317; People *v.* Baker, 76 N. Y. 78; s. c. 32 Am. Rep. 274; Cross *v.* Cross, 108 N. Y. 628; though there is actual notice. O'Dea *v.* O'Dea, 101 N. Y. 23. So in Ontario, Magurn *v.* Magurn, 11 Ont. App. 178. See Cox *v.* Cox, 19 Ohio St. 502; s. c. 2 Am. Rep. 415. An appearance by defendant afterwards for the purposes of a motion to set aside the decree, which motion was defeated on technical grounds, will not affect the question. Hoffman *v.* Hoffman, 46 N. Y. 30; s. c. 7 Am. Rep. 299.

Upon the whole subject of jurisdiction in divorce suits, no case in the books is more full and satisfactory than that of Ditson *v.* Ditson, 4 R. I. 87, which reviews and comments upon a number of the cases cited, and particularly upon the Massachusetts cases of Barber *v.* Root, 10 Mass. 260; Inhabitants of Hanover *v.* Turner, 14 Mass. 227; Harteau *v.* Harteau, 14 Pick. 181; and Lyon *v.* Lyon, 2 Gray, 367. The divorce of one party divorces both. Cooper *v.* Cooper, 7 Ohio, 594. And will leave both at liberty to enter into new marriage relations, unless the local statute expressly forbids the guilty party from contracting a second marriage. See Commonwealth *v.* Putnam, 1 Pick. 136; Baker *v.* People, 2 Hill, 325. A party who has gone into another State and procured a divorce will not be heard to allege his own fraud to impeach it. Elliott *v.* Wohlfrom, 55 Cal. 384. A divorce good at the place of domicile will be sustained in England though the cause would not sustain a divorce there. Harvey *v.* Farnie, L. R. 8 App. Cas. 43; Turner *v.* Thompson, L. R. 13 P. D. 37.

[1] Doughty *v.* Hope, 3 Denio, 594. See Matter of Empire City Bank, 18 N. Y. 199; Nations *v.* Johnson, 24 How. 204, 205; Blackwell on Tax Titles, 213.

[2] Jack *v.* Thompson, 41 Miss. 49. As to the right of an attorney to notice of proceedings to disbar him, see notes to pp. 410, 411, and 498. "Notice of some kind is the vital breath that animates judicial jurisdiction over the person. It is the primary element of the application of the judicatory power. It is of the essence of a cause. Without it there cannot be parties, and without parties there may be the form of a sentence, but no judgment obligating the person." See Bragg's Case, 11 Coke, 99 *a*; Rex *v.* Chancellor of Cambridge, 1 Str. 567; Cooper *v.* Board of Works, 14 C. B. N. S. 194; Meade *v.* Deputy Marshal, 1 Brock. 324; Goetcheus *v.* Mathewson, 61 N. Y. 420; Underwood *v.* McVeigh, 23 Gratt. 409; McVeigh *v.* United States, 11 Wall. 259; Littleton *v.* Richardson, 34 N. H. 179; Black *v.* Black, 4 Bradf. Sur. Rep. 174, 205; Mead *v.* Larkin, 66 Ala. 87. Succession of Townsend, 36 La. Ann. 447. Where, however, a statute provides for the taking of a certain security, and au-

cases also partake of the nature both of proceedings *in rem* and of personal actions, since, although they proceed by seizing property, they also contemplate the service of process on defendant parties. Of this class are the proceedings by foreign attachment, in which the property of a non-resident or concealed debtor is seized and retained by the officer as security for the satisfaction of any judgment that may be recovered against him, but at the same time process is issued to be served upon the defendant, and which must be served, or some substitute for service had, before judgment can be rendered.

In such cases, as well as in divorce suits, it will often happen that the party proceeded against cannot be found in the State, and personal service upon him is therefore impossible, unless it is allowable to make it wherever he may be found abroad. But any such service would be ineffectual. No State has authority to invade the jurisdiction of another, and by service of process compel parties there resident or being to submit their controversies to the determination of its courts; and those courts will consequently be sometimes unable to enforce a jurisdiction which the State possesses in respect to the subjects within its limits, unless a substituted service is admissible. A substituted service is provided by statute for many such cases; generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it home, if possible, to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon.[1]

thorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment. Lewis *v.* Garrett's Adm'r, 6 Miss. 434; People *v.* Van Eps, 4 Wend. 387; Chappee *v.* Thomas, 5 Mich. 53; Gildersleeve *v.* People, 10 Barb. 35; People *v.* Lott, 21 Barb. 130; Pratt *v.* Donovan, 10 Wis. 378; Murray *v.* Hoboken Land Co., 18 How. 272; Philadelphia *v.* Commonwealth, 52 Pa. St. 451; Whitehurst *v.* Coleen, 53 Ill. 247.

[1] "It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon purely *ex parte* proceedings, without a pretence of notice, or any provision for defending, would be a violation of the constitution, and be void; but where the legislature has presented a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal." *Denio*, J., in Matter of Empire City Bank, 18 N. Y. 199, 215. See also, per *Morgan*, J., in Rockwell *v.* Nearing, 35 N. Y. 302, 314; Nations *v.* Johnson, 24 How. 195; Beard *v.* Beard, 21 Ind. 321; Mason *v.* Messenger, 17 Iowa, 261; Cupp *v.* Commissioners of Seneca Co., 19 Ohio St. 173; Campbell *v.* Evans, 45 N. Y. 356; Happy *v.* Mosher, 48 N. Y. 313; Jones *v.* Driskell, 94 Mo.

But such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may give it effect so far as the subject-matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process, so as to subject the defendant to a valid judgment against him personally. In attachment proceedings, the published notice may be sufficient to enable the plaintiff to obtain a judgment which he can enforce by sale of the property attached, but for any other purpose such judgment would be ineffectual. The defendant could not be followed into another State or country, and there have recovery against him upon the judgment as an established demand. The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings.[1] Where a party has property in a State, and

190; Palmer *v.* McCormick, 28 Fed. Rep. 541; Traylor *v.* Lide, 7 S. W. Rep. 58 (Tex.). If an absent defendant returns pending publication, he need not be personally served. Duché *v.* Voisin, 18 Abb. N. C. 358. Jurisdiction cannot be acquired by ordering goods of a non-resident for the mere purpose of attaching them. Copas *v.* Anglo-Am. Prov. Co., 41 N. W. Rep. 690 (Mich.). In Burnham *v.* Commonwealth, 1 Duv. 210, a personal judgment against the absconding officers of the provisional government was sustained. But in the case of constructive notice, if the party appears, he has a right to be heard, and this cannot be denied him, even though he be a rebel. McVeigh *v.* United States, 11 Wall. 259, 267.

[1] Pawling *v.* Willson, 13 Johns. 192; Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369; Curtis *v.* Gibbs, 1 Penn. 399; Miller's Ex'r *v.* Miller, 1 Bailey, 242; Cone *v.* Cotton, 2 Blackf. 82; Kilburn *v.* Woodworth, 5 Johns. 37; Robinson *v.* Ward's Ex'r, 8 Johns. 86; Hall *v.* Williams, 6 Pick. 232; Bartlet *v.* Knight, 1 Mass. 401; St. Albans *v.* Bush, 4 Vt. 58; Fenton *v.* Garlick, 6 Johns. 194; Bissell *v.* Briggs, 9 Mass. 462; s. c. 6 Am. Dec. 88; Denison *v.* Hyde, 6 Conn. 508; Aldrich *v.* Kinney, 4 Conn. 380; s. c. 10 Am. Dec. 151; Hoxie *v.* Wright, 2 Vt. 263; Prosser *v.* Warner, 47 Vt. 667; s. c. 19 Am. Rep. 132; Newell *v.* Newton, 10 Pick. 470; Starbuck *v.* Murray, 5 Wend. 148; s. c. 21 Am. Dec. 172; Armstrong *v.* Harshaw, 1 Dev. 187; Bradshaw *v.* Heath, 13 Wend. 407; Bates *v.* Delavan, 5 Paige, 299; Webster *v.* Reid, 11 How. 437; Gleason *v.* Dodd, 4 Met. 333; Green *v.* Custard, 23 How. 484; Eliot *v.* McCormick, 144 Mass. 10. A personal judgment on such service when sued on is no basis for recovery. Needham *v.* Thayer, 147 Mass. 536; Eastman *v.* Dearborn, 63 N. H. 364. But see Everhart *v.* Holloway, 55 Iowa, 179. A personal judgment cannot be based on service by publication or personal service out of the State. Denny *v.* Ashley, 20 Pac. Rep. 331 (Col.). Service by publication may suffice for a decree of partition of land, but not to create a personal demand for costs. Freeman *v.* Alderson, 119 U. S. 185. So if notice is served in another State. Cloyd *v.* Trotter, 118 Ill. 391. A judgment *in personam* declaring bonds void does not bind a non-resident holder where the only notice was constructive by publication. Pana *v.* Bowler, 107 U. S. 529. In *Ex parte* Heyfron, 8 Miss. 127, it was held that an attorney could not be stricken from the rolls without notice of the proceeding, and opportunity to be heard. And see *ante*, p. 410, note. Leaving notice with one's family is not equivalent to personal service. Rape *v.*

resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.

The same rule applies in divorce cases. The courts of the State where the complaining party resides have jurisdiction of the subject-matter; and if the other party is a non-resident, they must be authorized to proceed without personal service of process. The publication which is permitted by the statute is sufficient to justify a decree in these cases changing the *status* of the complaining party, and thereby terminating the marriage;[1] and it might be sufficient also to empower the court to pass upon the question of the custody and control of the children of the marriage, if they were then within its jurisdiction. But a decree on this subject could only be absolutely binding on the parties while the children remained within the jurisdiction; if they acquire a domicile in another State or country, the judicial tribunals of that State or country would have authority to determine the question of their guardianship there.[2]

But in divorce cases, no more than in any other, can the court make a decree for the payment of money by a defendant not served with process, and not appearing in the case, which shall be binding upon him personally. It must follow, in such a case, that the wife, when complainant, cannot obtain a valid decree for alimony, nor a valid judgment for costs. If the defendant had property within the State, it would be competent to provide by

Heaton, 9 Wis. 329. At least after defendant has himself left the State. Amsbaugh *v.* Exchange Bank, 33 Kan. 100. And see Bimeler *v.* Dawson, 5 Ill. 536.

[1] Hull *v.* Hull, 2 Strob. Eq. 174; Manley *v.* Manley, 4 Chand. 97; Hubbell *v.* Hubbell, 3 Wis. 662; Mansfield *v.* McIntyre, 10 Ohio, 28; Ditson *v.* Ditson, 4 R. I. 87; Harrison *v.* Harrison, 19 Ala. 499; Thompson *v.* State, 28 Ala. 12; Harding *v.* Alden, 9 Me. 140; s. c. 23 Am. Dec. 549; Maguire *v.* Maguire, 7 Dana, 181; Hawkins *v.* Ragsdale, 80 Ky. 353. It is immaterial in these cases whether notice was actually brought home to the defendant or not. And see Heirs of Holman *v.* Bank of Norfolk, 12 Ala. 369. But see *contra*, People *v.* Baker, 76 N. Y. 78; O'Dea *v.* O'Dea, 101 N. Y. 23; Magurn *v.* Magurn, 11 Ont. App. 178; Flower *v.* Flower, 42 N. J. Eq. 152.

[2] This must be so on general principles, as the appointment of guardians for minors is of local force only. See Morrell *v.* Dickey, 1 Johns. Ch. 153; Woodworth *v.* Spring, 4 Allen, 321; Potter *v.* Hiscox, 30 Conn. 508; Kraft *v.* Wickey, 4 G. & J. 322; s. c. 23 Am. Dec. 569. In Kline *v.* Kline, 57 Iowa, 386, an order awarding custody of children was held inoperative when at the time the children were in another State; and in People *v.* Allen, 40 Hun, 611, an order made where all parties resided was held binding in another State. The case of Townsend *v.* Kendall, 4 Minn. 412, appears to be *contra*, but some reliance is placed by the court on the statute of the State which allows the foreign appointment to be recognized for the purposes of a sale of the real estate of a ward.

law for the seizure and appropriation of such property, under the decree of the court, to the use of the complainant; but the legal tribunals elsewhere would not recognize a decree for alimony or for costs not based on personal service or appearance. The remedy of the complainant must generally, in these cases, be confined to a dissolution of the marriage, with the incidental benefits springing therefrom, and to an order for the custody of the children, if within the State.[1]

When the question is raised whether the proceedings of a court may not be void for want of jurisdiction, it will sometimes be important to note the grade of the court, and the extent of its authority. Some courts are of general jurisdiction, by which is meant that their authority extends to a great variety of matters; while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to certain specified cases. The want of jurisdiction is equally fatal in the proceedings of each; but different rules prevail in showing it. It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon matters over which it had no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction, but the recitals contained in the minutes of proceedings must be sufficient to show that the case was one which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process.[2]

[1] See Jackson *v.* Jackson, 1 Johns. 424; Harding *v.* Alden, 9 Me. 140; s. c. 23 Am. Dec. 549; Holmes *v.* Holmes, 4 Barb. 295; Crane *v.* Meginnis, 1 Gill & J. 463; Maguire *v.* Maguire, 7 Dana, 181; s. c. 19 Am. Dec. 237; Townsend *v.* Griffin, 4 Harr. 440; Sowders *v.* Edmunds, 76 Ind. 123. In Beard *v.* Beard, 21 Ind. 321, *Perkins*, J., after a learned and somewhat elaborate examination of the subject, expresses the opinion that the State may permit a personal judgment for alimony in the case of a resident defendant, on service by publication only, though he conceded that there would be no such power in the case of non-residents. Upon a California divorce a wife is not entitled to dower in Oregon lands, which in such case is allowed in Oregon, although the California court had jurisdiction. Barrett *v.* Failing, 111 U. S. 523.

[2] See Dakin *v.* Hudson, 6 Cow. 221; Cleveland *v.* Rogers, 6 Wend. 438; People *v.* Koeber, 7 Hill, 39; Shelden *v.* Wright, 5 N. Y. 497; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Wall *v.* Trumbull, 16 Mich. 228; Denning *v.* Corwin, 11 Wend. 647; Bridge *v.* Ford, 4 Mass. 641; Smith *v.* Rice, 11 Mass. 507; Barrett *v.* Crane, 16 Vt. 246; Tift *v.* Griffin, 4 Ga. 185; Jennings *v.* Stafford, 1 Ired. 404; Perrine *v.* Farr, 22 N. J. 356; State *v.* Metzger, 26 Mo. 65; Owen *v.* Jordan, 27 Ala. 608; Hill *v.* Pride, 4 Call. 107; Sullivan *v.* Blackwell, 28 Miss. 737. If without the aid of parol evidence a justice's judgment is void, it cannot be aided by filing a transcript of it in a court of general jurisdiction. Barron *v.* Dent, 17 S. C. 75. If a court of general jurisdiction exercises special powers in a proceeding not after the course of the common law,

There is also another difference between these two classes of tribunals in this, that the jurisdiction of the one may be disproved under circumstances where it would not be allowed in the case of the other. A record is not commonly suffered to be contradicted by parol evidence; but wherever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals, it is allowable to do so, and thus defeat its effect.[1] But in the case of a court of special and limited authority, it is permitted to go still further, and to show a want of jurisdiction even in opposition to the recitals contained in the record.[2] This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions.[3]

the essential jurisdictional facts must appear of record. Furgeson *v.* Jones, 20 Pac. Rep. 842 (Oreg.).

[1] See this subject considered at some length in Wilcox *v.* Kassick, 2 Mich. 165. The record cannot be contradicted by parol. Littleton *v.* Smith, 119 Ind. 230; Turner *v.* Malone, 24 S. C. 398; Boyd *v.* Roane, 49 Ark. 397; Harris *v.* McClanahan, 11 Lea, 181. General recitals may be contradicted by more specific ones in the same record. Cloud *v.* Pierce City, 86 Mo. 457. And see Adams *v.* Cowles, 95 Mo. 501; Rape *v.* Heaton, 9 Wis. 329; Bimeler *v.* Dawson, 5 Ill. 536; Webster *v.* Reid, 11 How. 437.

[2] Sheldon *v.* Wright, 5 N. Y. 497; Dyckman *v.* Mayor, &c. of N. Y., 5 N. Y. 434; Clark *v.* Holmes, 1 Doug. (Mich.) 390; Cooper *v.* Sunderland, 3 Iowa, 114; Sears *v.* Terry, 26 Conn. 273; Brown *v.* Foster, 6 R. I. 564; Fawcett *v.* Fowlis, 1 Man. & R. 102. But see Facey *v.* Fuller, 13 Mich. 527, where it was held that the entry in the docket of a justice that the parties appeared and proceeded to trial was conclusive. And see Selin *v.* Snyder, 7 S. & R. 172.

[3] Britain *v.* Kinnaird, 1 B. & B. 432. Conviction under the Bumboat Act. The record was fair on its face, but it was insisted that the vessel in question was not a "boat" within the intent of the act. *Dallas*, Ch. J.: "The general principle applicable to cases of this description is perfectly clear: it is established by all the ancient, and recognized by all the modern decisions; and the principle is, that a conviction by a magistrate, who has jurisdiction over the subject-matter, is, if no defects appear, on the face of it, conclusive evidence of the facts stated in it. Such being the principle, what are the facts of the present case? If the subject-matter in the present case were a boat, it is agreed that the boat would be forfeited; and the conviction stated it to be a boat. But it is said that in order to give the magistrate jurisdiction, the subject-matter of his conviction must be a boat; and that it is competent to the party to impeach the conviction by showing that this was not a boat. I agree, that if he had not jurisdiction, the conviction signifies nothing. Had he then jurisdiction in this case? By the act of Parliament he is empowered to search for and seize gunpowder in any boat on the river Thames. Now, allowing, for the sake of argument, that 'boat' is a word of technical meaning, and somewhat different from a vessel, still, it was a matter of fact to be made out before the magistrate, and on which he was to draw his own conclusion. But it is said that a jurisdiction limited as to person

When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law

place, and subject-matter is stinted in its nature, and cannot be lawfully exceeded. I agree: but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence? Does not the place, does not the subject-matter, form such a question? The possession of a boat, therefore, with gunpowder on board, is part of the offence charged; and how could the magistrate decide but by examining evidence in proof of what was alleged? The magistrate, it is urged, could not give himself jurisdiction by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves jurisdiction; and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally; and if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend everything against a stinted jurisdiction: that is not the rule now; and nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that magistrates will do what is right." *Richardson*, J., in the same case, states the real point very clearly: "Whether the vessel in question were a boat or no was a fact on which the magistrate was to decide; and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction. If a fact decided as this has been might be questioned in a civil suit, the magistrate would never be safe in his jurisdiction. Suppose the case for a conviction under the game laws of having partridges in possession; could the magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge? and yet it might as well be urged, in that case, that the magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he, in a civil action, be allowed to dispute the truth of the conviction? In a question like the present we are not to look to the inconvenience, but at the law; but surely if the magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action; and the more so, as he might have been compelled by a *mandamus* to proceed on the investigation. Upon the general principle, therefore, that where the magistrate has jurisdiction his conviction is conclusive evidence of the facts stated in it, I think this rule must be discharged." See also Basten *v.* Carew, 3 B. & C. 648; Fawcett *v.* Fowlis, 7 B. & C. 394; Ashcroft *v.* Bourne, 3 B. & Ad. 684; Mather *v.* Hodd, 8 Johns. 44; Mackaboy *v.* Commonwealth, 2 Virg. Cas. 270; *Ex parte* Kellogg, 6 Vt. 509; State *v.* Scott, 1 Bailey, 294; Facey *v.* Fuller, 13 Mich. 527; Wall *v.* Trumbull, 16 Mich. 228; Sheldon *v.* Wright, 5 N. Y. 497; Wanzer *v.* Howland, 10 Wis. 16; Ricketts *v.* Spraker, 77 Ind. 371; Fanning *v.* Krapfl, 68 Iowa, 244; Schee *v.* La Grange, 42 N. W. Rep. 616 (Iowa); Sims *v.* Gay, 109 Ind. 501; Epping *v.* Robinson, 21 Fla. 36; Freeman on Judgments, § 523, and cases cited.

to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void.[1] An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case;[2] and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if any such there be. Wherever the question of the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if in all respects the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs, or on appeal or process in error therefrom. And even in the same proceeding an irregularity may be waived, and will commonly be held to be waived if the party entitled to complain of it shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of it.[3]

We have thus briefly indicated the cases in which judicial action may be treated as void because not in accordance with the law of the land. The design of the present work does not permit an enlarged discussion of the topics which suggest themselves in this connection, and which, however interesting and important, do not specially pertain to the subject of constitutional law.

[1] *Ex parte* Kellogg, 6 Vt. 509; Edgerton *v.* Hart, 8 Vt. 208; Carter *v.* Walker, 2 Ohio St. 339; White *v.* Crow, 110 U. S. 183; Fox *v.* Cottage, &c. Ass., 81 Va. 677; King *v.* Burdett, 28 W. Va. 601; Levan *v.* Millholland, 114 Pa. St. 49; Weiss *v.* Guerineau, 109 Ind. 438; Rosenheim *v.* Hartsock, 90 Mo. 357; Head *v.* Daniels, 38 Kan. 1; Spillman *v.* Williams, 91 N. C. 483; Freeman on Judgments, § 135. See Matthews *v.* Densmore, 109 U. S. 216; Bonney *v.* Bowman, 63 Miss. 166. Compare Seamster *v.* Blackstock, 83 Va. 232. Even if a court, after acquiring jurisdiction, were to render judgment without trial or an opportunity for hearing, the judgment would not be void, but only erroneous. Clark *v.* County Court, 55 Cal. 199.

A judge cannot perform any judicial act when he is beyond the limits of his State; not even the granting of a *certiorari*. Buchanan *v.* Jones, 12 Ga. 612.

[2] "The doing or not doing that in the conduct of a suit at law, which, conformably to the practice of the court, ought or ought not to be done." Bouv. Law. Dic. See Dick *v.* McLaurin, 63 N. C. 185.

[3] Robinson *v.* West, 1 Sandf. 19; Malone *v.* Clark, 2 Hill, 657; Wood *v.* Randall, 5 Hill, 264; Baker *v.* Kerr, 13 Iowa, 384; Loomis *v.* Wadhams, 8 Gray, 557; Warren *v.* Glynn, 37 N. H. 340. A strong instance of waiver is where, on appeal from a court having no jurisdiction of the subject-matter to a court having general jurisdiction, the parties going to trial without objection are held bound by the judgment. Randolph Co. *v.* Ralls, 18 Ill. 29; Wells *v.* Scott, 4 Mich. 347; Tower *v.* Lamb, 6 Mich. 362. If an objection to proceeding with a jury of less than twelve is overruled, it is not waived by moving for judgment on the findings of such jury. Eshelman *v.* Chicago, &c. Ry. Co., 67 Iowa, 296.

But a party in any case has a right to demand that the judgment of the court be given upon his suit, and he cannot be bound by a delegated exercise of judicial power, whether the delegation be by the courts or by legislative act devolving judicial duties on ministerial officers.[1] Proceedings in any such case would be void; but they must be carefully distinguished from those cases in which the court has itself acted, though irregularly. All the State constitutions preserve the right of trial by jury, for civil as well as for criminal cases, with such exceptions as are specified, and which for the most part consist in such cases as are of small consequence, and are triable in inferior courts. The constitutional provisions do not extend the right; they only secure it in the cases in which it was a matter of right before.[2] But in doing

[1] Hall *v.* Marks, 34 Ill. 358; Chandler *v.* Nash, 5 Mich. 409. It is not competent to provide by statute that the judge may call a member of the bar to sit in his place in a special case. "The legislature has no power to authorize a district judge to place his judicial robe upon the shoulders of any man." Winchester *v.* Ayres, 4 Greene (Iowa), 104. See Wright *v.* Boon, 2 Greene (Iowa), 458; Michales *v.* Hine, 3 Greene (Iowa), 470; Smith *v.* Frisbie, 7 Iowa, 486. To allow it would be to provide a mode for choosing judges different from that prescribed by the Constitution. State *v.* Phillips, 27 La. Ann. 663; State *v.* Fritz 27 La. Ann. 689. Even the consent of parties would not give the judge this authority. Hoagland *v.* Creed, 81 Ill. 506; Andrews *v.* Beck, 23 Tex. 455; Haverly I. M. Co. *v.* Howcutt, 6 Col. 574. In Missouri there is statutory provision for a special judge. State *v.* Hosmer, 85 Mo. 553. Under the Tennessee statute a special judge can act only in civil cases. Neil *v.* State, 2 Lea, 674. It is competent to send a case to referees or to a master for investigation of accounts. Underwood *v.* McDuffee, 15 Mich. 361; Hard *v.* Burton, 79 Ill. 504. All the issues in a case involving accounts may be referred. Huston *v.* Wadsworth, 5 Col. 213. But it is not competent to give the referee powers of final decision. Johnson *v.* Wallace, 7 Ohio, 342; King *v.* Hopkins, 57 N. H. 334; St. Paul, &c. R. R. Co. *v.* Gardner, 19 Minn. 132; s. c. 18 Am. Rep. 334. A decree for the payment of money must specify the precise amount to be paid, and not leave it to subsequent computation. Aldrich *v.* Sharp, 4 Ill. 261; Smith *v.* Trimble, 27 Ill. 152. For the general principle that judicial power cannot be delegated, see further, Gough *v.* Dorsey, 27 Wis. 119; Milwaukee Industrial School *v.* Supervisors, 40 Wis. 328; Allor *v.* County Auditors, 43 Mich. 76; Ward *v.* Farwell, 97 Ill. 593. A justice having power to issue writs as the commencement of suit, cannot issue them in blank to be filled up by parties or by ministerial officers. Pierce *v.* Hubbard, 10 Johns. 405; Craighead *v.* Martin, 25 Minn. 41. But a writ will not necessarily be quashed because filled up by an unauthorized person. Kinne *v.* Hinman, 58 N. H. 363. The clerk of a court of record may be authorized to enter up judgment in vacation against a defendant whose indebtedness is admitted of record: Lathrop *v.* Snyder, 17 Wis. 110; but not in other cases. See Grattan *v.* Matteson, 54 Iowa, 229; Keith *v.* Kellogg, 97 Ill. 147. Such an entry not authorized or approved by the court is void. Balm *v.* Nunn, 63 Ia. 641; Mitchell *v.* St. John, 98 Ind. 598. For the distinction between judicial and ministerial action, see Flournoy *v.* Jeffersonville, 17 Ind. 169; People *v.* Bennett, 29 Mich. 451.

[2] Backus *v.* Lebanon, 11 N. H. 19; Opinions of Judges, 41 N. H. 550; Dane Co. *v.* Dunning, 20 Wis. 210; Stilwell *v.* Kellogg, 14 Wis. 461; Mead *v.* Walker, 17 Wis. 189; Commissioners *v.* Seabrook, 2 Strob. 560; Tabor *v.* Cook, 15 Mich. 322; Lake Erie, &c. R. R. Co. *v.* Heath, 9 Ind. 558; Byers *v.* Commonwealth, 42 Pa. St. 89; State *v.* Peterson, 41 Vt. 504; *In re* Hackett, 53 Vt. 354; Buffalo,

this, they preserve the historical jury of twelve men,[1] with all its incidents, unless a contrary purpose clearly appears. The party is therefore entitled to examine into the qualifications and impartiality of jurors;[2] and to have the proceedings public;[3] and no conditions can be imposed upon the exercise of the right that shall impair its value and usefulness.[4] It has been held, however, in many cases, that it is competent to deny to parties the privilege of a trial in a court of first instance, provided the right is allowed on appeal.[5] It is undoubtedly competent to create new

&c. R. R. Co. *v.* Ferris, 26 Tex. 588; Sands *v.* Kimbark, 27 N. Y. 147; Howell *v.* Fry, 19 Ohio St. 556; Guile *v.* Brown, 38 Conn. 237; Howe *v.* Plainfield, 37 N. J. 145; Commissioners *v.* Morrison, 22 Minn. 178. These provisions do not apply to equitable causes or proceedings: Flaherty *v.* McCormick, 113 Ill. 538; State *v.* Churchill, 48 Ark. 426; Mahan *v.* Cavender, 77 Ga. 118; *In re* Burrows, 33 Kan. 675; Eikenberry *v.* Edwards, 67 Iowa, 619; McKinsey *v.* Squires, 9 S. E. Rep. 55 (W. Va.); not even to enjoining and abating a building as a liquor nuisance: Carleton *v.* Rugg, 149 Mass. 550; nor to special statutory drainage proceedings: Lipes *v.* Hand, 104 Ind. 503; nor to proceedings to determine lunacy: County of Black Hawk *v.* Springer, 58 Iowa, 417; Crocker *v.* State, 60 Wis. 553; nor to summary landlord and tenant proceedings: Frazee *v.* Beattie, 26 S. C. 348; nor to a hearing as to damages on default in tort: Seeley *v.* Bridgeport, 53 Conn. 1; nor to insolvency proceedings. Weston *v.* Loyhed, 30 Minn. 221; *contra*, Risser *v.* Hoyt, 53 Mich. 185. Nor do they prevent a court from denying a new trial unless plaintiff remits a part of the verdict. Arkansas V. L. &c. Co. *v.* Mann, 130 U. S. 69. Nor summary distress for rent if a jury may be had by replevying property seized. Blanchard *v.* Raines, 20 Fla. 467. They do prevent making the findings of appraisers conclusive evidence of value, ownership, and injury, where stock is killed by a railroad. Graves *v.* Nor. Pac. R. R. Co., 5 Mont. 556. That notwithstanding jury trial is preserved, the jurisdiction of justices to try petty cases without jury may be extended, see Beers *v.* Beers, 4 Conn. 535; s. c. 10 Am. Dec. 186; Keddie *v.* Moore, 2 Murph. 41; s. c. 5 Am. Dec. 518.

[1] See *ante*, p. 389. And see the general examination of the subject historically in Hagany *v.* Cohnen, 29 Ohio St. 82; and Copp *v.* Henniker, 55 N. H. 179. A statute allowing less than twelve to sit if a juror is sick is bad. Eshelman *v.* Chicago, &c. Ry. Co., 67 Iowa, 296. But a jury of six may be allowed in inferior courts. Higgins *v.* Farmers' Ins. Co., 60 Iowa, 50. One of less than twelve may act in statutory highway proceedings. McManus *v.* McDonough, 107 Ill. 95.

[2] Palmore *v.* State, 29 Ark. 249; Paul *v.* Detroit, 32 Mich. 108.

[3] Watertown Bank &c. *v.* Mix, 51 N. Y. 558.

[4] Greene *v.* Briggs, 1 Curt. C. C. 311; Lincoln *v.* Smith, 27 Vt. 328; Norristown, &c. Co. *v.* Burket, 26 Ind. 53; State *v.* Gurney, 37 Me. 156; Copp *v.* Henniker, 55 N. H. 179. It is not inadmissible, however, to require of a party demanding a jury that he shall pay the jury fee. Randall *v.* Kehlor, 60 Me. 37; Conners *v.* Burlington &c. Ry. Co., 74 Iowa, 383; Conneau *v.* Geis, 73 Cal. 176.

[5] Emerick *v.* Harris, 1 Binn. 416; Biddle *v.* Commonwealth, 13 S. & R. 405; McDonald *v.* Schell, 6 S. & R. 240; Keddie *v.* Moore, 2 Murph. 41; Wilson *v.* Simonton, 1 Hawks, 482; Monford *v.* Barney, 8 Yerg. 444; Beers *v.* Beers, 4 Conn. 535; s. c. 10 Am. Dec. 186; State *v.* Brennan's Liquors, 25 Conn. 278; Curtis *v.* Gill, 34 Conn. 49; Reckner *v.* Warner, 22 Ohio St. 275; Jones *v.* Robbins, 8 Gray, 329; Hapgood *v.* Doherty, 8 Gray, 373; Flint River, &c. Co. *v.* Foster, 5 Ga. 194; State *v.* Beneke, 9 Iowa, 203; Lincoln *v.* Smith, 27 Vt. 328, 360; Steuart *v.* Baltimore, 7 Md. 500; Commonwealth *v.* Whitney, 108 Mass. 5; Maxwell *v.* Com'rs Fulton Co., 119 Ind. 20; Helverstine *v.* Yantes, 11 S. W. Rep. 811 (Ky.); Beasley *v.* Beckley, 28 W. Va.

tribunals without common-law powers, and to authorize them to proceed without a jury; but a change in the forms of action will not authorize submitting common-law rights to a tribunal in which no jury is allowed.[1] In any case, we suppose a failure to award a jury on proper demand would be an irregularity merely, rendering the proceedings liable to reversal, but not making them void.

There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that "even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges leyum*."[2]

This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause.[3] Nor is it essential that the

81; State *v.* Fitzpatrick, 11 Atl. Rep. 773 (R. I.). But the recognizance to the lower court on appeal must not be burdened with unreasonable conditions. Liquors of McSorley, 15 R. I. 608. Compare *In re* Marron, 60 Vt. 199. But that this could not be admissible in criminal cases was held in Matter of Dana, 7 Benedict, 1, by Judge *Blatchford*, who very sensibly remarks, "In my judgment the accused is entitled, not to be first convicted by a court, and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury." On a charge of criminal conspiracy, a prisoner has a right to jury trial, "from the first moment and in whatever court he is put on trial for the offence charged." Callan *v.* Wilson, 127 U. S 540. If in a lower court one has had a jury trial and appeals to a higher *nisi prius* court, he cannot be deprived of a jury there. McGinty *v.* Carter, 48 N. J. L. 113. That the right to jury trial in civil cases may be waived by failure to demand it, see Gleason *v.* Keteltas, 17 N. Y. 491; Baird *v.* Mayor, 74 N. Y. 382; Garrison *v.* Hollins, 2 Lea, 684; Foster *v.* Morse, 132 Mass. 354. That it is competent to provide that the failure to file an affidavit of defence shall entitle the plaintiff to judgment, see Hoffman *v.* Locke, 19 Pa. St. 57; Lawrance *v.* Born, 86 Pa. St 225; Dortic *v.* Lockwood, 61 Ga. 293.

[1] See Rhines *v.* Clark, 51 Pa. St. 96. Compare Haines *v.* Levin, 51 Pa. St. 412; Haine's Appeal, 73 Pa. St. 169. Whether jury trial is of right in *quo warranto* cases, see State *v.* Allen, 5 Kan. 213; State *v.* Johnson, 26 Ark. 281; Williamson *v.* Lane, 52 Tex. 335; State *v.* Vail, 53 Mo. 97; State *v.* Lupton, 64 Mo. 415; s. c. 27 Am. Rep. 253; People *v.* Cicott, 16 Mich. 283; People *v.* Railroad Co., 57 N. Y. 161; Royal *v.* Thomas, 28 Gratt. 130; s. c. 26 Am. Rep. 335; and cases, p. 786, note 2, *post*.

[2] Co. Lit. § 212. See Day *v.* Savadge, Hobart, 85. We should not venture to predict, however, that even in a case of this kind, if one could be imagined to exist, the courts would declare the act of Parliament void; though they would never find such an intent in the statute, if any other could possibly be made consistent with the words.

[3] Washington Ins. Co. *v.* Price, Hopk. Ch. 2; Sigourney *v.* Sibley, 21 Pick. 101;

judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named.[1] Accordingly, where the Lord Chancellor, who was a shareholder in a company in whose favor the Vice-Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the de cree on this ground, Lord *Campbell* observing: "It is of the last importance that the maxim that 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." "We have again and again set aside proceedings in inferior tribunals, because an individual who had an interest in a cause took a part in the decision. And it will have a most salutary effect on these tribunals, when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care, not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence."[2]

It is matter of some interest to know whether the legislatures of the American States can set aside this maxim of the common law, and by express enactment permit one to act judicially when interested in the controversy. The maxim itself, it is said, in some cases, does not apply where, from necessity, the judge must proceed in the case, there being no other tribunal authorized to act;[3] but we prefer the opinion of Chancellor *Sandford* of New

Freeman on Judgments, § 144. A judge of probate cannot act upon an estate of which he is executor: Bedell *v.* Bailey, 58 N. H. 62; or creditor, Burks *v.* Bennett, 62 Tex. 277. Compare Matter of Hancock, 91 N. Y. 284. A justice may sit, although he has received for collection the note in suit. Moon *v.* Stevens, 53 Mich. 144.

[1] Washington Ins. Co. *v.* Price, Hopk. Ch. 1; Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759; Pearce *v.* Atwood, 13 Mass. 324; Kentish Artillery *v.* Gardiner, 15 R. I. 296; Peck *v.* Freeholders of Essex, 20 N. J. 457; Commonwealth *v* McLane, 4 Gray, 427; Dively *v.* Cedar Falls, 21 Iowa, 565; Clark *v.* Lamb, 2 Allen, 396; Stockwell *v.* White Lake, 22 Mich. 341; Petition of New Boston, 49 N. H. 328. If the property of a judge from its situation will be affected like complainant's by his ruling he cannot sit. North Bloomfield G. M. Co. *v.* Keyser, 58 Cal. 315. As to disqualification by relationship, see Russell *v.* Belcher, 76 Me. 501; Patterson *v.* Collier, 76 Ga. 419; Jordan *v.* Moore, 65 Tex. 363; Hume *v.* Commercial Bank, 10 Lea, 1.

[2] Dimes *v.* Proprietors of Grand Junction Canal, 3 House of Lords Cases, 759, 793.

[3] Ranger *v.* Great Western R., 5 House of Lords Cases, 72, 88; Stuart *v.* Mechanics' & Farmers' Bank, 19 Johns. 496.

York, that in such a case it belongs to the power which created such a court to provide another in which this judge may be a party; and whether another tribunal is established or not, he at least is not entrusted with authority to determine his own rights, or his own wrongs.[1]

It has been held that where the interest was that of corporator in a municipal corporation, the legislature might provide that it should constitute no disqualification where the corporation was a party. But the ground of this ruling appears to be, that the interest is so remote, trifling, and insignificant, that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of an individual.[2] And where penalties are imposed, to be recovered only in a municipal court, the judges or jurors in which would be interested as corporators in the recovery, the law providing for such recovery must be regarded as precluding the objection of interest.[3] And it is very common, in a certain class of cases, for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public; but in such case there is no adversary party, unless the State, which passes the law, or the municipalities, which are its component parts and subject to its control, can be regarded as such.

But except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State, when framing their constitution, may possibly establish so great an anomaly, if they see fit;[4] but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one party to a controversy to decide it for himself is not

[1] Washington Insurance Co. *v.* Price, Hopk. Ch. 1. This subject was considered in Hall *v.* Thayer, 105 Mass. 219, and an appointment by a judge of probate of his wife's brother as administrator of an estate of which her father was a principal creditor was held void. And see People *v.* Gies, 25 Mich. 83.

[2] Commonwealth *v.* Reed, 1 Gray, 475; Justices *v.* Fennimore, 1 N. J. 190; Commissioners *v.* Little, 3 Ohio, 289; Minneapolis *v.* Wilkin, 30 Minn. 140. See Foreman *v.* Marianna, 43 Ark. 324, case of annexing territory; Sauls *v.* Freeman, 4 Sou. Rep. 525 (Fla.), case of changing county seat.

[3] Commonwealth *v.* Ryan, 5 Mass. 90; Hill *v.* Wells, 6 Pick. 104; Commonwealth *v.* Emery, 11 Cush. 406; State *v.* Craig, 80 Me. 85; *In re* Guerrero, 69 Cal. 88.

[4] Matter of Leefe, 2 Barb. Ch. 39. Even this must be deemed doubtful since the adoption of the fourteenth article of the amendments to the federal Constitution, which denies to the State the right to deprive one of life, liberty, or property, without due process of law.

within the legislative authority, because it is not the establishment of any rule of action or decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the law, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.[1]

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in an appellate court; and the suit may there be dismissed on that ground.[2] The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party.[3]

Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do;[4] but that is the extent of his power.

[1] See Ames *v.* Port Huron Log-Driving and Booming Co., 11 Mich. 139; Hall *v.* Thayer, 105 Mass. 219; State *v.* Crane, 36 N. J. 394; Cypress Pond Draining Co. *v.* Hooper, 2 Met. (Ky.) 350; Scuffletown Fence Co. *v.* McAllister, 12 Bush, 312; Reams *v.* Kearns, 5 Cold. 217. No power to make a municipal corporation party and judge in the same controversy can constitutionally be given. Lanfear *v.* Mayor, 4 La. 97; s. c. 23 Am. Dec. 477.

[2] Richardson *v.* Welcome, 6 Cush. 332; Dimes *v.* Proprietors of Grand Junction Canal, 3 H. L. Cas. 759. And see Sigourney *v.* Sibley, 21 Pick. 101; Oakley *v.* Aspinwall, 3 N. Y. 547. But it is held in Pettigrew *v.* Washington Co., 43 Ark. 33, that after judgment it is too late to object that relationship to a party disqualified a judge.

[3] In Queen *v.* Justices of Hertfordshire, 6 Q. B. 753, it was decided that, if any one of the magistrates hearing a case at sessions was interested, the court was improperly constituted, and an order made in the case should be quashed. It was also decided that it was no answer to the objection that there was a majority in favor of the decision without reckoning the interested party, nor that the interested party withdrew before the decision, if he appeared to have joined in discussing the matter with the other magistrates. See also The Queen *v.* Justices of Suffolk, 18 Q. B. 416; The Queen *v.* Justices of London, 18 Q. B. 421; Peninsula R. R. Co. *v.* Howard, 20 Mich. 18.

[4] Richardson *v.* Boston, 1 Curtis, C. C. 250; Washington Insurance Co. *v.* Price, Hopk. Ch. 1; Buckingham *v.* Davis, 9 Md 324; Heydenfeldt *v.* Towns, 27 Ala. 423; State *v.* Judge, 37 La. Ann. 253. If the judge who renders judgment in a cause had previously been attorney in it, the judgment is a nullity. Reams *v.* Kearns, 5 Cold. 217; Slaven *v.* Wheeler, 58 Tex. 23. So though the case in suit is not precisely the one in which he has been consulted. Newcome *v.* Light, 58 Tex. 141.

Addendum H

THE DISSEISIN OF CHATTELS.

II.

The Nature of Ownership.

IN a preceding paper the writer endeavored to show, in the light of history, that disseisin was not a feudal doctrine, but a principle of property in general, personal as well as real. Conversion of chattels, we found, differed from disseisin of land in name, but not in substance. In each case the effect of the tort was to transfer the *res* to the wrong-doer, and to cut down the interest of the party wronged to a mere right to recover the *res*. Or, as the sagacious Brian, C. J., put it, the one had the property, the other only the right of property.

The disseisor, whether of land or chattels, was said to have the property, for these reasons. So long as the disseisin continued he had the power of present enjoyment of the *res;* his interest, although liable to be determined at any moment by the disseisee, was as fully protected against all other assailants as the interest of an absolute owner ; and, finally, his interest was freely transferable, both by his own act and by operation of law, although, of course, by reason of its precarious nature, its exchangeable value was small. The disseisee, on the other hand, was said to have a mere right of property, because, although he was entitled to recover the *res* by self-redress, or by action at law, this was his only right. The disseisin deprived him of the two conspicuous marks of perfect ownership. He could neither enjoy the land or chattel *in specie*, nor bring either of them to market. The interest of the disseisor might have little exchangeable value ; but that of the disseisee had none. For, as we have seen, this interest, being a *chose* in action, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law.

Are these doctrines of the old common law accidents of English legal history, or are they founded in the nature of things ? Do they chiefly concern the legal antiquarian, or have they also a practical bearing upon the litigation of to-day ? To answer these

questions, it will be necessary, in the first place, to analyze the idea of "ownership" or "property," in the hope of working out a definition that will bear the test of application to concrete cases; and, secondly, an attempt must be made to explain the reason of the rule that *choses* in action are not assignable.

It is customary to speak of one as owner of a thing, although he has ceased to possess it for a time, either by his own act, as in the case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet every one would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or, at least, elliptical use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For although they all have the power of present enjoyment, and, consequently, the power of transfer, their interest is either of limited duration, or altogether precarious. It would seem to follow, therefore, that wherever there is a lease, bailment, loss, or disseisin of a *res*, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juriset seisinæ conjunctio*, then, and then only, is the title completely legal."[1]

A true property may, therefore, be shortly defined as possession coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership. Let us test these results by considering some of the modes by

[1] 2 Bl. Com. 199. See also ibid. 196: "And, at all events, without such actual possession no title can be completely good."

which a perfect title may be acquired by one who has neither, or only one of these two elements of complete ownership.

The typical case of title by original acquisition is title by occupation. For the occupier of a *res nullius* does acquire a perfect title and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one *in rerum natura* who can rightfully interfere with him. It is on the same principle that a stranger who occupies land on the death of a tenant *pur auter vie* is owner of the residue of the life estate. For no one during the life of *cestui que vie* can legally disturb him.

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.

There is one curious case of derivative title which may be thought to confirm in a somewhat striking manner the accuracy of the definition here suggested. If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or extremely rare, gave the reversioner and remainderman no remedy against the life tenant. There was no action for chattels corresponding to the formedon in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bail-

ment; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obligor himself, and therefore before his death; he could not create a duty binding only his executor.[1] Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute.[2]

Another rule, now obsolete, admits of a similar explanation. In the fourteenth century, as we have seen, a trespasser acquired the absolute property in the chattel wrongfully taken. The common law gave the dispossessed owner no remedy for its recovery. There was no assize of novel disseisin for chattels. Replevin was restricted to cases of wrongful distress. Detinue, originally founded upon a bailment, and afterwards extended to cases of losing and finding, was not allowed against a trespasser until about 1600. Trespass was therefore the owner's only action; but Trespass sounded in damages. The trespasser's possession being inviolable, he was necessarily owner.

A derivative title may be acquired by an equitable estoppel. If the owner of land permits another to sell and convey it, as if it were the seller's own, the purchaser gets at law only the seisin. The original owner's title, that is, his right to recover the seisin, is not otherwise affected by the conveyance. But a court of equity will grant a permanent injunction against the owner's assertion of his common-law right, and thereby practically nullify it, so that the purchaser's title is substantially perfect.

Where the two elements of ownership are severed, as by a disseisin, and vested in two persons, either may conceivably make his defective title perfect; but the mode of accomplishing this is different in the two cases. The disseisee may regain his lost possession by entry or recaption, by action at law, or by a voluntary surrender on the part of the disseisor. In each of these ways his title becomes complete, and is the result of a transfer, voluntary or involuntary, of the physical *res*.

The perfection of the title of the disseisor, on the other hand, is

[1] Perrot *v.* Austin, Cro. El. 222; Cover *v.* Stem, 67 Md. 449.

[2] After a time the chancellors gave relief by compelling life tenants to give bonds that the reversioners and remaindermen should have the chattels. Warman *v.* Seaman, Freem. C. C. 306, 307; Howard *v.* Duke of Norfolk, 2 Sw. 464; 1 Fonb. Eq. 213, n. And now either in equity or at law the reversioners and remaindermen are amply protected. The learning on this point, together with a full citation of the authorities, may be found in Gray, Perpetuities, §§ 78–98.

not accomplished through a transfer to him of the disseisee's right to recover possession. In the very nature of things, this right of the dispossessed owner cannot be conveyed to the wrongful possessor. It would be absurd to speak of such possessor acquiring a right to recover possession from himself, which would be the necessary consequence of the supposed transfer. But the disseisee's right, although not transferable, may, nevertheless, be extinguished. And since, by its extinguishment, the possession of the disseisor becomes legally unassailable, the latter's ownership is thereby complete.

The extinguishment may come about in divers ways:—

(1.) *By a release.* "Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor and the uniting the right to the possession completes the title of the releasee."[1] In feoffments and grants it was a rule that the word "heirs" was essential to the creation of an estate of inheritance. But, as Coke tells us, "When a bare right is released, as when the disseisee releases to the disseisor all his right, he need not speake of his heires."[2] This distinction would seem to be due to the fact that a release operates, not as a true conveyance, but by way of extinguishment.

(2.) *By marriage.* As we have seen in the preceding article,[3] if a woman, who was dispossessed of her land or chattels, married, her right of action against the wrong-doer not being assignable, did not pass to her husband. If, therefore, she died before possession was regained, the husband had no curtesy in the land, and the right to recover the chattel passed to her representative. But if the dispossessed woman can be imagined to marry the dispossessor, it seems clear, although no authority has been found,[4] that in that highly improbable case the marriage, by suspending and consequently extinguishing her right of action, would give the husband a fee simple in the land and absolute ownership of the chattel.

(3.) *By death.* If a man were disseised by his eldest son and died, the son and heir would be complete owner; for death would

[1] Co. Lit. 274 a, Buker's note [237].

[2] Co. Lit. 9 b.

[3] *Supra*, 27, 38.

[4] A woman by marrying her bailee or debtor extinguished the bailment or debt. Y. B. 21 H. VII. 29–4.

have removed the only person in the world who could legally assail his possession. The law of trusts furnishes another illustration. The right of a *cestui que trust*, it is true, is not a right *in rem*, but a right *in personam*. Nevertheless it relates to a specific *res*, and so long as it exists, practically deprives the trustee of the benefits of ownership. If this right of the *cestui que trust* could be annihilated, the trustee would be owner in substance as well as in name. This annihilation occurred in England, if the *cestui que trust* of land died intestate and without heirs, inasmuch as a trust of land did not escheat to the crown or other feudal lord.[1] The trust was said to sink for the benefit of the trustee, and for the obvious reason that no one could call him to account.

(4.) *By lapse of time.* Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of *bona fides*, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of *bona fides* apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition.[2] As a matter of legal reasoning this seems clear. For, as already pointed out, the only imperfection in the disseisor's title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from

[1] Burgess *v.* Wheate, 1 W. Bl. 123; Ames Cas. on Trusts, 501, 511, n. 1. By St. 47 and 48 Vict. c. 71, § 4, equitable interests do now escheat. It has been urged by Mr. F. W. Hardman, with great ability, that a trust in land ought to have been held to pass to the sovereign after the analogy of *bona vacantia*. 4 L. Q. Rev. 330–336. And this view has met with favor in this country. Johnston *v.* Spicer, 107 N. Y. 185; Ames, Cas. on Trusts, 511, n. 1.

[2] The writer regrets to find himself in disaccord upon this point with the opinion expressed incidentally by Professor Langdell, in his summary of Equity Pleading (2 ed.), § 122.

Bracton's time down: "*Longa enim possessio . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem . . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione per patientiam et negligentiam veri domini.*" [1]

Blackstone is even more explicit: "Such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title." [2] Lord Mansfield may also be cited: "Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession." [3]

Sir Thomas Plummer, M. R., has expressed himself to the same effect as to equitable interests: "If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title forever. The defendant keeps possession without the possibility of being ever disturbed by any one. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity." [4]

There are, to be sure, occasional *dicta* to the effect that the statute of James I. only barred the remedy without extinguishing the right, and that the right which would support a writ of right or other droitural action never died. An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand.[5] Fortunately these

[1] Bract. 52 a.

[2] 2 Bl. Com. 196; see also 3 Bl. Com. 196; 1 Hayes, Conveyancing (5 ed.), 270; Stokes *v.* Berry, 2 Salk. 421, per Lord Holt. Butler's note in Co. Lit. 239 a is as follows: "But if A. permits the possession to be withheld from him [by B.] beyond a certain period of time, without claiming it . . . B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right . . . so that if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete."

[3] Taylor *v.* Horde, 1 Burr. 60, 119.

[4] Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 156.

[5] The notion that a debt survives the extinction of all remedies for its enforcement is peculiar to English and American law, and even in those systems cannot fairly be deduced from the authorities commonly cited in its support. It is not because the debt continues, that a new promise to pay a debt barred by the statute is binding; but because the extinguishment of the creditor's right is not equivalent to performance by the debtor. The moral duty to pay for the *quid pro quo* remains, and is sufficient to support the new promise. It is because this moral duty remains that the debtor, though discharged from all actions, cannot, without payment, recover any security that the creditor may hold. Again, it has been urged that the statute affects the remedy, but not the right, because

dicta have had no other effect than to bring some unnecessary confusion of ideas into this subject. The logic of facts has proved irresistible in the decision of concrete cases. The courts have uniformly held that a title gained by lapse of time is not to be distinguished from a title acquired by grant. Thus, if the prescriptive owner desires to transfer his title, he must observe the usual formalities of a conveyance; he cannot revest the title in the disseisee by disclaiming the benefit of the statute.[1] His title is so perfect that a court of equity will compel its acceptance by a purchaser.[2] A repeal of the statute will not affect his title.[3] If dispossessed by the disseisee after the statute has run, he may enforce his right of entry or action against him as he might against any other intruder.[4] He may even maintain a bill in equity to remove the cloud upon his title, created by the documentary title of the original owner.[5] The English cases cited in support of these propositions, it may be urged, were decided under St. 3 and 4 Wm. IV. c. 27, the 34th

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the lapse of the statutory time in the jurisdiction of the debtor is no bar to an action in another jurisdiction. But this rule admits of another explanation. A debt being transitory, a creditor has an option, from the moment of its creation, to sue the debtor wherever he can find him. The expiration of the period of limitation in one jurisdiction, before he exercises his option, has no effect upon his right to sue elsewhere. But it extinguishes his right to sue in the jurisdiction where the statute has run, and a subsequent repeal of the statute will not revive it. Cooley, Const. Lim. 365. The case of Campbell *v.* Holt, 115 U. S. 620, *contra*, stands almost alone.

[1] Sanders *v.* Sanders, 19 Ch. Div. 373; Hobbs *v.* Wade, 36 Ch. D. 553; Jack *v.* Walsh, 4 Ir. L. R. 254; Doe *v.* Henderson, 3 Up. Can. Q. B. 486; McIntyre *v.* Canada Co., 18 Grant, Ch. 367; Bird *v.* Lisbros, 9 Cal. 1, 5 (*semble*); School District *v.* Benson, 31 Me. 381; Austin *v.* Bailey, 37 Vt. 219; Hodges *v.* Eddy, 41 Vt. 485.

[2] Scott *v.* Nixon, 3 Dr. & War. 388, 405; Sands *v.* Thompson, 22 Ch. D. 614; Games *v.* Bonnor, 54 L. J. Ch. 517.

[3] Campbell *v.* Holt, 115 U. S. 620, 622 (*semble*); Trim *v.* McPherson, 7 Cold. 15; Grigsby *v.* Peak, 57 Tex. 142; Sprecker *v.* Wakely, 11 Wis. 432; Hill *v.* Kricke, 11 Wis. 442; Knox *v.* Cleveland, 13 Wis. 245.

[4] Brassington *v.* Llewellyn, 27 L. J. Ex. 297; Bryan *v.* Cowdal, 21 W. R. 693; Rains *v.* Buxton, 14 Ch. D. 537; Groome *v.* Blake, 8 Ir. C. L. 428; Mulholland *v.* Conklin, 22 Up. Can. C. P. 372; Johnston *v.* Oliver, 3 Ont. R. 26; Holtzapple *v.* Phillibaum, 4 Wash. 356; Barclay *v.* Smith, 66 Ala. 230 (*semble*); Jacks *v.* Chaffin, 34 Ark. 534; Clarke *v.* Gilbert, 39 Conn. 94; Doe *v.* Lancaster, 5 Ga. 39; McDuffee *v.* Sinnott, 119 Ill. 449; Brown *v.* Anderson, 90 Ind. 93; Chiles *v.* Jones, 4 Dana, 479; Armstrong *v.* Risteau, 5 Md. 256; Littlefield *v.* Boston, 146 Mass. 268; Jones *v.* Brandon, 59 Miss. 585; Biddle *v.* Mellon, 13 Mo. 335; Jackson *v.* Oltz, 8 Wend. 440; Pace *v.* Staton, 4 Ired. 32; Pederick *v.* Searle, 5 S. & R. 236; Abel *v.* Hutto, 8 Rich. 42.

[5] Low *v.* Morrison, 14 Grant, Ch. 192; Pendleton *v.* Alexander, 8 Cranch, 462; Arrington *v.* Liscom, 34 Cal. 365; Tracy *v.* Newton, 57 Iowa, 210; Rayner *v.* Lee, 20 Mich. 384; Stettnische *v.* Lamb, 18 Neb. 619; Watson *v.* Jeffrey, 39 N. J. Eq. 62; Parker *v.* Metzger, 12 Oreg. 407.

section of which expressly extinguishes the title of the original owner at the end of the time limited. But inasmuch as the American cases cited were decided under statutes substantially like St. 21 James I. c. 16, which contains no allusion to any extinguishment of title, the 34th section referred to may fairly be regarded as pure surplusage.

The conclusions reached in regard to land apply with equal force to chattels. The vice in the converter's title is the dispossessed owner's right to recover the chattel by recaption or action. The bar of the statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right; and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process.[1] The vice being thus removed, the converter's title is unimpeachable; and it is as true of chattels as of land that a prescriptive title is as effective for all purposes as a title by grant. Accordingly, the adverse possessor cannot restore the title to the original owner by waiving the benefit of the statute.[2] His title is not affected by a repeal of the statute.[3] If dispossessed by the original owner, he may maintain Detinue or Replevin against the latter, as he might against any stranger.[4] A

[1] *Ex parte* Drake, 5 Ch. Div. 866, 868; Chapin *v.* Freeland, 142 Mass. 383; cases cited *infra*, n. 4.

According to Littleton, a right of entry or recaption is not extinguished by a release of all actions; and in Put *v.* Rawsterne, Skin. 48, 57, 2 Mod. 318, there is a *dictum* that the right of recaption is not lost, although all rights of action are merged in a judgment in trover. It may be that Littleton's interpretation would be followed to-day, although it certainly savors of scholasticism. But the *dictum* in Put *v.* Rawsterne, surely, cannot be law.

[2] Morris *v* Lyon, 84 Va 331.

[3] Campbell *v.* Holt, 115 U. S 623 (*semble*); Jones *v.* Jones, 18 Ala. 245, 253 (*semble*); Davis *v.* Minor, 2 Miss. 183, 189-90 (*semble*); Power *v.* Telford, 60 Miss. 195 (*semble*); Moore *v.* State, 43 N. J. 203, 206 (*semble*); Yancy *v.* Yancy, 5 Heisk. 353; Brown *v.* Parker, 28 Wis. 21, 28 (*semble*).

[4] Brent *v* Chapman, 5 Cranch, 358; Shelby *v.* Guy, 11 Wheat. 361 (*semble*); Howell *v.* Hair, 15 Ala. 194; Sadler *v.* Sadler, 16 Ark. 628; Wynn *v.* Lee, 5 Ga. 217 (*semble*); Robbins *v.* Sackett, 23 Kas. 301; Stanley *v.* Earl, 5 Litt. 281; Smart *v.* Baugh, 3 J. J. Marsh 363 (*semble*); Clark *v.* Slaughter, 34 Miss. 65; Chapin *v.* Freeland, 142 Mass. 383 (Field, J., diss.); Baker *v.* Chase, 55 N. H. 61, 63 (*semble*); Powell *v.* Powell, 1 Dev. & B. Eq. 379; Call *v.* Ellis, 10 Ired. 250, Cockfield *v.* Hudson, 1 Brev. 311; Gregg *v.* Bigham, 1 Hill (S. Ca.), 299; Simon *v.* Fox, 12 Rich. 392; McGowan *v.* Reid, 27 S. Ca. 262, 267 (*semble*); Kegler *v* Miles, Mart. & Y. 426; Partee *v.* Badget, 4 Yerg. 174; Wheaton *v.* Weld, 9 Humph. 773; Winburn *v.* Cochran, 9 Tex. 123; Connor *v.* Hawkins, 71 Tex. 582; Preston *v.* Briggs, 16 Vt. 124, 130; Newby *v* Blakey, 3 Hen. & M. 57.

title gained by lapse of time in one State is good everywhere.[1] If insolvent, he cannot surrender the chattel to the original owner.[2] If sued by the original owner, he may plead in denial of the plaintiff's title.[3]

In the cases thus far considered the land or chattel has been assumed to continue in the possession of the disseisor or converter until the bar of the statute was complete. But before that time the wrong-doer may have parted with the *res* by a sale or other transfer, or he may have been, in turn, deprived of it by a second wrong-doer.

If the thing has passed to the new possessor by a sale, the change of possession will produce, so far as the statute of limitations is concerned, only this difference: the title will vest at the end of the period of limitation in the new possessor, instead of the original disseisor or converter. Let us suppose, for example, that B. disseises A., occupies for ten years, and then conveys to C. If the statutory period be assumed to be twenty years, B.'s title at the time of the transfer is good against every one except A., but is limited by the latter's right to recover possession at any time during the ensuing ten years. B.'s title, thus qualified, passes to C. At the end of the second ten years the qualification vanishes, and C. is complete owner. This, it is believed, is the rationale of the oft-repeated rule that the times of successive adverse holders, standing in privity with each other, may be tacked together to

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[1] Shelby *v.* Guy, 11 Wheat. 361; Goodman *v.* Munks, 8 Port. 84, 94-5; Howell *v.* Hair, 15 Ala. 194 (*semble*); Newcombe *v.* Leavitt, 22 Ala. 631; Wynn *v.* Lee, 5 Ga. 217; Broh *v.* Jenkins, 9 Mart 526 (*semble*); Davis *v.* Minor, 2 Miss. 183 (*semble*); Fears *v.* Sykes, 35 Miss. 633; Moore *v.* State, 43 N. J. 203, 205, 208 (*semble*); Alexander *v.* Burnet, 5 Rich. 189 (*semble*); Sprecker *v.* Wakeley, 11, Wis. 432, 440 (*semble*).

[2] Gath *v.* Barksdale, 5 Munf. 101.

[3] Campbell *v.* Holt, 115 U. S. 623 (*semble*); Smart *v.* Baugh, 3 J. J. Marsh. 363; Smart *v.* Johnson, 3 J. J. Marsh. 373; Duckett *v.* Crider, 11 B. Mon. 188; Elam *v.* Bass, 4 Munf. 301.

The general rule is asserted also in Bryan *v.* Weems, 29 Ala. 423; Pryor *v.* Ryburn, 16 Ark. 671; Crabtree *v.* McDaniel, 17 Ark. 222; Machin *v.* Thompson, 17 Ark. 199; Blackburn *v.* Morton, 18 Ark. 384; Morine *v.* Wilson, 19 Ark. 520; Ewell *v.* Tidwell, 20 Ark. 136; Spencer *v.* McDonald, 22 Ark. 466; Curtis *v.* Daniel, 23 Ark. 362; Paschal *v.* Davis, 3 Ga. 256, 265; Wellborn *v.* Weaver, 17 Ga. 267; Thompson *v.* Caldwell, 3 Litt. 136; Orr *v.* Pickett, 3 J. J. Marsh. 269, 278; Martin *v.* Dunn, 30 Miss. 264, 268; Hardeson *v.* Hays, 4 Yerg. 507; Prince *v.* Broach, 5 Sneed, 318; Kirkman *v.* Philips, 7 Heisk. 222; Munson *v.* Hallowell, 26 Tex. 475; Merrill *v.* Bullard, 59 Vt., 389; Garland *v.* Enos, 4 Munf. 504.

Goodwin *v.* Morris, 9 Oreg. 322, is a solitary decision to the contrary.

make up the period of limitation. In regard to land, this rule of tacking is all but universal.[1]

The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land.[2] A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the dispossessed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted, if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself,—a conclusion as shocking in point of justice as it would be anomalous in law.

It remains to consider the operation of the statute when the disseisor or converter has been, in turn, dispossessed by a wrong-doer. A change of possession accomplished in this mode has no more effect upon the right of the original owner than a change of possession by means of a transfer. But the rights and relations of the two successive adverse possessors are fundamentally different in the two cases. Let us suppose, as before, that B disseises A., and occupies for ten years, and then, instead of selling to C., is disseised

[1] *Ancestor and heir.* Doe *v.* Lawley, 13 Q. B. 954; Clarke *v.* Clarke, Ir R. 2 C. L. 395; Currier *v.* Gale, 9 All. 522; Duren *v.* Kee, 26 S. Ca. 224.

Devisor and devisee. Newcomb *v.* Stebbins, 9 Met. 545; Shaw *v.* Nicholay, 30 Mo. 99; Caston *v.* Caston, 2 Rich. Eq. 1.

Vendor and vendee. Simmons *v.* Shipman, 15 Ont. R. 301; Christy *v.* Alford, 17 How. 601; Riggs *v.* Fuller, 54 Ala. 141; Smith *v.* Chapin, 31 Conn. 530; Webster *v.* Anderson, 73 Ill. 439; Durel *v.* Tennison, 31 La. An. 538; Chadbourne *v.* Swan, 40 Me. 260; Hanson *v.* Johnson, 62 Md. 25; Crispen *v.* Hannavan, 50 Mo. 536; McNeely *v.* Langan, 22 Oh. St. 32; Overfield *v.* Christie, 7 S. & R. 173; Clarke *v.* Chase, 5 Sneed, 636; Cook *v.* Dennis, 61 Tex. 246; Day *v.* Wilder, 47 Vt. 583. But see *contra*, King *v.* Smith, Rice, 10; Johnson *v.* Cobb, 29 S. Ca. 372.

Lessor and lessee. Melvin *v.* Proprietors, 5 Met. 15; Sherin *v.* Brackett, 36 Minn. 152.

Judgment debtor and execution purchaser. Searcy *v.* Reardon, 1 A. K. Marsh. 3; Chouquette *v.* Barada, 23 Mo. 331; Scheetz *v.* Fitzwater, 5 Barr, 126.

Wife and tenant by curtesy. Colgan *v.* Pellens, 48 N. J. 27, 49 N. J. 694.

See further, McEntie *v.* Brown, 28 Ind. 347; Haynes *v.* Boardman, 119 Mass. 414; St. Louis *v.* Gorman, 29 Mo. 593; Hickman *v.* Link, 97 Mo. 482.

[2] Bohannon *v.* Chapman, 17 Ala. 696; Newcombe *v.* Leavitt, 22 Ala. 631; Shute *v.* Wade, 5 Yerg. 1, 12 (*semble*); Norment *v.* Smith, 1 Humph. 46, 48 (*semble*); (but see Wells *v.* Ragland, 1 Swan, 501; Hobbs *v.* Ballard, 5 Sneed, 395), *accord.*

Tacking not being allowed in regard to land in South Carolina, is naturally not permitted there in the case of chattels Beadle *v.* Hunter, 3 Strob. 331; Alexander *v.* Burnet, 5 Rich. 189; Dillard *v.* Philson, 5 Strob. 213 (*semble*).

by C., who occupies for another ten years. At the moment of the second disseisin B's possession is qualified by A.'s right to recover the *res* at any time during the next ten years. After the disseisin C.'s possession would, of course, be subject to the same qualification. But B. had as against the rest of the world the two elements of perfect ownership,—possession and the unlimited right of possession. C. by disseising B. severs these two elements of B.'s title, good against every one but A., in the same way that B. by his tort had previously divided A.'s ownership, good against every one without exception. Just as by the original disseisin B. acquired the *res* subject to A.'s right of entry or action for twenty years, so by the second disseisin C. acquires the *res* subject to B.'s right of entry or action for an equal period. There would be, therefore, two defects in C.'s title; namely, A.'s right to recover the *res* for ten years, and B.'s right to recover it for twenty years from the time of the second disseisin. If A. fails to assert his claim during his ten years, his right is gone forever. One of the defects of C.'s title is blotted out. He becomes owner against every one but B. He may, accordingly, at any time thereafter defend successfully an action brought by A., or if forcibly dispossessed by A., he may recover the *res* from him by entry or action as he might against any other dispossessor, B. alone excepted. In other words, C., although a disseisor, and therefore not in privity with B., may tack the time of B.'s adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States.[1] There are, however, some decisions and a widespread opinion to the contrary in this country.[2] But

[1] Doe *v.* Carter, 9 Q. B. 863; Kipp *v.* Synod, 33 Up. Can. Q. B. 220; Fanning *v.* Willcox, 3 Day, 258; Smith *v.* Chapin, 31 Conn. 530 (*semble*); Shannon *v.* Kinny, 1 A. K. Marsh. 3; Hord *v.* Walton, 2 A. K. Marsh. 620; Fitzrandol h *v.* Norman, 2 Tayl. 131; Candler *v.* Lunsford, 4 Dev. & B. 407; Davis *v.* McArthur, 78 N. C. 357; Cowles *v.* Hall, 90 N. C. 330. See, also, 1 Dart, V. & P. (6 ed.) 464–6; Pollock and Wright, Possession 23.

[2] San Francisco *v.* Fulde, 37 Cal. 349; Doe *v.* Brown, 4 Ind. 143 (*semble*); Sawyer *v.* Kendall, 10 Cush. 241; Witt *v.* St. Paul Co., 38 Minn, 122 (*semble*); Locke *v.* Whitney, 63 N. H. 597 (*semble*); Jackson *v.* Leonard, 9 Cow. 653; Moore *v.* Collishaw, 10 Barr, 224; Sh.ack *v.* Zubler, 34 Pa. 38; Erck *v.* Church, 87 Tenn. 575; Graeven *v.* Dieves, 68 Wis. 317 (*semble*). See, also, Riopelle *v.* Hilman, 23 Mich. 33.

Doe *v.* Barnard, 13 Q. B. 945, lends no countenance to the cases just cited. In that case B. occupied without right for eighteen years, and died leaving a son; C. excluded the son and occupied for thirteen years, when he was ousted out by A., the original owner. C. brought ejectment against A., but failed; not, however, because of any right in A.; on the contrary, the latter, as plaintiff, in an ejectment against C., had been already defeated

this opinion, with all deference, must be deemed erroneous. The laches of the original owner, who remains continuously dispossessed throughout the statutory period, is the same, and should be attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors. If, indeed, the adverse possession is not continuous, if, for instance, B., after disseising A., abandons the land, leaving the possession vacant, and C. subsequently enters without right upon this vacant possession, he cannot, of course, tack his time to B.'s.[1] Upon B.'s abandonment of the land the disseisin comes to an end. In legal contemplation, A.'s possession revives.[2] Having the right to possess, and no one else having actual possession, he is in a position analogous to that of an heir, or conusee of a fine, before entry, and like them has a seisin in law. C.'s disseisin has, therefore, the same effect as if A. had never been disseised by B., and A.'s right of entry or action must continue until C. himself, or C. and his successors, have held adversely for twenty years. If the distinction here suggested between successive disseisins with continuous adverse possession, and successive disseisins without

because the statute had extinguished his title. Doe *v.* Carter, 9 Q. B. 863. The court decided against C. in Doe *v.* Barnard, on the ground that he, being a disseisor of A.'s heir, who had the superior right, could not maintain ejectment at all, even against a wrongful dispossessor. This view, although allowed in Nagle *v.* Shea, Ir. R. 8 C. L. 224, is, of course, untenable, being a departure from the law as settled by the practice of six centuries. For, from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrong-doer by entry, by assize, or by ejectment. Bract. f. 165 a; 1 Nich. Britt. 296; Bateman *v.* Allen, Cro. El. 437, 438; Jenk. Cent. 42; Allen *v.* Rivington, 2 Saund. 111; Smith *v.* Oxenden, 1 Ch. Ca. 25; Doe *v.* Dyball, M. & M. 346; Davison *v.* Gent, 1 H. & N. 744, per Bramwell, B. This time-honored rule is universally prevalent in this country. The doctrine of Doe *v.* Barnard is open to the further criticism that it is a distinct encouragement of private war as a substitute for legal proceedings. For C., the unsuccessful plaintiff, has only to eject A. by force in order to turn the tables upon him. Once in possession, he could defeat a new ejectment brought by A., in the same way that he himself had been rebuffed; that is, by setting up the superior right of B.'s heir. Fortunately Doe *v.* Barnard has been overruled, in effect, by Asher *v.* Whitlock, L. R. 1 Q. B. 1. The suggestion of Mellor, J., in the latter case, although adopted by Mr. Pollock (Poll. & Wr., Poss. 97, 99), that the former case may be supported on the ground that the superior right of B.'s heir was disclosed by the plaintiff's evidence, will hardly command approval. If an outstanding superior right of a third person is a relevant fact, it must be competent for the defendant to prove it; if it is irrelevant, its disclosure by the plaintiff's evidence must be harmless.

[1] Brandt *v.* Ogden, 1 Johns. 156; Malloy *v.* Bruden, 86 N. C. 251; Taylor *v.* Burnside, 1 Grat. 165. See, also, Brown *v.* Hanauer, 48 Ark. 277.

[2] Agency Co. *v.* Short, 13 App. Cas. 793.

continuous adverse possession, had been kept in mind, a different result, it is believed, would have been reached in the American cases.[1]

If the conclusions here advocated are true in regard to land, they would seem to be equally valid where there is a continuous adverse possession of chattels by successive holders, although there is no privity between them. But no decisions have been discovered upon this point.[2]

(5.) *By judgment.* One who has been wrongfully dispossessed of a chattel has the option of suing the wrong-doer in Replevin, Detinue, Trover, or Trespass. A judgment in Replevin enables him to keep the chattels already replevied and delivered to him by the sheriff, and a judgment in Detinue establishes his right to recover the chattel *in specie*,[3] or, that being impracticable, its value. A judgment in Trespass or Trover, on the other hand, is for the recovery of the value only, as damages. Inasmuch as a defendant ought not to be twice vexed for a single wrong, a judgment in any one of these forms of action is not only a merger of the right to resort to that one, but is also a bar against the others.[4] Accordingly, a judgment in Trespass or Trover against a sole wrong-doer who, at the time of judgment recovered, is still in possession of the chattel operates like the statute of limitations, and annihilates the dispossessed owner's right to recover the chattel. The converter's possession being thus set free from adverse claims, changes into ownership.[5]

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[1] It is a significant fact that in most of these cases Brandt *v.* Ogden, 1 Johns. 156, a case where the adverse possession was not continuous, was cited as a decision in point.

[2] In Norment *v.* Smith, 1 Humph. 46; Moffatt *v.* Buchanan, 11 Humph. 369; Wells *v.* Ragland, 1 Swan. 501; Hobbs *v.* Ballard, 5 Sneed, 395, there was in fact a privity; but the court thought otherwise, and accordingly disallowed tacking, as the same court denies the right to tack in the case of land if there is no privity.

[3] *Ex parte* Drake, 5 Ch. Div. 866; *Re* Scarth, 10 Ch. 234; Sharpe *v.* Gray, 5 B. Mon. 4; Norrill *v.* Corley, 2 Rich. Eq. 288, n. (*a*).

[4] Lacon *v.* Barnard, Cro. Car. 35; Put *v.* Rawsterne, T. Ray. 472, 2 Show. 211 (*semble*); Hitchin *v.* Campbell, 2 W. Bl. 827; Lovejoy *v.* Wallace, 3 Wall. 1, 16 (*semble*); Barb *v.* Fish, 8 Black, 481; Rembert *v.* Hally, 10 Humph. 513. Similarly, if the converted chattel has been sold, the owner, by recovering a judgment in *assumpsit*, extinguishes all his other remedies against the converter. Smith *v.* Baker, L. R. 8 C. P. 350 (*semble*); Bradley *v.* Brigham, 149 Mass. 141, 144–5; Boots *v.* Ferguson, 46 Hun, 129; Wright *v.* Ritterman, 4 Rob. 704.

[5] The chattel may therefore be taken on execution by a creditor of the converter. Rogers *v.* Moore, Rice, 60; Norrill *v.* Corley, 2 Rich. Eq. 288, n. (*a*); Foreman *v.* Neilson, 2 Rich. Eq. 287. See, also, Morris *v.* Beckley, 2 Mill, C. R. 227. A purchaser from a converter after judgment should take a perfect title. Goff *v.* Craven, 34 Hun, 150, *contra*, would seem to be a hasty decision.

If the change of possession is before judgment, there is a difference. Let us suppose, for instance, that B. converts the chattel of A., and, before judgment recovered against him in Trespass or Trover, sells it to C., or is in turn dispossessed by C. C., the new possessor, will hold the chattel, as B. held it, subject to A.'s right to recover it. The change of possession simply enlarges the scope of A.'s remedies; for his new rights against C. do not destroy his old right to sue B. in Trespass or Trover. Nor will an unsatisfied judgment against B. in either of these actions affect his right to recover the chattel from C.[1] It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B. is satisfied can C. use it as a bar to an action against himself. A different principle then comes into play, namely, that no one should receive double compensation for a single injury.[2]

Another case can be put where the dispossessed owner has concurrent rights against two or more persons. B. and C. may have jointly dispossessed A., instead of being successive holders of the converted chattel. Under these circumstances A. may proceed against B. and C. jointly or severally. If he obtain a joint judgment in Trespass or Trover, all his rights against both are merged therein, and his title to the chattel is extinguished. But if he obtain a separate judgment against one, he may still bring Replevin or Detinue against the other to recover the chattel, or Trespass or Trover for its value; for the latter cannot invoke the maxim, *nemo bis vexari debet pro eadem causa*.[3] Not until the judgment

[1] Matthews *v.* Menedger, 2 McL. 145; Spivey *v.* Morris, 18 Ala. 254; Dow *v.* King (Ark.) 12 S. W. Rep. 577; Atwater *v.* Tupper, 45 Conn. 144; Sharp *v.* Gray, 5 B. Mon. 4; Osterhout *v.* Roberts, 8 Cow. 43. But see *contra*, March *v.* Pier, 4 Rawle, 273, 286 (*semble*); Fox *v.* Northern Liberties, 3 W. & S. 103, 106 (*semble*); Wilburn *v.* Bogan, 1 Speer, 179.

Similarly, an unsatisfied judgment against C. is no bar to a subsequent action against B. McGee *v.* Overby, 12 Ark. 164; Hopkins *v.* Hersey, 20 Me. 449; Bradley *v.* Brigham, 149 Mass. 141, 144-5. But see *contra*, Murrell *v.* Johnson, 1 Hen. & M. 449.

[2] Cooper *v.* Shepherd, 3 C. B. 266.

[3] Lovejoy *v.* Murray, 3 Wall. 1; Elliot *v.* Porter, 5 Dana, 299; Elliott *v.* Hayden, 104 Mass. 180; Floyd *v.* Brown, 1 Rawle, 121 (*semble*); Fox *v.* Northern Liberties, 3 W. & S. 103 (*semble*); Sanderson *v.* Caldwell, 2 Ark. 195.

But see *contra*, Brown *v.* Wootton, Yelv. 67, Cro. Jac. 73; Adams *v.* Broughton, Andr. 18; Buckland *v.* Johnson, 15 C. B. 145; Hunt *v.* Bates, 7 R. I. 217. In Brinsmead *v.* Harrison, L. R. 6 C. P. 584, L. R. 7 C. P. 547, one of the joint converters pleaded, to a court in Detinue, a prior judgment against his companion. The plaintiff now assigned a detention subsequent to the joint taking. The court, with some reluctance, held the

against the one is satisfied can it be used as a bar in an action against the other. The controversy whether the title to a converted chattel vests in a defendant by a simple judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result.

J. B. Ames.

CAMBRIDGE, 1890.

[*To be concluded in March.*]

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plea good, but also supported the replication, thus neutralizing one error by the commission of another, and so bringing about the same result as the American cases. The fallacy of the notion that the detention of a chattel by the wrongful taker is a fresh tort, was exposed, curiously enough, by the same court in an earlier case in the same volume; Wilkinson *v.* Verity, L. R. 6 C. P. 206. Such a notion, as there pointed out, would virtually repeal the statute of limitations. See Philpott *v.* Kelley, 3 A. & E. 106.

Addendum I

COMMENTARIES

ON THE LAW OF

STATUTORY CRIMES.

EMBRACING

THE GENERAL PRINCIPLES OF INTERPRETATION OF STATUTES;
PARTICULAR PRINCIPLES APPLICABLE IN CRIMINAL CASES;
LEADING DOCTRINES OF THE COMMON LAW OF CRIMES,

AND DISCUSSIONS OF

THE SPECIFIC STATUTORY OFFENCES,

AS TO BOTH LAW AND PROCEDURE.

BY

JOEL PRENTISS BISHOP.

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CHAPTER X.

STATUTES OF LIMITATIONS OF CRIMINAL PROSECUTIONS.

§ 257. **In England.** — The limitation of the time within which actions and prosecutions are to be brought is a creation of statute, and does not exist at the common law. In England, there have never been any general statutes of limitations of criminal prosecutions.[1] "So that," says Chitty,[2] "instances have frequently occurred in which parties have been convicted and punished many years after the crime had been forgotten.[3] And it has been repeatedly held that no length of time can legalize a public nuisance, although it may afford an answer to an action of a private individual."[4] Some of the English statutes creating crimes — as, for example, those against poaching — contain a limitation clause;[5] and there are special statutory limitations of some of the common-law offences.[6]

§ 258. **In United States.** — In most of our own States there are general statutes of limitations as respects crimes. There may be a State or two in which there are none. These statutes are expressed in different words, and the interpretations of them are not well defined. Such few principles as can be collected from the English and American decisions are the following.

§ 259. **Liberal, in Favor of Defendants — Time.** — We have already seen,[7] that criminal statutes are to be construed strictly as against defendants, and liberally in their favor. Statutes of limitations, the reader perceives, are for the ease of accused persons, as freeing them from prosecutions; therefore, within the rule just stated, they should be construed liberally. Thus, we have seen[8] that there are different methods of computing

[1] Reg. *v.* Hull, 2 Fost. & F. 16.

[2] 1 Chit. Crim. Law, 160.

[3] 2 Hale P. C. 158; Burn Just. Indictment, III. Lieut.-Col. Wall was tried, convicted, and executed for a murder committed twenty years before. 4 Bl. Com. 15th ed. 305, note 2.

[4] 7 East, 199; 3 Camp. 227; 4 Esp. 109; Peake C. N. P. 91.

[5] Reg. *v.* Hull, supra.

[6] Archb. Crim. Pl. & Ev. 13th Lond. ed. 63, 64.

[7] Ante, § 196.

[8] Ante, § 105–111.

time; and, applying the rule of a liberal construction in favor of defendants, the Texas court held, that, where the statutory period was two years, and an offence was committed on the first day of January, 1855, an indictment on the first day of January, 1857, was too late.[1]

§ 260. **How Liberal, continued — The Particular Offence — Conspiracy — Penalty — Imprisonment.** — Yet, in spite of the principle just stated, a statute is not held to bar an offence not denoted by its words. Thus, if the limitation applies in terms to the substantive offence, it will not be extended by construction to embrace conspiracies to commit the offence.[2] And in this particular it is the same with an exception found in the statute of limitations as with the body of the act itself. Thus it was provided in North Carolina, that, "in all trespasses and other misdemeanors, except the offences of perjury, forgery, malicious mischief, and *deceit*, the prosecution shall commence within two years after the commission." And it was held, that a conspiracy to cheat and defraud does not fall within the exception. "This is a distinct offence from that of cheating or deceiving."[3] So a statute of South Carolina provided, that, in "every case where any penalty, fine, or forfeiture whatever" has been incurred, "no information, action, or prosecution shall be commenced or carried on against the offender, for and in respect to such fine, penalty, or forfeiture, unless within six months"; and it was held, that even the word "penalty," in this provision, refers only to a fine or forfeiture of money, and that this statute does not bar the prosecution for an offence the punishment for which is corporeal, — as, for instance, imprisonment or death, — or, as to the imprisonment, where the punishment is fine and imprisonment.[4]

§ 261. **Commencement of the Prosecution.** — Some of the statutes require that the indictment shall be found, and others

[1] The State *v.* Asbury, 26 Texas, 82. See People *v.* New York Central Railroad, 28 Barb. 284.

[2] Reg. *v.* Thompson, 16 Q. B. 832, 4 Eng. L. & Eq. 287. This case is not very strong to the proposition in the text, but it seems sufficiently to sustain it.

[3] The State *v.* Christianbury, Busbee, 46, 47.

[4] The State *v.* Taylor, 2 McCord, 483; The State *v.* Thomas, 8 Rich. 295; The State *v.* Free, 2 Hill, S. C. 628; The State *v.* Fields, 2 Bailey, 554.

that the prosecution shall be commenced, within the statutory period. Thus, in England, prosecutions for the offence of night poaching were limited by Stat. 9 Geo. 4, c. 69, § 4, as follows: "The prosecution for every offence punishable upon indictment by virtue of this act shall be commenced within twelve calendar months after the commission of such offence." And it was held by Pollock, C. B. in a *nisi prius* case, that the issuing of a warrant for the apprehension of the offender is not a commencement of prosecution within this statute.[1] This is a negative ruling; and in the same negative way it is held, that the finding of an indictment is not essential to the commencement of prosecution, but it may be deemed to have been commenced before.[2] In a case at the assizes, Pollock, C. B. said: "I think the warrant of commitment must be taken in this case to show the commencement of the prosecution. The first proceeding was to take the party before the magistrate, and he grants his warrant of commitment."[3] And there is a later case before all the judges from which it may perhaps be inferred, that, if there is a regular information or complaint in writing before a magistrate, and thereupon he issues his warrant, and the proceedings go on in the usual way, the prosecution is commenced by the complaint and warrant; but this was not said, and the point decided was, that, where evidence of the warrant only was produced, not enough was shown to take away the statutory bar.[4] In principle, this would seem to be the true view.

[1] Reg. *v.* Hull, 2 Fost. & F. 16.

[2] Reg. *v.* Brooks, 1 Den. C. C. 217, 2 Car. & K. 402, 2 Cox C. C. 436.

[3] Reg. *v.* Austin, 1 Car. & K. 621.

[4] Reg. *v.* Parker, Leigh & C. 459, 9 Cox C. C. 475. And see Reg. *v.* Casbolt, 21 Law Times, N. S. 263; Rex *v.* Phillips, Russ. & Ry. 369. The case of Rex *v.* Willace, 1 East P. C. 186, is as follows: "Stat. 8 & 9 Will. 3, c. 26, § 9, provides, that no prosecution shall be made for any offence against that act, unless such *prosecution be commenced* within three months next after such offence committed. In Willace's Case, who was indicted for high treason in coloring a piece of base coin resembling a shilling with materials producing the color of silver, the evidence was, that on the 5th May, 1797, search was made in the prisoner's lodgings in consequence of information; and upon the party's entering the room the prisoner immediately ran away. There was found in his room a quantity of base money such as described in the indictment, some in earlier, some in more advanced stages of the process. The prisoner was apprehended the same evening and lodged in Durham jail. He was afterwards carried before a magistrate, and by warrant dated 8th May was committed to jail, charged on oath 'with suspicion of high treason

§ 262. **Proceedings erroneous, &c.** — Some of the statutes provide for cases in which the indictment is adjudged defective, or some other error makes a proceeding of no avail. In the absence of such a provision, suppose the issuing of the warrant, or the order of commitment to be the commencement of the proceeding against a defendant, then suppose an erroneous indictment to be found and quashed either on motion or on a plea in abatement, and another indictment to be thereupon found without an actual discharge of the defendant from custody, there is no difficulty in holding that the second indictment, the same as the first, is unobjectionable, even though the statutory period should have elapsed. So it has been held, in Alabama, where the statute expressly declares that "a prosecution may be commenced, within the meaning of this chapter, by the issue of a warrant, or by binding over the offender." [1] In North Carolina the court carried the doctrine to a point not so clear in legal principle, according to views of practice generally prevailing in the other States. There, by statute, "in all trespasses and other misdemeanors, except the offences of perjury, forgery, malicious mischief, and deceit, the prosecution shall commence within two years after the commission of the said trespasses and misdemeanors, and not after," &c.[2] And, without reference to the original complaint and warrant, or order of commitment, if such there were, the court held, that, where there is an indictment within the statutory period, then this indictment is abated on a plea of misnomer, then another indictment is found against the defendant by his right name after the statutory period has elapsed, this is sufficient. Said the learned Chief Justice: "The first bill was found within two years after the commission of the offence;

in *counterfeiting* the current money of this kingdom, viz. shillings,' &c. The assizes at Durham were holden on the 8th of August; so that more than three months had elapsed between the commission of the offence and the preferring of the indictment. But the judges, at a conference, unanimously held that the information and proceeding before the magistrate was the commencement of the prosecution within the meaning of the act; and that the variance between the manner of laying the offence in the indictment and charging it in the commitment made no difference." The Alabama statute provides, that, within the meaning of the act, a prosecution may be commenced "by the issue of a warrant, or by binding over the offender." Foster *v.* The State, 38 Ala. 425.

[1] Foster *v.* The State, 38 Ala. 425.

[2] R. S. c. 35, § 8. The statute is not given in the report.

the second bill was a continuation and a part of the same proceeding, according to a well-settled principle." [1]

§ 263. **Past and Future Offences.** — The majority of the Texas court held, that statutes limiting criminal prosecutions do not apply to past offences, unless they are in terms clearly retrospective.[2] But, in the language of a learned Vermont judge, speaking of the limitations of civil actions, "when a statute of limitations is passed, it operates upon an antecedent as well as subsequent cause of action, unless by its terms it is restrained to the letter." [3] Now, from principles already developed,[4] it follows that the construction must be, at least, as favorable to the defendant in a criminal as in a civil cause; and the better doctrine is, that, in the absence of express words, a statute limiting the time for prosecuting crimes must be applied alike to past and to future ones.[5]

§ 264. **How take Advantage of Statute.** — It is not necessary for a defendant, relying on the statute of limitations, to plead it in bar. It devolves on the prosecuting power to show an offence within the statutory period.[6]

§ 265. **Reviving Prosecutions against which the Statute has run.** — According to a Texas case, decided in 1860, a statute will not be construed, where its words are not express, as

[1] The State *v.* Hailey, 6 Jones, N. C. 42, 43, referring to The State *v.* Johnston, 5 Jones, N. C. 221; The State *v.* Haney, 2 Dev. & Bat. 390; The State *v.* Tisdale, 2 Dev. & Bat. 159; The State *v.* Harshaw, 2 Car. Law Repos. 251. The principle mentioned is more fully stated in The State *v.* Johnston, supra, where it is held, that, if an indictment is found, and afterward another indictment against the same defendant for the same cause, the legal effect is simply to add a new count to the first indictment, and the two constitute one case. Whether this is so in other States we need not inquire; since, if it is so, it does not follow that the new indictment is a part of a proceeding already quashed. If it is, it is quashed also. It may be further observed of this case of The State *v.* Hailey, that the point stated in the text was not necessary to the decision, since the statute contained a saving within which the case clearly fell. Still in an English case at the assizes, the learned judge had so much doubt on the point as to reserve it, though it came to nothing, for the prisoner was acquitted on the merits. Rex *v.* Killminster, 7 Car. & P. 228. And it may be that some other judges will take the same view as did those of the North Carolina Court. See also The State *v.* Duclos, 35 Misso. 237.

[2] Martin *v.* The State, 24 Texas, 61.

[3] Cardell *v.* Carpenter, 42 Vt. 234, 236, Wilson, J.

[4] Ante, § 196, 259.

[5] United States *v.* Ballard, 3 McLean, 469. And see ante, § 84, 85.

[6] United States *v.* Smith, 4 Day, 121; Rex *v.* Phillips, Russ. & Ry. 369. See Commonwealth *v.* Ruffner, 4 Casey, Pa. 259.

intended to revive criminal prosecutions already barred by a statute of limitations. There can be no doubt of the soundness of this doctrine, at least in a sort of general way; but the words of the learned judge, who pronounced the opinion of the court, went further. He said: "The State, having neglected to prosecute within the time prescribed for its own action, lost the right to prosecute the suit. To give the act of the legislature, passed after such loss, the effect of reviving the right of action in the State, would give it an operation *ex post facto*, which we cannot suppose the legislature intended."[1] Plainly, therefore, if, in a case in which the words of the legislature are express, the operation of a statute reviving lapsed rights of prosecution, is *ex post facto*, the statute is void as violating a constitutional provision.[2] In civil cases it has been held, and, it is believed, correctly, that, when the period of limitations has expired, the rights of the parties have become vested, and the legislature cannot then take away the vested right by removing the statutory bar.[3] But the question as respects the criminal prosecution is of a different sort, it has nothing to do with vested rights, but it concerns simply the provision forbidding *ex post facto* laws.

§ 266. **Continued.** — Now, an *ex post facto* law is one which makes punishable what was innocent when committed, or subjects a person who has committed a crime to a heavier penalty than was provided at the time of its commission.[4] A statute of limitations compels the State to prosecute the crime within a specified period, if at all, by withholding from the courts jurisdiction over the offence afterward. And it has already been decided, in cases of another class, that, if the legislature takes away the jurisdiction so that no prosecution can be had, it may revive the old or create a new jurisdiction, and then, though the right to prosecute had once lapsed, the prosecution may be carried on under the new law. This is something pertaining, not to the right, but to the remedy.[5] And a statute authorizing a prosecution after the period of limitation had

[1] The State *v.* Sneed, 25 Texas, Sup. 66.

[2] Ante, § 85, 185.

[3] Pleasants *v.* Rohrer, 17 Wis. 577, 579; Sprecker *v.* Wakeley, 11 Wis. 432. And see Cassity *v.* Storms, 1 Bush, 452; ante, § 178.

[4] Ante, § 185; Calder *v.* Bull, 3 Dall. 386, 390.

[5] Ante, § 176, 177, 180, 182.

lapsed, would seem to come within this principle. It pertains to the remedy. It does not punish an act innocent when committed, or add to the punishment which the law then prescribed. In some exceptional circumstances, such a statute would be eminently just, while in others it would be unjust; in none, it is believed, would it violate any provision of the Constitution of the United States, or of our States generally.

§ 267. **Continued — United States Statute — Suspension of Statute by the Rebellion.** — This question has been somewhat discussed in Congress;[1] and, in 1869, the following statute was passed: "That the time for finding indictments in the courts of the United States in the late rebel States for offences cognizable by said courts, and which may have been committed since said States went into rebellion, be, and hereby is, extended for the period of two years, from and after [the time when] said States are or may be restored to representation in Congress: Provided, however, That the provisions hereof shall not apply to treason or other political offences."[2] It seems to the writer, that, while this act plainly "extends" the period of limitations where such period had not fully elapsed, and while Congress had the power to go further, grave doubts may be entertained whether by the true construction it applies to cases in which the period had elapsed — where the term had actually broken and ended — at the time of its enactment; though it is known to have been passed with special reference to a case of the latter sort, and was supposed to cover both classes of cases. This statute, it should be borne in mind, is not one of those statutes of limitations which are to be liberally construed for the ease of defendants;[3] but, being against liberty, its construction is to be strict.[4] The query is merely suggested; but, upon this branch of the question, the writer expresses no opinion. Then, suppose the view thus intimated should be maintained, the question would occur whether, at the date of this enactment, a particular case was barred. For

[1] For a very able statement of the question on the side which favors the legislative right, with many citations of authorities, see in the "Globe," the speech of Hon. William Lawrence, of Ohio, delivered January 4, 1867.

[2] Act of March 3, 1869, 15 Stat. at Large, 340, c. 148. And see act of June 11, 1864, 13 Stat. at Large, 123, c. 118.

[3] Ante, § 259.

[4] Ante, § 191–193, 196.

it has been decided that the effect of the late rebellion was to suspend the statute of limitations in circumstances in which judicial proceedings could not be carried on, — an illustration of the doctrine that all things bend to necessity.[1]

CHAPTER XI.

MEANING OF PARTICULAR WORDS AND PHRASES.

§ 268. **Varieties of Things — Thoughts — Words.** — The immense variety of human things appears in nothing more conspicuous than in the variety of human thoughts. The inhabitants of our earth, a multitude whose numbers are beyond adequate comprehension, are continually shifting; yet, in all the unfathomed ocean of mind, no two individual minds are exactly alike, — no two thoughts, even of the same person, are identical in all their forms and proportions, but each thought differs from every other, — and all are moving as rapidly, the one of this instant succeeded by the one of the next, as the electric fluid leaps from the clouds. To convey these thoughts, as nearly infinite in number as finite things can be, each several mind has to use human language, while the words in each language are comparatively few. The consequence is, that each word has necessarily a great variety of meanings and shades of meaning, varying with the subjects to which it is applied, with the relations it sustains to other words in the same sentence or paragraph, with the particular development of the language at the time when it is used, with the mental

[1] United States *v.* Wiley, 11 Wal. 508. As to the doctrine of necessity, see Crim. Law, 4th ed. I. § 441–449; Crim. Proced. 2d ed. I. § 493 et seq.; ante, § 132.

Addendum J

Second Edition.

A TREATISE

ON

THE LIMITATION OF ACTIONS

AT LAW AND IN EQUITY

With an Appendix,

CONTAINING THE

AMERICAN AND ENGLISH STATUTES OF LIMITATIONS.

By H. G. WOOD,

AUTHOR OF "THE LAW OF NUISANCES," "MASTER AND SERVANT," "FIRE INSURANCE," "LANDLORD AND TENANT," "LAW OF RAILROADS," ETC.

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STATUTES

OF

THE LIMITATION OF ACTIONS.

CHAPTER I.

What are — History of — General Rules.

Sec. 1. **What are.** — Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced; and those statutes which merely restrict a statutory or other right do not come under this head, but rather are in the nature of conditions put by the law upon the right given. Thus, a statute that prescribes the term of court at which an indorsee of a note is required to sue the maker in order to hold the indorser liable,[1] or the time within which

[1] McDaniel *v.* Dougherty, 42 Ala. 506; Davidson *v.* Petticolas, 34 Tex. 27. "Statutes of limitations," says the court in Elder *v.* Bradley, 2 Sneed (Tenn.), 247, "are rigorous rules the enactment of which public policy demanded." They differ essentially from the civil-law doctrine of prescription, as they act simply upon and defeat the remedy; while the latter defeat the right itself. Billings *v.* Hall, 7 Cal. 1. But instances often arise where these statutes not only defeat the remedy for the recovery of personal property, but also act upon the title, and defeat the rights of the party against whom it has run, so as to divest him of the title thereto in any jurisdiction. Sims *v.* Canfield, 2 Ala. 555; Fears *v.* Sykes, 35 Miss. 633; Newcombe *v.* Leavitt, 22 Ala. 631; Winburn *v.* Cochran, 9 Tex. 123.

writs of error shall be brought,[1] or a statute which fixes the time within which lands sold on execution may be redeemed,[2] or within which a judgment or other lien shall be enforced,[3] or which merely postpones a claim unless enforced within a certain time,[4] or which provides that a certain class of evidence shall be admissible if action is brought within a certain time,[5] — are not statutes of limitation within the legal sense of the term, and consequently are not affected by any act suspending, extending, or repealing such statutes. But statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are statutes of limitations, although they merely act upon the remedy, and do not extinguish the claim.[6] In other words,

[1] Pace *v.* Hollaran, 31 Tex. 358; Trim *v.* McPherson, 7 Coldw. (Tenn.) 15. In Georgia, it is provided by § 3525 of the Revised Code that, when any person has *bona fide* and for a valuable consideration purchased real or personal property, and has been in possession of such real property for four years and of such personal property for two years, the same shall be discharged from the lien of any judgment against the person from whom he purchased; and this is held not a statute of limitations, but rather a coudition put by law upon the lien of the judgment, like the duty of recording a mortgage, and consequently that it does not come within the purview of a statute suspending temporarily all statutes of limitation. And in Tennessee a similar doctrine was held in reference to a statute which allows a party to whom land has been sold on execution to redeem the same within two years. Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221. So, also, in Texas, a statute providing that a creditor of a deceased person must present his claim against the estate within twelve months, or it will be postponed until all the claims which were presented within that time have been fully paid, was held not a statute of limitations, but rather a condition imposed upon the creditor. Chandler *v.* Westfall, 30 Tex. 475; Ryan *v.* Flint, id. 382.

[2] Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221.

[3] Battle *v.* Shivers, 39 Ga. 405; Chapman *v.* Aken, id. 347; Darly *v.* Isbell id. 342.

[4] Chandler *v.* Westfall, 30 Tex. 475; Ryan *v.* Flint, id. 382.

[5] Neville *v.* Northcutt, 7 Coldw. (Tenn.) 294.

[6] Horton *v.* Clark, 40 Ga. 412; McMillar *v.* Werner, 35 Tex. 419.

In Stillwell *v.* Coons, 122 N. Y. 242, the plaintiff, as superintendent of the poor of the county of S., after receiving notice from the overseer of the poor of the town of T., that he had given temporary relief to one H. a pauper, who had formerly resided in the town of B. in another county, with a statement of the circumstances of the case, believing that the removal of H., to the town of T., was prohibited by the Revised Statutes mailed to the defendant, the oversecr of the poor of the town of B., a notice of the removal, with a request that he provide for the relief and support of H., within the thirty days prescribed by the statute. After service of notice the plaintiff received an answer from C. denying unequivocally, but not in the words of the statute, that H. was a pauper while he lived in his county, and denying any liability for his support. These transactions were prior to the amendment to the provisions of the Revised Statutes in reference to the removal of paupers from one town to another. More than six months after receipt of an answer, this action to recover for such support was commenced. It was held that as the action was not commenced within three months after receiving the defendant's denial of liability, it was barred by the statute. Also, that the denial of liability was sufficient; that it was not necessary it should follow the language of the statute.

In re Will of Gouraud, 95 N. Y. 256, it was held that in proceedings taken under the statute for the revocation of the probate of a will of personal property, the contestant is not confined to matters which

statutes which destroy a remedy or a right unless enforced within a certain specified period are statutes of limitation, and those which merely suspend a remedy or right unless enforced within a certain time are not statutes of limitation in any sense.

At the common law there was no limitation as to the time within which an action might be brought. But courts of equity, recognizing the injustice of enforcing stale demands, adopted a rule that in all cases the payment of a bond or other specialty would be presumed after the period of twenty years, and courts of law adopted the same rule.[1]

This presumption of payment existed independently of any statute, and differs in many respects in its effect from the statutory limitation. In a Pennsylvania case,[2] MR. JUSTICE CLARK says: "This presumption is an established rule of the law derived by analogy from the English statute of limitations. It originated in equity and was afterwards engrafted into the common law, and has since been steadily maintained. It is not, like the statute of limitations, a bar to the action on the original contract, therefore a new promise is not necessary to sustain the suit. Any competent evidence which tends to show that the debt is unpaid is admissible for that purpose. The evidence made consists of the defendant's admissions made to the creditor himself, or to his agent, or even to a stranger, but an admission will not be as readily implied from language casually addressed to a stranger, as when addressed to the creditor in reply to a demand for the debt. It is of no consequence that the admission of non-payment is accompanied by the refusal to pay. The action is not founded upon a new promise, but upon the original indebtedness. The question as against the presumption, is whether or not the debt is in fact unpaid."

This presumption of payment may be overcome by evidence which would be wholly insufficient as against the general statute of limitations,[3] as if non-payment is established by an admission of the indebtedness, although such admission is accompanied by refusal to pay and denial of liability to pay, yet the presumption is defeated.[4]

were not investigated and tried when the will was admitted to probate, but the whole case is left open, and he has the right to have the questions then litigated and determined tried, the same as if no adjudication had been had thereon.

To bring the case within the one year's limit fixed by said statute it was not essential to have a citation issued within the year; it was sufficient if the requisite allegations were filed with the surrogate within that time. The rule is the same under the code except that a petition in the form prescribed is required to be filed within the year, instead of allegations.

[1] Bean *v.* Tonnele, 94 N. Y. 381.

[2] Gregory *v.* Com., 121 Penn. 611.

[3] Walker *v.* Robinson, 136 Mass. 280.

[4] Bentley's Appeal, 99 Penn. St. 500; and see Shubrick *v.* Adams, 20 S. C. 49, where it is held that in order to overcome this presumption the evidence must be of a character sufficient to overcome the statutory bar.

In a Pennsylvania case,[1] MR. JUSTICE STRONG, after commenting on the essential difference between this presumption and the statutory bar, says: "The latter [the statute] is removed by nothing less than a new promise to pay or an acknowledgment consistent with such a promise. The presumption is rebutted, or to speak more accurately, does not arise where there is affirmative proof beyond that furnished by the specialty itself that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor."

SEC. 2. **History and Origin of.** The law relating to the limitation of actions, so far as questions of title or contract are concerned, is merely the creation of statute. At the common law there was no limit to the time within which an action might be brought, except in the single instance of a fine, with proclamations.[2] But in the case of torts the maxim, "actio personalis moritur cum persona," applied, and therefore were only limited by the duration of the life of either party. The want

[1] Read *v.* Read, 46 Penn. St. 239.

[2] In the instance of a fine with proclamations, the time within which a stranger might make a claim was limited to a year and a day thereafter, and by Stat. 32 Hen. VIII. c. 2, this was enlarged to five years. Co. Litt. 26 *a*. As to the statement that this was the only limitation at common law, see Blanshard, 4. The statement of BRACTON to the contrary, "omnes actiones in mundo infra certa tempora habent limitationem," Lib. 2, fol. 52, is extremely doubtful. As one author expresses it, "as doubtful as the Latinity." Banning on Limitations, 1. LORD COKE says that the limitation of actions was by force of various statutes. Co. Litt. 115; 2 Int. 95; 4 Coke, 10; 5 Bacon's Abr. 461; Spelm's Glossary, 32. And such seems to be the generally accepted idea both of text-writers, Banning on Limitations, 1–8, and the courts, Wall *v.* Robson, 2 N. & McCord (S. C.), 499; People *v.* Gilbert, 18 Johns. (N. Y.) 227; Wilcox *v.* Finch, 20 id. 475. The lapse of time, as twenty years, without the institution of legal proceedings for the recovery of a debt, was held to afford a strong *prima facie* presumption of payment, or that the cause of action had been satisfied. Bracton, lib. 2, fol. 282, says: "Omnis querela et actio injuriarum limitata est infra certa tempora." And also see 2 Inst. 95. As, however, no precise time was fixed at the common law when a claim should be regarded as absolutely extinguished, it was found necessary for the protection of trade and commerce, as well as of the rights of parties generally, to fix such period by statute. These statutes affect only the remedy. They go "ad litis ordinationem," and not "ad litis decisionem," in a just judicial sense. Their object is to fix a certain period within which action may be brought, whether by citizens or foreigners, and thus enable debtors to enjoy a repose from stale demands. They are now generally regarded with favor, and as being in the interest of justice, and for the prevention of fraud, by compelling parties to bring their actions before the proofs for or against their claims are lost. Story on Conflict of Laws, sec. 576.

United States *v.* Thompson, 98 U. S. 486; Bean *v.* Tonnele, 94 N. Y. 381; Black *v.* Platt, &c. Coal Co., 85 Ala. 504; Harrison *v.* Heflin, 54 Ala. 552; Gregory *v.* Com., 121 Penn. St. 611; Runner's Appeal, 121 id. 649; Breneman's Appeal, 121 id. 641; Porter *v.* Nelson, 121 id. 628; Lash *v.* VonNida, 109 id. 207; Hays' Appeal, 113 id. 380; *In re* Neilley, 95 N. Y. 382; Wells *v.* Washington, 6 Munf. (Va.) 532; Kriss *v.* Kriss, 28 W. Va. 388; Tucker *v.* Baker, 94 N. C. 162; Buie *v.* Buie, 2 Ired. (N. C.) 87; Walker *v.* Robinson, 136 Mass. 280; Van Rensselaer *v.* Livingston, 12 Wend. (N. Y.) 490.

of a limitation was supplied, in a measure, by a doubtful doctrine of presumption,[1] and also by the trial by wager of law, which is believed

[1] At the common law a presumption was raised from the non-payment of a debt for twenty years, that it had been paid, throwing the burden of establishing non-payment upon the party seeking to enforce it; and this presumption still exists, notwithstanding the statutes of limitations. Carr *v.* Dings, 54 Mo. 95. LORD ELLENBOROUGH, in Williams *v.* Jones, 13 East, 449. The right of action descended to the plaintiff's representative, against the representative of the defendant, for an unlimited time. Banning on Limitations, 10. But in actions for torts, the rule *actio personalis moritur cum persona* prevailed; and on the death of either party, not only an action, but all right of action, died with the person; and such is now the rule, except in so far as the right is saved by statute. To remedy this evil (for it really was so), the statute of 21 James I. c. 16, was passed, limiting the time within which actions arising out of contracts, and a certain class of torts, should be brought. The third section of this act is as follows: "All actions of *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, or imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say), the said actions upon the case (other than for slander), and the said actions for trespass, debt, detinue, and replevin for goods or cattle and the said action of trespass, *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suits and not after; and the said actions of trespass, assault, battery or wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions and not after; and the said actions upon the case for words, within one year next after the end of this present session of Parliament, or within two years next after the words spoken and not after." Secs. 4 and 7 of the act are as follows: "4. And nevertheless, be it enacted, That if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after. 7. Provided nevertheless, and be it further enacted, That if any person or persons that is, or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words be, or shall be, at the time of any such cause of action, given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions so as they take the same within such times as are before limited after their coming to, or being of full age, discovert, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done." It will be observed that there is no direct mention in this act of the action of assumpsit, which is the most important of all the

to have operated as a check on stale demands.[1] When the abuses from stale demands became so great as to be unendurable, the legislature did not at first fix any certain and progressive period within which actions should be commenced, but from time to time chose for that purpose certain notable times; and in this way, by virtue of various statutes, the beginning of the reign of King Henry the First, the return of King John from Ireland, the journey of Henry the Third into Normandy, and the coronation of King Richard the First, were successively chosen, that suits and actions, the cause of which arose previous to their respective dates, should be barred.[2] The early statutes had reference to realty alone, and, though productive of immediate relief, the advantage was only temporary, and in the reign of Henry the Eighth a more commodious course was taken, so that, in the language of LORD COKE, "by one constant law certain limitations might serve both for the time present and for all times to come."[3] This was effected by the statute 32 Hen. VIII. c. 2,[4] by which the limitation of time, in every case, was reduced to a fixed interval between the accrual of the right and the commencement of the action. These intervals were, in the various cases, periods of thirty, fifty, and sixty years. The statute 21 James I. superseded all prior statutes, and, with some exceptions, is substantially in force in many of the States, and practically in all of them, as its leading features have been incorporated to a greater or less extent in all of them; and except where essential changes have been made, the decisions of the English courts under that statute are generally accepted by our courts as affording sound rules of construction.[5]

actions; but it was held to embrace this action, as being fairly within the reason of the act, if not fairly considered to be embraced in the action of trespass on the case. Bacon's Abr. Limitations, E 1; Harris *v.* Saunders, 4 B. & C. 411; Piggott *v.* Rush, 4 Ad. & El. 912; Inglis *v.* Haigh, 8 M. & W. 769. This statute did not embrace specialties, or contracts under seal, judgments, or other matters of record properly coming under that head; but these were provided for by a later statute, 3 & 4 Wm. IV. c. 27, which made it necessary to bring an action for such debts within twenty years.

[1] By this method a defendant was allowed to clear himself by his own oath and that of eleven compurgators. In the Code Napoleon, Civil, 2275, something analogous to the wager of law is preserved, but the purpose is opposite, viz. to prevent abuse from the law of limitations. Wager *at law only* applied to an action of debt on a simple contract, and of detinue. The action of assumpsit did not come into general use until after Slade's Case, 7 Mod. 112, in the year 1603, and as through it wager at law was avoided, it took the place of actions of debt on simple contracts, as the action of trover took the place of detinue. Wilkinson on Limitations; 3 Blackstone's Com. 341; 2 Bouv. Law Dic. (Wager of Law).

[2] Hale's Common Law, 152; Co. Litt. 114 *b*, 115 *a*.

[3] 2 Inst. 95.

[4] Co. Litt. 115 *a*.

[5] Walden *v.* Gratz, 1 Wheat. (U. S.) 292. In the statute 21 James I. c. 16, the rights of the crown were to be barred at the expiration of sixty years from the beginning of the then session, viz. February 19, 1623. The limit of legal memory still dates from the time of Richard I.

SEC. 3. **Adverse Possession.** — The statute of James applied to real as well as personal actions, and was the principal act of limitation in England as to both, until the adoption of the statute 3 & 4 Wm. IV. c. 27. Prior to the adoption of the latter statute, the construction of the statute of James, relative to realty, had become involved in almost hopeless confusion, especially so far as the old doctrine of adverse possession was concerned. Indeed, so great had become the doubts as to the true construction of this portion of that statute, that LORD MANSFIELD, in speaking of it in a leading case,[1] upon this branch of it, made use of this strong expression: "The more we read, the more we shall be confounded." But in England this statute was greatly modified by the statute 3 & 4 Wm. IV. This statute greatly simplified the law by abolishing, in the old sense of the expression, the doctrine of adverse possession; and although in England some important changes have been made[2] in these statutes, especially so far as relates to the length of limitation, the main features of the statute Wm. IV. have been left undisturbed. In this country there is more diversity in the statutes relating to realty than in reference to personal actions; but this matter will be treated of, so far as our statutes are concerned, in a separate chapter, and we will not pursue it further here.

SEC. 4. **Nature of Statutes of Limitations.** — Statutes of limitations were formerly regarded with little favor, and the courts devised numerous theories and expedients for their evasion; but latterly they are considered as beneficial, and resting on principles of a sound public policy, and as not to be evaded except by the methods provided therein.[3] Indeed, they are now termed statutes of repose,[4] and are re-

[1] Atkyns *v.* Horde, 1 Burr. 60; 2 Smith's L. C.

[2] 37 & 38 Vict. c. 57.

[3] Reid *v.* Clark, 3 McLean (U. S.), 480; Clementson *v.* Williams, 8 Cranch (U. S.), 72; Roberts *v.* Pillow, 13 How. (U. S.), 472; Bell *v.* Morrison, 1 Pet. (U. S.) 351; McCluny *v.* Silliman, 3 id. 270; Hawkins *v.* Barney, 5 id. 457; Bradstreet *v.* Huntington, id. 402. But, to avail himself of it, a party must bring himself strictly within its provisions. Russell *v.* Barton, 6 McLean (U. S.), 577; Sanborn *v.* Stetson, 2 Story (U. S. C. C.) 481. Such statutes are regarded "as beneficial." Hart's Appeal, 32 Conn. 540; Peck *v.* Botsford, 7 id. 172; Weed *v.* Bishop, id. 172; Marshall *v.* Dolliber, 5 id. 480; Lord *v.* Shaler, 3 id. 131. They are looked upon "as furnishing a presumption of payment, rather than as a statutory bar to a valid claim." HINMAN, C. J., in Hart's Appeal, *ante*. In People *v.* Judge of Wayne Co., 27 Mich. 138, the court says: "The early decisions, made when the statute of limitations was regarded as an unconscionable defence, allowing a plaintiff who had been consulted upon his original declaration, and whose real cause of action had become barred, to evade the statute by amending his declaration, ought not to be followed at the present day. Statutes of limitations are now generally regarded as statutes of repose, and construed with the same favor as other statutes, to effect legislative intent."

[4] In Roberts *v.* Pillow, 1 Humph. (Tenn.) 624, the court says: "Statutes of limitations are founded on sound public policy, are statutes of repose, and are not to be evaded by a forced construction." In Bell *v.* Morrison, 1 Pet. (U. S.) 360, STORY, J., gives these statutes his unqualified approval. He says: "Statutes

garded as essential to the security of all men ;[1] and opinion, professional and general, has been in favor of a continuous augmentation of their stringency, as is evinced by the numerous stringent changes made in their provisions by the legislatures of nearly all the States within the last few years, especially as to the character of proof required to remove the statutory bar, and as to the periods of limitation, and the extension of their provisions to a large class of cases not embraced in former statutes. These statutes are declared by LIVINGSTON, J.,[2] "among the most beneficial to be found in our books." "They rest upon sound policy, and tend to the peace and welfare of society;"[3] and are so construed as to effectuate the intention of the legislature, although in individual cases they may seem to be productive of great hardship. There certainly can be no hardship in requiring parties to settle their business matters within certain reasonable periods before human testimony is lost and before human memory fails; and if, with the sure prospect of losing the right to a remedy thereon, they stand by inactive and permit their claim to be barred, it is not the law, but the party, who is responsible for the hardship entailed. There can be no question that laws of limitation are founded on correct and salutary principles, although, in isolated cases, they may be productive of great hardship; therefore, although they are to be encouraged, yet, as they are acts which take away existing rights they should always be construed with reasonable strictness, and for the benefit of the rights sought to be defeated thereby, so far as can be done consistently with their letter and spirit. In this country it was at one time seriously questioned whether these statutes were not unconstitutional, as interfering with the rights of property, guaranteed by the paramount law of the Constitution; but it has come to be pretty well settled that to make or repeal them is not an interference with a vested right, except when they are made to act retrospectively.[4]

of limitation, instead of being received in an unfavorable light, as an unjust and discreditable defence, should have received such support from courts of justice as would have made them what they were intended emphatically to be, statutes of repose." Martin *v.* Tully, 72 Ala. 24; Shepherd *v.* Thompson, 122 U. S. 231.

[1] 2 Salk. 421.

[2] Fisher *v.* Harnden, 1 Paine (U.S.C.C.), 61.

[3] McLEAN, J., in McCluny *v.* Silliman, 3 Pet. (U. S.) 270. See also Green *v.* Johnson, 3 G. & J. (Md.) 394; McCarthy *v.* White, 21 Cal. 495; Richmond *v.* Maryland Ins. Co., 8 Cr. (U. S.) 84; Phillips *v.* Pope, 10 B. Mon. (Ky.) 163; McQueen *v.* Babcock, 3 Abb. App. (N. Y.) 129; Dickinson *v.* McCanny, 5 Ga. 486.

[4] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gall. (U. S.) 105. In Bank of Alabama *v.* Dalton, 9 How. (U. S.) 522, a State statute declaring that any judgment obtained in another State prior to the passage of such statute should be barred, unless suit was brought thereon within two years after the passage of the act, was held constitutional. But in Christmas *v.* Russell, 5 Wall. (U. S.) 290, a State statute, which provided that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment, &c., was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred

SEC. 5. **Principles on which founded.** — According to Pothier, the principles upon which laws of limitation and prescription are founded depend in part upon the presumption of payment or release arising from the lapse of time, inasmuch as it is not common for a creditor to wait so long, and prescriptions are founded on the ordinary course of things, "ex eo plerumque fit," and partly, also, because a debtor ought not to be obliged to take care for ever of his acquittances, which prove a demand to have been satisfied; and it is proper to limit a time beyond which he shall not be under the necessity of producing them.[1] They are, too, according to the same authority, partly established for the punishment of the creditor. The law having allowed him a time to institute his action, the claim ought not to be received when he has suffered that time to elapse.[2] Whatever may formerly have been thought to be the ground upon which these statutes are based, it is now quite generally conceded that their purpose was, and is, to compel the settlement of claims within a reasonable period after their origin; and while the evidence upon which their enforcement or resistance rests is yet fresh in the minds of the parties or their witnesses, and that there is no presumption to be raised either as to payment or otherwise, from the mere lapse of the statutory period, more than would naturally arise as to any stale demand.[3]

SEC. 6. **General Rules. Statute having commenced to run will not stop.** — Before proceeding to discuss the topics involved, in detail, there are some general rules, of almost universal application, which it may be well to notice. And it is proper to say here, that while the statutes of the various States apparently differ in their essential provisions, there is, after all, no material difference in their general results, or the principles controlling them, and they are all founded upon the statute of James, and retain the esseutial provisions of that statute, with some modifications and additions, so that the principles evolved from the cases will be equally applicable in all the States.

One of the most important and universal rules (which is not, however, without exception) is, that time, when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event which is not within the saving of the statute.[4] Thus, it has been held that it

by any act of limitation of this State if such suit had been brought therein," was held unconstitutional and void, because it impairs the right of a party to enforce a judgment regularly obtained in another State, and entitled to full faith and credit in the State in which he sues upon it. Edmunds *v.* Waugh, L. R. 1 Eq. 421.

[1] Evans's Pothier, 644.

[2] Id.

[3] McCarthy *v.* White, 21 Cal. 495.

[4] Conover *v.* Wright, 6 N. J. Eq. 613; Clark *v.* Richardson, 4 N. J. Eq. 347; Roberts *v.* Moore, 3 Wall. Jr. (U. S.) 292; De Kay *v.* Darrah, 3 N. J. Eq. 288; Wright *v.* Scott, 4 Wash. (U. S. C. C.) 16; Pinckney *v.* Burrage, 31 N. J. L. 21; Thorpe *v.* Corwin, 20 N. J. L. 311; Bradstreet *v.* Clark, 12 Wend. (N. Y.) 602; Peck *v.* Randall, 1 Johns. (N. Y.) 165; Kestler *v.* Hereth, 75 Ind. 177; Cole *v.* Runnels, 6 Tex. 272; Chevalier *v.* Durst,

is no answer to a plea of the statute, unless otherwise provided therein, that, after the cause of action accrued, and after the statute had commenced to run, the debtor within six years died, and that by reason of litigation as to the right of probate, an executor of his will was not appointed until after the expiration of six years, and that the action was brought within a reasonable time after probate was granted.[1] In another English case,[2] LORD KENYON says: "I never heard it doubted

id. 239; Den *v.* Richards, 15 N. J. L. 347; Coy *v.* Nichols, 5 Miss. 31; Pearce *v.* House, Term Rep. (N. C.) 305; Fitzhugh *v.* Anderson, 2 H. & M. (Va.) 289; Hudson *v.* Hudson, 6 Munf. (Va.) 352; Fewell *v.* Collins, 3 Brev. (S. C.) 286; Parsons *v.* McCracken, 9 Leigh (Va.), 495; Faysoreux *v.* Prather, 1 N. & McCord (S. C.), 296; Rogers *v.* Hillhouse, 3 Conn. 398; Tyson *v.* Britton, 6 Tex. 222; Crosier *v.* Gano, 1 Bibb (Ky.), 257. Thus, except where the statute otherwise so provides, the fact that the action was enjoined will not prevent the statute from running. Barker *v.* Miller, 16 Wend. (N. Y.) 592; Berrien *v.* Wright, 26 Barb. (N. Y.) 208; Sands *v.* Campbell, 31 N.Y. 345; Prideaux *v.* Webber, 1 Lev. 31; Bacon's Abr. Limitations, 238 (E), 6. There is a well-known instance of the application of this rule drawn from the time of the English civil wars. Thus, in an action in answer to a plea of the statute, the plaintiff replied that a civil war had broken out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were shut up, and that within six years after the war ended he commenced his action, and yet his replication was held to be bad; and in confirmation of this doctrine we find an act of Parliament of 1 W. & M. c. 4, whereby it was expressly enacted that the interval that elapsed from the day of the departure of King James, on the 10th December, 1687, till the assumption of the government by King William, on the 12th of March, 1688, should not be accounted any part of the time within which any person by virtue of the statute of limitations might bring his action. Prideaux *v.* Webber, *ante;* Bacon's Abr. Lim. 238 (E), 6. Doyle *v.* Ward, 23 Fla. 90.

[1] Rhodes *v.* Smethurst, 4 M. & W. 42; Daniel *v.* Day, 51 Ala. 481; Meeks *v.* Vassault, 31 Ark. 364; Hapgood *v.* Southgate, 21 Vt. 584; Conant *v.* Hitt, 12 id. 285; Sambs *v.* Stein, 53 Wis. 569; Baker *v.* Brown, 18 Ill. 91; Pitkin *v.* Hewitt, 17 Ala. 291; Baker *v.* Baker, 13 B. Mon. (Ky.) 406; Hagman *v.* Vieally, 3 Cr. (U. S.) 325; Lynan *v.* Walker, 35 Cal. 634; Hull *v.* Deatly, 7 Bush (Ky.), 687; Brown *v.* Merrick, 16 Ark. 612; Stewart *v.* Shelden, 5 Md. 434; McCullough *v.* Speed, 3 McCall (S. C.), 455. In Johnson *v.* Wren, 3 Stew. (Ala.) 84, the court held that the statute of limitations does not begin to run until there is some one to sue, or liable to be sued, but that when the statute once begins to run, the death of neither party impedes its operation. See also Granger *v.* Granger, 6 Ohio, 35; Beauchamp *v.* Mudd, 2 Bibb (Ky.), 537; Nicks *v.* Martindale, 1 Harp. (S. C.) 133. But, where the cause of action arises after the intestate's death, it is considered as existing only from the time when there was some one capable of suing, and consequently, in that case, the statute does not begin to run until administration is granted. Geigers *v.* Brown, 4 McCord (S. C.), 423; Fishwick *v.* Sewell, 4 H. & J. (Md.) 399; Aritt *v.* Elmore, 2 Bailey (S. C.), 595; Clark *v.* Hardeman, 2 Leigh (Va.), 347.

[2] Durore *v.* Jones, 4 T. R. 300. Proceedings in bankruptcy under the Federal laws do not suspend the operation of the statute of limitation. It is well settled that the pendency of proceedings under the insolvent laws of a State does not suspend the operation of the statute of limitations upon debts which are provable in insolvency, since such proceedings do not prevent the creditor from bringing an action upon his debt. Collester *v.* Bailey, 6 Gray (Mass.), 517; Stoddard *v.* Doane, 7 id. 387; Richardson *v.* Thomas, 13 id. 381. So it has been held that the representation of the estate of a deceased person

whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on one of those statutes, it would also on others. I am clearly of opinion, on the words of the statute of fines, and on the uniform construction of all the statutes of limitations down to the present moment, and the generally received opinion of the profession on the subject, that the question ought not to be disturbed." In some of our State courts, and in the United States court, an important exception to this rule has been adopted, which, although not within the letter, is perhaps within the spirit of the statutes of the several States and their saving clauses, which is, that the statute does not run during a period of civil war as to matters of controversy between citizens of the opposing belligerents;[1] but, as this exception is predicated upon the ground that the courts are not open to belligerents, it follows that it does not apply to questions arising between residents of the same State, or as to those who are not residents of either belligerent section.[2] The general rule is, that whatever the courts may think the legislature would have done if it had foreseen a certain contingency, nevertheless,

as insolvent and the appointment of commissioners does not suspend the operation of the statute limiting actions against administrators to two years from the time of their giving bonds. Tarbell *v.* Parker, 106 Mass. 347; Richardson *v.* Allen, 116 id. 447. The same principle applies to bankruptcy proceedings where the bankrupt law does not prohibit a creditor whose debt has not been proved from bringing an action against the bankrupt. Such statutes do not generally suspend the right of a creditor to commence an action, but only prevent him from prosecuting it to final judgment until the bankrupt has the opportunity to obtain his discharge. Doe *v.* Irwin, Mass. Sup. Ct. 1883.

[1] Coleman *v.* Holmes, 44 Ala. 124; Adger *v.* Alston, 15 Wall. (U. S.) 555; Stewart *v.* Kohn, 11 id. 493; Brown *v.* Hiatt, 15 id. 177; Levy *v.* Stewart, 11 id. 244; Chappelle *v.* Olney, 1 Sawyer (U. S. C. C.), 401. This applies to statutes relating to appeals also. The Protector, 9 Wall. (U. S.) 687. See, on general proposition, Ahrent *v.* Zaun, 40 Wis. 622; Jones *v.* Nelson, 51 Ala. 471; Johnston *v.* Gill, 27 Gratt. (Va.) 587; Edwards *v.* Jarvis, 74 N. C. 315; Hawkins *v.* Savage, 75 id. 133. This doctrine, so far as it has grown up under acts of the legislatures in the States lately in rebellion suspending the statute during the civil conflict, is correct; but, independent of those acts or resolutions, there is no possible ground on which the doctrine could stand, except that the suspension is fairly implied from the emergency; and this latter position opens the door for a multitude of exceptions, and would seem to border largely on the usurpation of legislative powers by the courts, but with us, as will be seen from the case cited, the doctrine is too well established to be disturbed. Semmes *v.* Hartford Ins. Co., 13 Wall. (U. S.) 158; Wiggle *v.* Owens, 45 Miss. 691; McCutchen *v.* Dougherty, 44 id. 419; Coley *v.* Henry, 42 Ga. 61; Clipper *v.* Hutchinson, 33 Tex. 120; Bradford *v.* Shine, 13 Fla. 393; Kirkland *v.* Krebs, 34 Md. 93; Selden *v.* Preston, 11 Bush (Ky.), 191; Petzer *v.* Burns, 7 W. Va. 63; Ross *v.* Jones, 22 Wall. (U. S.) 576; McMerty *v.* Morrison, 62 Mo. 140; Gooding *v.* Varn, Chase's Dec. (U. S. C. C.) 286; Bell *v.* Hanks, 57 Ga. 272; Eddins *v.* Grady, 28 Ark. 500; Hall *v.* Denckler, 29 id. 506; Randolph *v.* Ward, id. 238.

[2] Hanger *v.* Abbott, 6 Wall. (U. S.) 532; Smith *v.* Charter Oak Ins. Co., 64 Mo. 330. Nor does it apply to a mere personal trust, which could have been executed by the trustee without the intervention of the courts. Mayo *v.* Cartwright, 30 Ark. 407.

a case coming fairly within the limitation imposed by the statute cannot be excepted from its operation, unless it also comes fairly within the exceptions named therein.[1] In other words, the legislature makes the law and the courts apply it, and they cannot extend it to cases to which it does not apply, or except from its operation cases clearly coming within its provisions, and not excepted from its operation.[2] The suspension by implication, held by the courts to have been wrought during the late civil war, can only be justified upon the ground of paramount necessity, and can only be applied so far as such paramount necessity exists. Consequently, as to citizens of other States, as to whom the courts of the insurrectionary States were closed, such suspension, during such period,[3] is held to have existed, upon the ground that, by a superior power, the creditor or party has been disabled to sue, without any default of his own, and therefore that none of the reasons which induced the enactment of these statutes apply while the actual disability so raised exist;[4] and, so soon as the disability ceased, the suspension ceased;[5] nor did it exist except as to the citizens of those States to whom such courts were closed.[6]

The rule as to disabilities is that, when the statute begins to run, it is not arrested by any subsequent disability, unless expressly so provided in the statute; and a person who claims the benefit of the general exceptions in the statute can only avail himself of such disabilities as existed when the right of action first accrued.[7] Thus, the pendency of adminis-

[1] The Sam Slick, 2 Curtis (U. S. C. C.), 480.

In Hill *v.* Suprs. Ren. Co., 119 N. Y. 344, 53 Hun (N.Y.), 194, in an action under the statute, to recover compensation for property destroyed in consequence of a mob or riot, it appeared that an action was begun in the county court for the same cause within the three months limited by said act, in which the complaint was dismissed for want of jurisdiction in that court to entertain actions brought to recover a sum exceeding $1,000; thereafter this action was commenced, but after the lapse of the statutory period. It was held that the action was not maintainable; that as it was brought under special law, and was maintainable solely by its authority, the limitation was so incorporated with the remedy given as to make it an integral part of it and was a condition precedent to the maintenance of the action; and that the provision of the code providing that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final judgment on the merits, the plaintiff may commence a new action for the same cause within one year after," such termination, did not apply.

[2] United States *v.* Maillard, 4 Ben. (U. S. C. C.) 459; Semmes *v.* Hartford Ins. Co., 13 Wall. (U. S.) 158.

[3] Coleman *v.* Holmes, 44 Ala. 124; Levy *v.* Stewart, 11 Wall. (U. S.) 244; Mixer *v.* Sibley, 53 Ill. 61.

[4] Braun *v.* Sauerwein, 10 Wall. (U. S.) 218; Stiles *v.* Easley, 57 Ill. 275.

[5] Stiles *v.* Easley, *ante;* Braun *v.* Sauerwein, *ante.*

[6] Smith *v.* Charter Oak Ins. Co., 64 Mo. 330. But see Ross *v.* Jones, 22 Wall. (U. S.) 576, where it was held that the statute was suspended as to citizens of other of the rebel States, as well as to citizens of the loyal States.

[7] Hogan *v.* Kurtz, 94 U. S. 773; Hodges *v.* Dunden, 51 Miss. 199; Bozeman *v.* Browning, 31 Ark. 364; Watts *v.* Gunn, 53 Miss. 502; Hogg *v.* Ashman, 83 Penn.

tration, and the inability of the heir to maintain an action to recover real estate by reason thereof, and the fact that the present right of action is in the administrator, does not constitute such a disability on the part of the heir, within the meaning of a statute which excepts from its operation persons under a disability when the right of action first accrues. The fact that the heir cannot sue because the right of action is, for the time being, vested in the administrator, does not constitute a disability; because the administrator in such cases is the trustee or representative of the heir, and not only is the exclusive right to bring an action vested in him, but the law also imposes upon him the duty to bring it, and if he fails to do so, whereby any right is lost to the heir, he is responsible therefor.[1] So, too, it is held that when the statute began to run during the life of the devisor, it is not arrested by any disability in the devisee;[2] so where it begins to run against the ancestor, it is not suspended by any statutory disability in the heir at the time of the descent cast.[3]

It may be stated, as the uniform result of the cases decided on the statute of limitations, that it does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein,[4]

St. 80; Smith *v.* Newby, 13 Mo. 159; Pendergrast *v.* Foley, 8 Ga. 1. See chapter on Disabilities in Personal Actions, *post.*

[1] Meeks *v.* Vassault, 3 Sawyer (U. S. C. C.) 206.

[2] Bozeman *v.* Browning, 31 Ark. 364.

[3] Rogers *v.* Brown, 61 Mo. 187; Swearingen *v.* Robertson, 39 Wis. 462.

[4] In this connection it may be well to examine the early English cases arising under a statute similar to that existing in most of the States. In Cary *v.* Stephenson, 2 Salk. 421, C. was indebted to A., who died, and B. received the money, and afterwards the plaintiff's wife took out administration to A., and within six years after the grant of administration, but not within six years after the receipt of the money, the plaintiff sued B. for money had and received; it was held that the statute of limitations could be no bar to the action, because the plaintiff's title commenced by taking out the letters of administration. In that case the money was not received by the defendant until after the death of the intestate; but the court says the statute does not apply, proceeding on the ground that there were no laches on the part of the plaintiff, because there was there no cause of action until an administrator was appointed, when the money became money received to his use. In Sanford's Case, Cro. Jac. 61, it was held that where before the expiration of an existing term the grantee died, and at the expiration of the first term the lessor entered and levied a fine before administration granted, the administrator had five years to enter in, because, says the court, "no one had the right of entry before." This case arose under the statute of fines, 4 Henry VII. In Wilcocks *v.* Huggins, 2 Stra. 907, an action was brought on a promissory note dated July, 1719, by the executor of the executrix of G. W. The defendant pleaded that the action did not accrue within six years; the plaintiff replied, that the first executrix, in Trin. 11 Geo. I. (1725), sued out a bill of Middlesex against the defendant, returnable in the following Michaelmas Term, on which there was a continuance by *non misit breve*, and an *alias* taken out, returnable in Hilary Term following, before which the executrix died, and made the plaintiff her executor, who, in Michaelmas Term, 3 Geo. II., sued out a *latitat* against the defendant, on which he declared; concluding with an averment that the cause of action accrued within six years before suing out the first bill of Middlesex. There no reason whatever was shown for the de-

and that the statute, unless otherwise provided, applies only to a disability or disabilities existing at the time the right accrues, and that

lay of the four years between the first and the last writ: and therefore the court held the replication bad by reason of that unnecessary delay, saying "that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; but they would not go a moment further, for it would let in all the inconveniencies which the statute was made to avoid." And they added: "If, indeed, the second executor had been retarded by suits about the will or administration, and he had shown that in pleading it would have been otherwise, because then the neglect would have been accounted for." It was erroneously stated in that case that the longest time that had ever been allowed to an executor was a year: in Lethbridge *v.* Chapman, cited Fitzg. 171, there was an interval of fourteen months, yet the action was held in time. Other cases of the same class are collected in Comyns' Digest, Temps, G. 17. In Hall *v.* Wybourn, Carth. 136, to assumpsit for goods sold, the defendant pleaded *non assumpsit infra sex annos.* The plaintiff replied, that the defendant, at the time of the promise in the declaration mentioned, was resident in parts beyond the seas, and out of the allegiance of the king and queen, and there continued until, &c., on which day, and not before, he voluntarily returned into this realm; and that the plaintiff's bill was exhibited against him within a year after his return. It was held, on demurrer, that the replication was ill, on the ground that the plaintiff had neglected his proper remedy, by not filing an original and prosecuting the defendant to outlawry, which, though it should be reversed on his return, yet the plaintiff might then have brought another original by journeys' accounts, and thereby taken advantage of his first writ. In Joliffe *v.* Pitt, 2 Vern. 694, the plaintiff had lent W. a sum of money on a note dated in August, 1689, with interest at £1 per cent per month. W., then residing beyond seas, paid two years' interest, but then failed, and went to the East Indies, where he died in February, 1706, having in the interval acquired considerable property, and made a will appointing the defendant Pitt his executor. In April, 1702, the plaintiff sued out a *latitat* against W., which was continued on the roll till 1706. In October, 1710, the defendant Pitt came over to England, and proved the will. In May, 1714, the plaintiff filed his bill against him and other creditors of W., for whom it was insisted that the plaintiff was barred by the statute of limitations. It is said to have been agreed that the plaintiff being abroad till 1702, and then suing out his writ, with continuances until the debtor's death, all that time was well excused; and also until his will was proved and there was an executor, since laches could not be attributed to the plaintiff for not suing, while there was no executor against whom he could bring his action; the only objection made on the defendant's part being, that the plaintiff ought to have revived the former action at law, and not have filed a bill in equity. LORD COWPER held that the statute did not apply, and decided in favor of the plaintiff. See Granger *v.* George, 5 B. & C. 149, 7 D. & R. 729; Short *v.* McCarthy, 3 B. & Ald. 626; Howell *v.* Young, 5 B. & C. 259. In Murray *v.* East India Company, 5 B. & Ald. 204, it was held that, in an action by an administrator on a bill of exchange payable to the intestate, but accepted after his death, the statute did not begin to run until administration granted. ABBOTT, C. J., says: "It cannot be said that a cause of action exists unless there be also a person in existence capable of suing." In this case Mr. Hope had despatched some bills to an agent in England, and himself embarked in a vessel for England; the vessel was lost, and he perished with it. His agent in England, acting under a power of attorney given by Mr. Hope before he died, presented the bills to the East India Company, and they were paid to the agent. It turned out that the agent had exceeded his authority in indorsing the bills; and it was held that the East India Company could not defend themselves against another action on the bills by the administrator of

no after-accruing disability will stop its operation.[1] The rule may be

Mr. Hope, on the ground that more than six years had elapsed since the date of the bills, because the right of action did not exist in the lifetime of Mr. Hope, therefore there was no power of bringing an action until administration was taken out: the action never accrued to anybody until the letters of administration were granted; from that time, therefore, according to the words of the statute, the statute began to run. Skeffington *v.* Whitehurst, 3 Y. & Col. 34. In Webster *v.* Webster, 10 Ves. 93, a plea of the statute was allowed, because LORD ELDON held the fair construction of the allegations in the bill to be, that the defendant had possessed himself of the personal estate of the debtor (in whose lifetime the debt had accrued), and might therefore have been sued within six years of the death as executor *de son tort*. In Perry *v.* Jenkins, 1 My. & C. 114, a suit for an account of rents had become abated by the plaintiff's death before decree, and his administrator more than six years afterwards filed a bill of revivor, to which the defendant pleaded the statute of limitations, but did not state in his plea that six years had elapsed since the representation taken out to the original plaintiff. The plea was overruled. In Douglas *v.* Forrest, 4 Bing. 686, it was held, that where the testator resided and died abroad, his executor in England might be sued at any time within six years after his taking out probate. In that case the debtor never returned from beyond seas; therefore the plaintiff might have sued him at any time during his life; and so might sue his executor at any time during six years after he was appointed executor. In Durore *v.* Jones, 4 T. R. 300, it was held that when once the five years allowed to an infant to make an entry for the purpose of avoiding a fine have begun, the time continues to run notwithstanding any subsequent disability; and ASHURST, J., there says: "If the disability be once removed, the time must continue to run notwithstanding any subsequent disability, either voluntary or involuntary; and even if there were any distinction between the two kinds of disability, the present is against the plaintiff, for the imprisonment for debt was in consequence of his own voluntary act." LORD KENYON, C. J., in the same case, says: "I never heard it doubted, till the discussion of this case, whether, when the statutes of limitation had begun to run, a subsequent disability would stop their running." His lordship states that to be the uniform construction of the statutes, and the generally received opinion of the profession. There are indeed cases where the courts have refined for the purpose of holding that the statute has not begun to run, but none which break in on the principle thus stated by LORD KENYON. The statute of the 21 Jac. I. c. 16, itself, says nothing whatever about defendants, excepting in the clause giving a year after the reversal of an outlawry. The first case in which the construction of it came in question was Prideaux *v.* Webber, 1 Lev. 31, where it was held that a plea of the statute was a bar, notwithstanding a replication that when the cause of action accrued, rebels had usurped the government, and none of the king's courts were open: for there was no exception in the act of such a case. At the time of the Revolution, again, there was an interval during which the courts were not sitting; and an act of Parliament, the 1 W. & M. c. 4, was passed expressly to provide for the case; enacting that the time between the 10th of December, 1688, and the 12th of March following (a period of ninety-two days), should not be reckoned in *quare impedit* or the statute of limitations. If this time would have been left out of the computation on the true construction of the statute of James, no legislative provision of the kind would have been necessary. The next statute which passed relating to the subject was that of the 4 Anne, c. 16, prior to which there had been decisions on the statute of James, holding the exception in section 7 to apply only to the case of plaintiffs absent beyond seas. Hall *v.* Wyburn, Carth. 136; Chevely *v.* Bond, id. 226.

[1] Jackson *v.* Johnson, 5 Cow. (N. Y.) 74; Jackson *v.* Wheat, 18 Johns. (N. Y.) 40; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129.

illustrated thus: If a female, not of age when the title to land by descent accrues, should marry before she becomes of age, she would not be within the saving operation of the statute except so long as her infancy existed. When she became of full age she could not set up the coverture as an excuse for not having brought her action within the time limited by the statute; the statute having commenced to run before her coverture the latter could not be tacked to the former.[1]

In the case last cited the statute provided that all appeals from a decree should be taken within two years from the time of the entry thereof. The decree appealed from was rendered on the 17th of April, 1878, and the appeal was not taken until the 6th of September, 1883. The appellant set up the disability of imprisonment as cause for the delay; this was held insufficient to excuse the delay and prevent the operation of the statute. BRADLEY, J., said: "As more than five years elapsed after the entry of the decree in this case before the appeal was taken, of course the appeal was barred by lapse of time unless the appellant was within one of these exceptions. He states in his petition of appeal, and the fact is not disputed, that being sued in the city of New York upon the decree appealed from, and judgment being rendered against him, his body was taken in execution, and on the 7th of February, 1879, he was thrown into the county jail of New York, where he has ever since remained, and is now kept in close confinement. As only ten months elapsed after the entry of the decree when the appellant was thrown into prison, and as he has been in prison ever since, he contends that two years, exclusive of the term of his imprisonment, had not expired when his appeal was taken."

This answer cannot avail the appellant if that construction be given to the statute which has almost uniformly been given to similar statutes in England and this country. The construction referred to is, that some or one of the disabilities mentioned in the proviso, must exist at the time the action accrues, in order to prevent the statute from running; and that after it has once commenced to run, no subsequent disability will interrupt it. This was the rule adopted in the exposition of the statute of 21 Jac. 1, c. 16, the English statute of limitations in force at the time of the first settlement of most of the American colonies. It is provided by the seventh section of that statute.

"That if any person entitled to bring any of the personal actions therein mentioned, shall be 'at the time of any such cause of action

Murray *v.* East India Company and Cary *v.* Stevenson show that no cause of action, within the meaning of the statute, accrues, until there is somebody capable of suing, and somebody capable of being sued; but if a cause of action has once accrued, it cannot be stopped, except in some one of the modes provided in the statute.

[1] The doctrine that no disability which did not exist at the time when the right of action accrued can be relied upon to avoid the operation of the statute, is well and ably discussed by MR. JUSTICE BRADLEY in McDonald *v.* Hovey, 110 U. S. 620.

given or accrued,' within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, such person shall be at liberty to bring the same actions within the times limited by the statute, after his disability has terminated."

It is true that the express words of this statute refer to disabilities existing "at the time" the cause of action accrues, and do not literally include disabilities arising afterwards. The courts, however, held that such was not only the literal, but the true and sensible meaning of the act; and that to allow successive disabilities to protract the right to sue would, in many cases, defeat its salutary object, and keep actions alive perhaps for a hundred years or more; that the object of the statute was to put an end to litigation, and to secure peace and repose; which would be greatly interfered with and often wholly subverted, if its operation were to be suspended by every subsequently accruing disability. A very exhaustive discussion of the subject had arisen in the time of Queen Elizabeth, in the case of Stowell *v.* Zouch,[1] in the construction of the statute of fines, passed in 4 Hen. 7, c. 24, which gave five years to persons not parties to the fine to prosecute their right to the land; but if they were women covert, or persons within the age of twenty-one years, in prison, or out of the realm, or not of whole mind at the time of the fine levied, they were allowed five years to prosecute their claim after the disability should cease. In that case, a person having a claim to land, died three years after a fine was levied upon it without commencing any suit, and leaving an infant heir; and it was held that the heir could not claim the benefit of his own infancy, but must commence his suit for the land within five years from the levying of the fine; because the limitation commenced to run against his ancestor, and having once commenced to run, the infancy of the heir did not stop it. The same construction was given, as already stated, to the general statute of limitations of 21 Jac. 1, before referred to. In an early English case,[2] Lord Kenyon said:

"I confess I never heard it doubted until the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on the construction of one of those statutes, it would also on the others. I am very clearly of opinion on the words of the statute of fines, on the uniform construction of all the statutes of limitations down to the present moment (1791), and on the generally received opinion of the profession on the subject, that this question ought not now to be disturbed. It would be mischievous to refine and make distinctions between the cases of voluntary and involuntary disabilities (as was attempted in that case); but in both cases, when the disability is once removed, the time begins to run."

To the same effect are Doe *v.* Jesson,[3] and many cases in this coun-

[1] Plowd. 353*a*.
[2] Doe *v.* Jones, 4 T. R. 300.
[3] 6 East, 80.

try referred to in Angell on Limitations, *qua supra*, and in Wood on Limitations, sect. 251. In a case that came to this court from Kentucky, in 1816, CH. JUSTICE MARSHALL said:

"The counsel for the defendants in error have endeavored to maintain this opinion by a construction of the statute of limitations of Kentucky. They contend, that after the statute has begun to run, it stops, if the title passes to a person under any legal disability, and recommences after such disability shall be removed. This construction, in the opinion of this court, is not justified by the words of the statute. Its language does not vary essentially from the language of the statute of James, the construction of which has been well settled; and it is to be construed as that statute, and all other acts of limitation founded on it, have been construed." [1]

And in the subsequent case of Mercer's Lessee *v.* Seldon,[2] the court took the same view in a case arising in the State of Virginia, in which the right of action accrued to one Jane Page, an infant within the exception of the statute; and it was insisted that her marriage before she was twenty-one added to her first disability (of infancy) that of coverture. But the court held otherwise, and decided that only the period of infancy, and not that of coverture, could be added to the time allowed for bringing the action. The same doctrine was held in the cases cited below.[3]

In most of the State statutes of limitation the clauses of exception or provisos in favor of persons laboring under disabilities employ terms equivalent to those used in the English statute, expressly limiting the exception to cases of disability existing when the cause of action accrues. But this is not always the case. The statutes of New York in force prior to the Revised Statutes limited the time for bringing real actions to twenty-five years after seisin or possession had, and the proviso in favor of persons laboring under disabilities was in these words: —

"Provided always, That no part of the time during which the plaintiff, or person making avowry or cognizance, shall have been within the age of twenty-one years, insane, *feme covert*, or imprisoned, shall be taken as a part of the said limitation of twenty-five years." [4]

It will be observed that this proviso is stronger in favor of cumulative and subsequently accruing disabilities than that of the act of Congress which we are now considering; yet the Supreme Court of New York, and subsequently this court, gave it the same construction in reference to such disabilities as has always been given to the English statute of

[1] Walden *v.* Gratz's Heirs, 1 Wheat. (U. S.) 292.

[2] 1 How. (U. S.) 37, 51.

[3] Eager *v.* Commonwealth, 4 Mass. 182; Fitzhugh *v.* Anderson, 2 Hen. and Mun. 306; Parsons *v.* McCracken, 9 Leigh, 495; Demarest *v.* Wynkoop, 3 Johns. Ch. 129; Bunce *v.* Wolcott, 2 Conn. 27.

[4] 1 Rev. Laws, 1813, p. 185, sec. 2; 2 Greenleaf's Laws, 95, sec. 6.

fines and statute of limitations. In the case of Bradstreet *v.* Clarke,[1] which was a writ of right, and was argued by the most eminent counsel of the State, it was strenuously contended that the proviso referred to, being different from that of the English statutes in not referring to disabilities existing when the cause of action accrued, a different construction ought to be given to it, and the disabilities named, though commencing subsequently, and even after the statute began to run, ought to be held to interrupt it. The court, however, did not concur in this view, but held that the coverture of the demandant occurring after the statute began to run could not be set up against its operation. MR. JUSTICE SUTHERLAND said: —

"It is believed that the same construction has uniformly been given to this proviso in this respect as to that in relation to possessory actions (contained in a different section of the act), that where the statute has once begun to run a subsequently accruing disability will not impede or suspend it."

Although the case did not finally turn on this point, the attention given to it by counsel and the apparent unanimity of the court, then consisting of SAVAGE, CHIEF JUSTICE, and SUTHERLAND and NELSON, JUSTICES, gave to that opinion a great deal of weight.

The same question afterwards arose in this court in the case of Thorp *v.* Raymond.[2] That was an action of ejectment, used in place of a writ of right, to try the title to lands in New York. The plaintiff's grandmother acquired a right of entry to the lands in 1801, but was then insane, and remained so till her death in 1822. Her only daughter, and heir, was a married woman, and remained such till the death of her husband in 1832. The action was not commenced until 1850. The plaintiff contended that, under the proviso referred to, the daughter's disability of coverture ought to be added to the mother's disability of insanity; and that this would save the action from the bar of the statute, whether under the limitation of twenty-five years or that of twenty years. But the court held that the disabilities could not be connected in this way. MR. JUSTICE NELSON, delivering the opinion, and having shown that the proposed cumulation was inadmissible under the third section of the act, considering the action as one of ejectment, disposed of the other view as follows: —

"But it is supposed that the saving clause in the second section of this act, which prescribes a limitation of twenty-five years as a bar to a writ of right, is different, and allows cumulative disabilities; and as ejectment is a substituted remedy in the court below for the writ of right, it is claimed the defendant is bound to make out an adverse possession of twenty-five years, deducting successive or cumulative disabilities. This, however, is a mistake. The saving clause in this second section, though somewhat different in phraseology, has received

[1] 12 Wend. 602. [2] 16 How. U. S. 247.

the same construction in the courts of New York as that given to the third section." (Citing the case of Bradstreet *v.* Clarke, in the decision of which the learned justice had participated.)

The statute of limitations of Texas is another instance in which language is used quite different from that of the English statute. After prescribing various limitations, the eleventh section provides for disabilities, as follows: —

"No law of limitations, except in the cases provided for in the eighth section of this act, shall run against infants, married women, persons imprisoned, or persons of unsound mind, during the existence of their respective disabilities; and when the law of limitations did not commence to run prior to the existence of these disabilities, such persons shall have the same time allowed them after their removal that is allowed to others by this and other laws of limitations now in force." Oldham & White, art. 1352.

According to the literal sense of this section, if one disability should prevent the statute from running until another supervened, the latter would be equally effectual to interrupt it. But the Supreme Court of Texas, in White *v.* Latimer,[1] held otherwise, and decided that one disability cannot be tacked on to another; but that the long-established rule in construing statutes of limitations must be applied. The court say: —

"The 11th section of the statute is not in its terms materially different from the exception contained in the statute of James, and cannot claim a different construction from that; and a departure from the rule so long and well established, that it applies to the particular disability existing at the time the right of action accrued, would introduce the evil so strongly deprecated by the most eminent English and American judges, of postponing actions for the trial of rights of property to an indefinite period of time, by the shifting of disabilities, from infancy to coverture, and again from coverture to infancy, an evil destructive of the best interests of society, and forbidden by the most sound and imperious policy of the age."

The authority of these cases goes far to decide the one before us. The proviso in the New York statute certainly was more general in its terms in describing the disabilities which would stay the operation of the statutes — described them more independently of the time when the cause of action accrued — than the act of Congress under consideration; and the courts, in giving it the construction they did, seemed to be largely influenced by the established interpretation given to similar statutes in *pari materia*, without having in the statute construed any express words to require such a construction. But in the case before us, the fair meaning of the *words* leads to the same result. The language is as follows: —

"No judgment, decree, or order . . . shall be reviewed in the

[1] 12 Tex. 61.

Supreme Court, . . . unless the writ of error is brought or the appeal is taken within two years after the entry of such judgment, decree, or order: Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted or such an appeal may be taken within two years after the judgment, decree, or order, exclusive of the term of such disability."

"*Is* an infant," when? "*Is* an insane person, or imprisoned," when? Evidently, when the judgment, decree, or order is entered. That is the point of time to which the attention is directed. The evident meaning is, that if the party is an infant, insane, or in prison when the judgment or decree is entered, and therefore when he or she becomes entitled to the writ of error or appeal, the time to take it is extended. In all the old statutes this was expressed in some form or other; this was their settled meaning. It will also be deemed to be the meaning of this statute unless its language clearly calls for a different meaning. But, as seen, it does not.

Section 1008 of the Revised Statutes was taken directly from the "Act to further the administration of justice," approved June 1, 1872, and is a mere transcript from the second section of that act. 17 Stat. 196. But this was a revision of the twenty-second section of the Judiciary Act of 1789, and if we turn back to that section we shall find that, with regard to the point under consideration, its language was, in effect, substantially the same as that of the present law. It was as follows: —

"Writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability."

"*Be* an infant," *when?* "*Be a feme covert, non covert, non compos*, or imprisoned," *when?* The same answer must be given as before, namely, when he or she becomes entitled; that is, when the judgment or decree is entered.

The phraseology of the act of 1872, and of section 1008 of the Revised Statutes, is so nearly identical with that of the twenty-second section of the act of 1789, in reference to the point under consideration, that we must presume that they were intended to have the same construction, and the act of 1789 contains no language which requires that it should have a different construction from that which had long been established in reference to all the statutes of limitation then known, whether in the mother country or in this. On the contrary, as we have seen, the terms of the act of 1789 fairly call for the same construction which had for centuries prevailed in reference to those statutes.

It is a received canon of construction, acquiesced in by this

court, "That where the English statutes — such, for instance, as the statute of frauds and the statute of limitations — have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." [1]

And even where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction. Thus, in New Jersey, where several English statutes had been consolidated, a proviso in one of them, broad enough in its terms to affect the whole consolidated law, was held to affect only those sections with which it had been originally connected. CHIEF JUSTICE GREEN said: —

"Where two or more statutes, whose construction has been long settled, are consolidated into one, without any change of phraseology, the same construction ought to be put upon the consolidated act as was given to the original statutes. A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated." [2]

So, upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology, — some change other than what may have been necessary to abbreviate the form of the law. As said by the New York Court for the Correction of Errors: [3] —

"Where the law antecedently to the revision was settled, either by clear expressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of law, unless such phraseology evidently purports an intention in the legislature to work a change." [4]

So the supreme court of Alabama has held that the legislature of that State, in adopting the code, must be presumed to have known the judicial construction which had been placed on the former statutes; and, therefore, the re-enactment in the code of provisions substantially the same as those contained in a former statute is a legislative adoption of their known judicial construction.[5]

"A change of phraseology in a revision will not be regarded as altering the law where it had been well settled by plain language in the

[1] Pennock *v.* Dialogue, 2 Pet. 1, 18; Smith's Commentaries on Stat. and Const. Law, sec. 634; Sedgwick on Construction of Stat. and Const. Law, 363.

[2] *In re* Murphy, 3 Zab. 180.

[3] Taylor *v.* Delancey, 2 Caines's Case, 143, 150.

[4] And see Yates's Case, 4 Johns. 317; Theriat *v.* Hart, 2 Hill, 380; Parmelee *v.* Thompson, 7 Hill, 77; Goddell *v.* Jackson, 20 Johns. 693; Croswell *v.* Crane, 7 Barb. 191. "The construction will not be changed by such alterations as are merely designed to render the provisions more precise." Mooers *v.* Bunker, 29 N. H. 421.

[5] Duramus *v.* Harrison, 26 Ala. 326.

statutes, or by judicial construction thereof, unless it is clear that such was the intent."[1]

Of course a change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law.[2]

In view of these authorities and of the principles involved in them, and from a careful consideration of the language of the law itself, we are satisfied that it was not the intention of Congress, either in the twenty-second section of the act of 1789, or in the second section of the act of 1872, or in section 1008 of the Revised Statutes, to change the rule which has always, from the time of Henry VII., been applied to statutes of limitation, namely, the rule that no disability will postpone the operation of the statute unless it exists when the cause of action accrues; and that when the statute begins to run no subsequent disability will interrupt it.

This conclusion disposes of the case. As the appellant was free from any disability for several months after the entry of the decree appealed from, the statute commenced to run at that time, and, therefore, the time for taking the appeal expired several years before it was actually taken.

The doctrine held in this case is so thoroughly established by the decisions of the courts, not only in England but also in this country, as to hardly need the citation of an authority in its support. The cases holding the doctrine are very numerous.[3] But if at the time when the right accrued a party is under two or more disabilities, as if she is a married woman, an infant, and insane, she may avail herself of either

[1] Sedgwick on Construction (2d ed.), 229, note. Referring to Hughes *v.* Farrar, 45 Me. 72; Burnham *v.* Stevens, 33 N. H. 247; Overfield *v.* Sutton, 1 Met. (Ky.) 621; McNamara *v.* Minnesota Central Railway Company, 12 Minn. 388; Conger *v.* Barker, 11 Ohio St. 1.

[2] Young *v.* Dake, 1 Seld. (N. Y.) 463.

[3] Swearingen *v.* Robertson, 39 Wis. 462; Jones *v.* Lemon, 26 W. Va. 629; Handy *v.* Smith, 30 W. Va. 195; Wilson *v.* Harper, 25 W. Va. 179; Hogan *v.* Kurtz, 94 U. S. 773; Dowell *v.* Tucker, 46 Ark. 438; McLeran *v.* Benton, 73 Cal. 329; Doyle *v.* Wade, 23 Fla. 90; Wade *v.* Doyle, 17 Fla. 522; Downing *v.* Ford, 9 Dana (Ky.), 391; Riggs *v.* Dooley, 7 B. Mon. (Ky.) 236; Clark *v.* Jones, 16 B. Mon. (Ky.) 121; Scott *v.* Haddock, 11 Ga. 258; Everett *v.* Whitfield, 27 Ga. 133; Millington *v.* Hill, 47 Ark. 301; Kistler *v.* Hereth, 75 Ind. 177; Clark *v.* Frail, 1 Met. (Ky.) 35; Blackwell *v.* Bragg, 78 Va. 529; Grimes *v.* Watkins, 59 Tex. 133; Grigsby *v.* Peck, 57 Tex. 142; Becton *v.* Alexander, 27 Tex. 659; Marsteller *v.* Marsteller, 93 Penn. St. 350; Hollingshead's Appeal, 103 Penn. St. 158; Arnole's Appeal, 115 Penn. St. 356; Douglas *v.* Irvine, 126 Penn. St. 643; Keiser's Appeal, 124 Penn. St. 80; Cozzens *v.* Franan, 30 Ohio St. 491; Hinde *v.* Whiting, 31 Ohio St. 53; Oliver *v.* Pullan, 24 Fed. Rep. 127; Rogers *v.* Brown, 61 Mo. 187; Billon *v.* Larimore, 37 Mo. 375; Campbell *v.* Laclede Gas Co., 84 Mo. 352; see also same case affirming the decision of the State court, 119 U. S. 445; North *v.* James, 61 Miss. 761; Hodges *v.* Darden, 51 id. 199; Watts *v.* Gunn, 53 id. 502; Tippin *v.* Coleman, 61 id. 516; Trafton *v.* Hill, 80 Me. 503; Bonney *v.* Stoughton, 122 Ill. 536; Keil *v.* Healey, 84 Ill. 104; Fritz *v.* Joiner, 54 Ill. 101.

of them, and, in the language of EDMOND, J.,[1] "it will always be an answer to an objector to such an election to say, the disability on which I rely is pointed out by the proviso; it existed at the time my right or title accrued; I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and the spirit of the law. But," he adds, "where a single disability only exists at the time the right accrues, and the five years after the discontinuance of that disability have elapsed, the statute immediately attaches, and the party so neglecting to prosecute can never avail himself of any other or supervenient disability, because the statute recognizes no other than such as actually existed, or should exist, when the right first commenced, and every after disability may be said to want, and is, in fact, destitute of that essential qualification." In an English case,[2] LORD HARDWICKE, in commenting upon the effect of several coexisting disabilities in one person, said: "If a man both of non-sane memory and out of the kingdom come into the kingdom, and then go out of the kingdom, — his non-sane memory continuing, — his privilege as to his being out of the kingdom is gone; and his privilege as to non-sane memory will begin from the time he returns to his senses."[3] Where a cause of action accrues in favor of the estate of a deceased person, as where by statute a right of action is given to an executor or administrator of a person killed by the negligence of a corporation, it is held that the cause of action is not complete, and consequently does not arise, until an executor or administrator is appointed, so that the statute of limitations does not begin to run until such appointment is made.[4]

SEC. 7. **The Bar of the Statute must be interposed by the Debtor.** — Another general rule of great practical importance is, that the bar of the statute must be interposed by the diligence of the debtor, and as early

[1] Bunce *v.* Wolcott, 2 Conn. 34. See also Davis *v.* Cooke, 3 Hawks (N. C.), 608; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129; Smith *v.* Burtis, 9 Johns. (N. Y.) 174; Wilson *v.* Kilcannon, 4 Hayw. (Tenn.) 182; Wilson *v.* Betts, 4 Den. (N. Y.) 20; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74.

Blackwell *v.* Bragg, 78 Va. 529; North *v.* James, 61 Miss. 761; Sims *v.* Bardoner, 86 Ind. 87; Sims *v.* Everhardt, 102 U. S. 300. Of course it will be understood that all disabilities which save the operation of the statute of limitations are those which are created by the statute itself; and unless the statute makes a certain disability a cause for suspending the operation of the statute, there can be no suspension, however great may be the hardships which ensue. In all its aspects and operations the statute is arbitrary. Forster *v.* Patterson, 17 Ch. Div. 132; Kinsman *v.* Rouse, 17 id. 104; Jones *v.* Lemon, 26 W. Va. 629; Amy *v.* Watertown, 130 U. S. 320; Rowell *v.* Patteson, 76 Me. 196; Bickle *v.* Chrisman, 76 Va. 678; Fairbanks *v.* Long, 91 Mo. 628; *In re* Griffith, 35 Kan. 377; Chicago, &c. R. R. Co. *v.* Jenkins, 103 Ill. 588; Miller *v.* Lesser, 71 Iowa, 147; State *v.* Pasey, 82 Ind. 543; Kendall *v.* United States, 107 U. S. 123.

[2] Start *v.* Mellish, Atk. 610.

[3] Butler *v.* Howe, 13 Me. 397; Keeton *v.* Keeton, 20 Mo. 530; Jordan *v.* Thornton, 7 Ga. 517; Demarest *v.* Wynkoop *ante*.

[4] Andrews *v.* Hartford, &c. R. R. Co., 34 Conn. 57; Hobart *v.* Conn. Turnpike Co., 15 Conn. 145.

as possible,[1] and usually, unless otherwise provided by statute, on the pleadings previously to the hearing, and that it will not be raised by the court unsolicited;[2] and, also, that the protection afforded by the

[1] In France, the objection may be taken at any stage of the proceedings. Code Civil, 2224. And such also is the provision in Louisiana. 4 Griffith's Annual Law Reg. 686. But generally in this country it must be interposed at the earliest opportunity. McIver *v.* Moore, 1 Cranch (U. S. , 90 ; Wilson *v.* Tubervine, id. 492 ; Marsteller *v.* McLean, id. 55 ; Thompson *v.* Affick, 2 id. 46 ; Beatty *v.* Van Ness, id. 67. If, however, a new declaration or complaint is filed, setting up a new cause of action, the statute runs until such new declaration is filed, and may be pleaded thereto. Holmes *v.* Trout, 7 Pet. (U. S.) 171 ; Miller *v.* McIntyre, 6 id. 61. And if new parties are brought in as defendants, the statute runs as to them until they are actually cited in, and they may plead it, although, as to the original defendants, it has not run. Alexander *v.* Pendleton, 8 Cranch (U. S.), 462 ; Miller *v.* McIntyre, *ante*. And the same rule has been applied where the declaration in an action of ejectment has been amended by adding a new demise in the name of another party asserting a different title. Sicard *v.* Davis, 6 Pet. (U. S.) 124. In an early English case it was held that the statute was an absolute bar to a claim upon which it had run, and consequently that it operated as a bar to an action by its own force, and without being pleaded. Brown *v.* Hancock, Cro. Car. 115. But the question coming before the court soon afterwards, the judges were equally divided on the question. Frankersley *v.* Robinson, id. 163. And still later it became well settled that a person could not avail himself of the statute unless he set it up by plea. Puckel *v.* Moore, Vent. 191 ; Gould *v.* Johnson, 2 Ld. Raym. 838 ; Kirkman *v.* Siboni, 4 M. & W. 339 ; Brickett *v.* Davis, 21 Pick. (Mass.) 404 ; Robbins *v.* Harvey, 5 Conn. 335 ; Pegram *v.* Staltz, 67 N. C. 144 ; Pearsall *v.* Dwight, 2 Mass. 87 ; Chambers *v.* Chambers, 4 G. & J. (Md.) 349 ; Parker *v.* Irwin, 47 Ga. 405 ; Merryman *v.* State, 5 H. & J. (Md.) 425 ; Jackson *v.* Varick, 2 Wend. (N. Y.) 294. And even in those States where it is held that a person may avail himself of the statute by demurrer, it is held that, unless the bar appears from the declaration, the statute must be pleaded. Davenport *v.* Short, 17 Minn. 24 ; Frosh *v.* Sweet, 2 Tex. 485 ; Sturges *v.* Burton, 8 Ohio St. 215 ; Lewis *v.* Alexander, 51 Tex. 578. That the statute must be pleaded, see Capen *v.* Woodrow, 51 Vt. 106 ; Hines *v.* Potts, 56 Miss. 346. But it has been held that in actions against the government, under a statute authorizing a claimant to sue it if his action was brought within six years from the time the right of action accrued, the courts were bound to take notice of the statute, and that the statute itself in such cases is in effect a plea of the statute of which the courts are bound to take notice. But in such cases it will be observed that the statute confers the right of action and subjects the right to a condition, viz. that suit shall be brought within a certain time ; and, unless the condition is not complied with, the right does not exist. Kendall *v.* United States, 14 Ct. of Cl. (U. S.) 122.

[2] To be available, the statute must be pleaded or interposed as a bar by answer, where such practice prevails, or by notice under the general issue ; and the proper plea, where the statute is interposed to bar an action upon a simple contract, is *non accrevit infra sex annos*. Parker *v.* Kane, 4 Wis. 1 ; Peck *v.* Cheney, id. 249 ; Humphrey *v.* Persons, 23 Barb. (N. Y.) 313 ; Young *v.* Epperson, 14 Tex. 618 ; Tazewell *v.* Whittle, 13 Gratt. (Va.) 329 ; Havlin *v.* Stevenson, 30 Iowa, 371 ; Offut *v.* Henderson, 1 Cr. (U. S. C. C.) 553 ; The Swallow, Olc. (U. S.) 334 ; Neale *v.* Walker, 1 Cr. (U. S. C. C.) 57 ; McIver *v.* Moore, id. 90 ; Gardner *v.* Lindo, id. 78 ; Rivers *v.* Washington, 34 Tex. 267 ; Robbins *v.* Harvey, 5 Conn. 335 ; Pegram *v.* Stoltz, 67 N. C. 144 ; Wisecarver *v.* Kincaid, 83 Penn. St. 100 ; Parker *v.* Irwin, 47 Ga. 405 ; Robinson *v.* Allen, 37 Iowa, 27 ; Tarbox *v.* Adams County, 34 Wis. 558. In Retzer *v.* Wood, U. S. S. C., Nov., 1883, it was held that in the absence of a statutory rule to the contrary,

statute may be waived by the debtor, the best possible proof of such waiver being a payment. It is probable, however, that this rule is applicable solely to cases where by the statute the remedy only, not the right, is destroyed.[1]

the defence of a statute of limitations, which is not raised either in pleading, or on the trial, or before judgment, cannot be availed of. In a suit to recover back internal revenue taxes, tried by the Circuit Court without a jury, the court having found the facts, and held that the taxes were illegally exacted, but that the suit was barred by a statute of limitation, rendered a judgment for the defendant. On a writ of error by the plaintiff, the record not showing that the question as to the statute of limitations was raised by the pleadings, or on the trial, or before judgment, and the conclusion of law as to the illegality of the taxes being upheld, the court reversed the judgment and directed a judgment for the plaintiff to be entered below. Storm *v.* United States, 94 U. S. 76; Upton *v.* McLaughlin, 105 id. 640. In New York, under the code, the statute must be set up by way of answer. Sands *v.* St. John, 36 Barb. (N. Y.) 628; Bilrin *v.* Bilrin, 17 Abb. Pr. (N. Y.) 19; Cotton *v.* Manurer, 3 Hun (N. Y.), 552. And the plaintiff cannot avail himself of the statute against a counter-claim unless he replies the statute thereto. Clinton *v.* Eddy, 1 Lans. (N. Y.) 61. But he may interpose the statute agaiust a set-off not the subject of counter-claim, although it is not specially pleaded. Mann *v.* Palmer, 2 Keyes (N. Y.), 177; Jacks *v.* Moore, 1 Yeates (Penn.), 391. In Kentucky, under the code, matters in avoidance of a plea of the statute need not be pleaded, but may be proved. Harris *v.* Moberly, 5 Bush (Ky.), 556. In all cases, unless otherwise provided by statute, the statute of limitations must be specially pleaded, or it is treated as waived. Bordens *v.* Murphy, 78 Ill. 81; Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290; Sears *v.* Shafer, 6 N. Y. 268; Fairchild's Case, 24 Wend. (N. Y.) 381; Boggs *v.* Bard, 2 Rawle (Penn.), 102; Heath *v.* Page, 48 Penn. St. 130; Gullick *v.* Loder, 2 N. J. Eq. 68. And when the statute is pleaded, the plaintiff must reply specially. Webster *v.* Newbold, 41 Penn. St. 482; Brand *v.* Longstreet, 4 N. J. L. 325; Crosby *v.* Stone, 2 id. 988. In Minnesota, the statute must be pleaded, unless the complaint on its face clearly shows that it has run. Davenport *v.* Short, 17 Minn. 24. In Arkansas, while under the Code, § 111, it is optional with a party, where the claim appears to be barred, upon the face of the declaration or complaint, to set up the statute either by demurrer or answer, yet if the complaint shows on its face that the claim is not barred when it in fact is, the defence can only be made by answer. McGehee *v.* Blackwell, 28 Ark. 27. In some of the States it is held that, where the plaintiff's pleadings show on their face that his demand is barred by statute, a demurrer showing the fact can be interposed. Hudson *v.* Wheeler, 34 Tex. 356. But the bar of the statute must appear affirmatively from the plaintiff's pleadings. Moulton *v.* Walsh, 30 Iowa, 361. And the statute can never be interposed by a general demurrer. Rivers *v.* Washington, *ante*. In Ohio, where the bar of the statute appears upon the face of the complaint, advantage of it may be taken by demurrer; but the demurrer is waived by a subsequent answer to the merits. Vose *v.* Woodford, 29 Ohio St. 245; Collins *v.* Mack, 31 Ark. 684. In North Carolina, advantage of the statute cannot be taken by demurrer, but must be set up in the answer. Green *v.* N. C. R. R. Co., 73 N. C. 524.

[1] In Perkins *v.* Guy, 55 Miss. 153, it was held that the statute of the *locus contractus* could not be pleaded in bar in a foreign jurisdiction, where both parties were resident in the place where the contract was made, during the whole statutory time, unless such statute goes to the extinction of the right itself, rather than to the extinction of the remedy. But that, where the right of action is extinguished by the statute of the *locus contractus*, effect will be given thereto by the *lex fori*. In Iowa, by statute, the statute of limitations of another State is a bar to an action upon

Not only must the statute be pleaded, but also, when it is set up in bar of the action, the plaintiff must reply thereto, and set up such matters as he relies upon in avoidance of its operation,[1] and in such a manner as to apprise the defendant of the issue intended to be raised, whether of denial or avoidance;[2] and the plaintiff will be precluded from giving any matter in evidence to avoid the statute, not specially embraced in his plea. Thus, under a replication that the defendant did assume and promise within six years, it has been held that the plaintiff could not show that the defendant had promised not to plead the statute.[3] So where a defendant, in his answer, instead of alleging that the cause of action did not accrue within the prescribed period before the commencement of the action, alleged that he did not at any time within the prescribed period before the commencement of the action undertake, promise, or agree, &c., it was held insufficient to interpose the bar of the statute.[4] And the same is true as to fraud, absence from the State, or indeed any matter that goes in avoidance of the statutory bar.[5] Where a right is not of common law origin, but is given by statute and the statute also prescribes the time within which the right must be enforced, a complaint which on its face shows that the time limited has expired will be insufficient on demurrer.[6] But, where the statute merely

the claim in that State. Davis *v.* Harper, 48 Iowa, 513. In Gans *v.* Frank, 36 Barb. (N. Y.) 320, a doctrine similar to that held in the Mississippi case, *supra*, was held.

[1] Crosby *v.* Stone, 2 N. J. L. 988; Van Dike *v.* Van Dike, 4 N. J. Eq. 289; Jarvis *v.* Pike, 11 Abb. Pr. (N. Y.) N. S. 398; Ford *v.* Babcock, 2 Sandf. (N. Y. S. C.) 518; Witherup *v.* Hill, 9 S. & R. (Penn.) 11; Webster *v.* Newbold, 41 Penn. St. 482; McKelvey's Appeal, 72 id. 409.

In Jex *v.* Mayor, &c. of City of N. Y., 111 N. Y. 389, it was held that the six years' statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction; and it is wholly unnecessary in such a case to set aside the assessment, the cause of action is one of a legal nature only.

In pleading the statute, it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter, to pay the claim after presentation and during which time the claimant is prohibited from bringing suit, has also elapsed.

Diefenthaler *v.* Mayor, &c., 111 N. Y. 331.

[2] Jarvis *v.* Pike, *ante*. The plea must be interposed before issue is joined, and this is the case even when a matter is referred. But if matters are brought up by the plaintiff, of which the defendant first had notice on the trial before a referee or auditor, to such matters the plea may then be interposed, either orally or in writing, by leave of the referee or auditor. When a defendant sets up a counter-claim, the plaintiff must plead the statute thereto, and cannot for the first time set it up before the referee, and the referee has no power to authorize the filing of such a plea. Ripley *v.* Corwin, 17 Hun (N. Y.), 597.

[3] McCulloch *v.* Norris, 5 Penn. St. 285.

[4] McCollister *v.* Willey, 52 Ind. 382.

[5] Bevan *v.* Cullen, 7 Penn. St. 281; King *v.* Baxter, 7 Phila. (Penn.) 186. See *post*, PLEADINGS.

[6] Laird *v.* Laird, 30 Md. 171.

bars the remedy upon a right which exists at the common law, the statute must be pleaded.[1]

In some of the States it is held, that when the complaint on its face shows that the statute has run, it may be availed of by demurrer.[2] In Iowa, it was held, that the defence of the statute cannot be raised by demurrer.[3] In Alabama, it is held, that when the bill or complaint seeks to enforce a claim which on its face is barred by the statute of limitations, but avers partial payments which avoid the bar, the defence of the statute cannot be taken by demurrer.[4] And there would seem to be no good reason why this rule should not be universal; but if no demurrer is filed, and no plea setting up the statute, it cannot be availed of as a defence,[5] as only those pleading the statute can avail themselves of it in defence.[6] In Georgia, it is held, that where it is apparent from the face of the declaration that the suit is barred by the statute, it will be dismissed on motion. As the statute is a purely personal privilege, it follows, as a matter of course, that no one can avail themselves of that privilege except the person who elects so to do by setting up the statute as a defence; and the court cannot of its own motion interpose a plea of the statute.[7] But the rule that the statute must be pleaded applies only where there is an opportunity to plead it.[8] And the court may, in its discretion, allow an amendment setting up the statute as a defence.[9] But as there is serious danger

[1] Cooke *v.* Chambers, 67 Ind. 107.

[2] Wilt *v.* Buchtel, 2 Wash. (U. S.), 417; Thompson *v.* Parker, 68 Ala. 387; Devor *v.* Rerick, 87 Ind. 337; Budd *v.* Walker, 29 Hun N. Y.), 344; Ilett *v.* Collins, 103 Ill. 74; Upton *v.* Steele, 2 Wy. 54; Upton *v.* Mason, 2 id. 55; St. Louis, &c. R. R. Co. *v.* Brown, 4 S. W. (Ark.) 781.

[3] State *v.* McIntyre, 58 Iowa, 72. See also State *v.* Spencer, 70 Mo. 314.

[4] Cameron *v.* Cameron, 82 Ala. 392; Manning *v.* Dallas, 15 Pac. Rep. (Cal.) 34; Walker *v.* Flemming, 37 Kan. 171; Heffernan *v.* Howell, 90 Mo. 344.

[5] Bannon *v.* Lloyd, 64 Md. 48; Cotherman *v.* Cotherman, 58 Mich. 465; Ward *v.* Walkers, 63 Wis. 39; Cooksey *v.* R. R. Co., 17 Mo. App. 172; Childress *v.* Grim, 57 Tex. 56; Bellville Savings Bank *v.* Winslow, 30 Fed. Rep. 488; Sanger *v.* Nightengale, 122 U. S. 176.

[6] Bannon *v.* Lloyd, *ante*; Bridgforth *v.* Payne, 62 Miss. 777.

In this case it was also held that a defendant, having relied on the statute not applicable, cannot have the benefit of one not pleaded.

[7] Smith *v.* Hutchinson, 78 Va. 683. Sanger *v.* Nightengale, 122 U. S. 176; Ewell *v.* Daggs, 108 U. S. 143. In this case the court said that, although a subsequent purchaser might set up a plea of the statute, the plea must show that the action is barred as between the parties to the debt, because as the owner of the equity of redemption it is that debt he has to pay. The statute does not operate as a discharge of the debt, but operates as a mere limitation upon the remedy preventing the creditor from enforcing his claim after the statutory period has elapsed, provided the debtor sees fit to avail himself of it. The statute does not destroy the right of action, but only defeats a remedy for the enforcement of the claim. Harris *v.* Gray, 49 Ga. 585; Parker *v.* Erwin, 47 Ga. 2; Baker *v.* Bush, 25 Ga. 594; George *v.* Gardiner, 49 Ga. 491.

[8] Dreutzer *v.* Baker, 60 Wis. 179.

[9] Smith *v.* Dreigert, 61 Wis. 222.

that the exercise of this discretion may be abused, the courts will only exercise it in extreme cases.[1]

In the case last cited it was held, that where a person pleads the statute by way of defence, he must be presumed to intend to plead the statute applicable to his case. But in a case cited from Mississippi,[2] it was held, that where a defendant relied on a statute not applicable, he cannot have the benefit of one not pleaded which might be applicable.

SEC. 8. **The Law of Limitations a Part of the Lex Fori.** — It is a well-settled rule, that personal contracts are to be interpreted by the law of the place where they are made; and it is a rule equally well settled, that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place of the contract. The reason of this rule, according to STORY, J.,[3] is obvious. "Courts of law," says he, "are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order from mere comity to any foreign nation. As a rule, statutes of limitation are to be considered to fall within these remarks. They go *ad litis ordinationem*, not *ad litis decisionem*. In cases, therefore (except where provision is otherwise made by statute), where an action is brought in one country or State upon a contract made in another, a plea of the statute of limitations existing in the place of contracts is not a good bar, but a plea of the statute existing in the country or State where the action is brought, is."[4] This rule is in conformity with the universal

[1] Morgan *v.* Bishop, 61 Wis. 407.

[2] Bridgforth *v.* Payne, 62 Miss. 777.

[3] In Le Roy *v.* Crowningshield, 2 Mas. (U. S.) 151.

[4] In Duplex *v.* De Roven, 2 Vern. 540, is to be found the first authority that statutes of limitation go *ad litis ordinationem* and not *ad litis decisionem*. In that case, a bill in equity for discovery of assets and satisfaction of the plaintiff's debt, which was a judgment obtained in France, was brought. The defendant set up the English statute of limitations in bar of the claim, which was allowed by the Lord Keeper, and this decree was confirmed on a rehearing. The question was made at law, and LORD ELLENBOROUGH said: "It is said that parties who have contracted abroad return to this country with the same rights which they had in the country where they so contracted; and, generally speaking, that is so, — that is, if the rights of the contracting parties be extinguished by the foreign law, by the happening of certain events. But here there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right; and there is no law or authority that where there is an extinction of the remedy only in the foreign court, that shall operate, by comity, as an extinction of the remedy here also. If it goes to the extinction of the right itself, the case may be different." Campbell *v.* Stein, 8 Dowl's Par. 116. The uniform administration of the law has been that the *lex loci contractus* expounds the obligations of contracts, and a statute of limitations prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertains *ad tempus et modum actionis instituendæ*, and not *ad valorem contractus*. Townsend *v.* Jameson, 9 How. (U. S.) 407; United States *v.* Donelly, 8 Pet. (U. S.) 361. In Dash *v.* Tup-

rule that, as the statute operates merely upon the remedy, the law of the *forum*, and not the law of the *situs* of the contract, controls.[1] But,

per, 1 Cai. (N. Y.) 402, in an action upon a note, the statute of limitations of New York was pleaded, and the plaintiff replied that the note was made in Connecticut, where the statute was seventeen years, whereas in New York it was only six years. The court held this replication bad on demurrer. In Scotland it has been held that, as to process brought there to recover an English debt, the statute of prescription in England cannot be pleaded, but that it may be pleaded to infer a presumption of payment; and the plaintiff will be permitted by positive evidence to overcome this presumption by contrary presumptions, or to show from the circumstances of the case that payment cannot be presumed. Kame's Principles of Equity, c. 8, p. 369. But this doctrine does not prevail in this country. WAYNE, J., in Townsend *v.* Jameson, 9 How. (U. S.) 407, in a very able and exhaustive opinion, says: "Most of the civilians, however, did not lose sight of the difference between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them as to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitations in suits upon contracts only relate to the remedy. But that was not done; and from some expressions of POTHIER and LORD KAMES, it was said, 'If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive to every other place as in the place of the contract.' . . . But neither POTHIER nor LORD KAMES meant to be understood that the theory of statutes of limitations purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made," but only that the presumption is in favor of the party pleading the statute. Bigelow *v.* Ames, 18 Minn. 537. In Miller *v.* Brenhaur, 7 Hun (N. Y.), 330, in an action upon a foreign judgment, it was held that the statute of the State in which the judgment was rendered could not be set up to defeat the action in New York, as the statute is local. Hubbell *v.* Cowdrey, 5 Johns. (N. Y.) 132; Bissell *v.* Hall, 11 id. 168; Ruggles *v.* Keeler, 3 id. 264; Carpenter *v.* Wells, 21 Barb. (N. Y.) 593; Power *v.* Hathaway, 43 id. 214; Toulandau *v.* Lachmeyer, 7 How. Pr. (N. Y.) 145. In Loveland *v.* Davidson, 3 Penn. L. J. 377, an action was brought in Pennsylvania upon a judgment obtained before a justice of the peace in New York, which was barred by the statute of limitations of that State. Held, that it was not a bar to an action thereon in Pennsylvania. Murray *v.* Fisher, 5 Lans. (N. Y.) 98.

[1] McCluny *v.* Silliman, 3 Pet. (U. S.) 270; Townsend *v.* Jennison, 9 How. (U. S.) 407; Thibodeau *v.* Levasser, 36 Me. 362; Le Roy *v.* Crowningshield, 2 Mas. (U. S.) 151; Jones *v.* Hays, 4 McLean (U. S.), 521; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312; Nicolls *v.* Rodgers, 2 Paine (U. S.), 437; Egberts *v.* Dibble, 3 McLean (U. S.), 86; Miller *v.* Brenham, 68 N. Y. 83; Mayer *v.* Freedman, 7 Hun (N. Y.), 218. In Loveland *v.* Davidson, 3 Penn. L. J. Rep. 377, in an action on a judgment obtained before a justice in New York, the defendant set up the New York statute of limitations in defence. The court held that the plea was bad, and that the *lex fori*, and not the *lex contractus*, governed. And even in those States where by statute the statute of another State may be set up to bar the action, the right to rely on the defence must be affirmatively shown by the answer. Gillett *v.* Hall, 32 Iowa, 226. This question was raised in Miller *v.* Brenham, 7 Hun (N. Y.), 330. In this case an action was brought against the defendant upon a judgment obtained against him in California. It was contended that the action was too late, because by the statute of California an action upon any judgment of the courts of the United States, or of any State and Territory, was required to be commenced within five years from its rendition, where-

if the statute extinguishes the right itself, it may be set up as a bar to an action thereon wherever brought.[1] This rule is forcibly illustrated in another way, and that is, that where by the laws of the *forum* a shorter period for the limitation of a claim is fixed than by the law of the *situs* of the contract, the statute of the *forum* will bar the claim if the party setting it up brings himself within it, although the statute of the place of contract has not run. Thus, in Massachusetts, a witnessed note is not barred until the lapse of twenty years; but in New York no distinction is made between a witnessed note and any other; and in an action in the latter State upon a witnessed note made in Massachusetts and payable there, it was held that the statute of New York run upon it in six years.[2]

There is a distinction as suggested by STORY, J., in his Conflict of Laws, and as suggested in reference to the preceding rule, in cases where the right as well as the remedy of the claimant is barred by the law existing at the place of contract.[3] This, however, is not perhaps a fre-

as nearly eight years had elapsed since the judgment in action was obtained. Under this statute, if the action was not brought within five years, the judgment was neither discharged nor extinguished, but the party was simply deprived of his remedy. The court, in denying this defence, said: "The statute did not affect the remedy in any other respect, and consequently it cannot be allowed to control the proceedings in this State, brought for the collection of the judgment. The effect of statutes relating alone to the remedy is necessarily local, and this is a provision of that description. In this State an action upon the judgment could only be barred by showing that the defendant had resided here for the length of time required for that purpose by the terms of our statute." Hendricks *v.* Comstock, 12 Ind. 238; Watson *v.* Brewster, 1 Penn. St. 381; Paine *v.* Drew, 44 N. H. 306; Hubbell *v.* Cowdrey, 5 Johns. (N. Y.) 132; Bissell *v.* Hall, 11 id. 168; Ruggles *v.* Keeler, 3 id. 264; Carpenter *v.* Wells, 21 Barb. (N. Y.) 293; Power *v.* Hathaway, 43 id. 214; Toulandau *v.* Lachmeyer, 37 How. Pr. (N. Y.) 145. In Putnam *v.* Dike, 13 Gray (Mass.), 535, the court held that, although the debt arose forty years before action was brought thereon, it was not barred without proof that the defendant has ever been in the State; and in Lawrence *v.* Bassett, 5 Allen (Mass.), 140, it was held that a note is not barred by the statute although overdue for more than six years, although the maker was once a resident of the State, but has lived out of it ever since the action accrued. Walworth *v.* Routh, 14 La. An. 205; Garraway *v.* Hopkins, 1 Head (Tenn.), 583; Putnam *v.* Dike, 13 Gray (Mass.), 535; Bulger *v.* Roche, 11 Pick. (Mass.) 36; Flowers *v.* Foreman, 23 How. (U. S.) 132; Carson *v.* Hunter, 46 Mo. 467; Stage Wagon Co. *v.* Mathieson, 3 Dak. 233.

[1] Gans *v.* Frank, 36 Barb. (N. Y.) 320; Perkins *v.* Guy, 55 Miss. 153. The rule may be said to lead to these results: the statute of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its jurisdiction, but the statute of the State where the contract was made cannot be pleaded. But when the statute of the place where the contract was made operates to extinguish the contract or debt itself, and the contract is sued upon in another State, the statute of the *lex loci contractus*, and not of the *lex fori*, controls. McMerty *v.* Morrison, 62 Mo. 140; McArthur *v.* Goddin, 12 Bush (Ky.), 274; Jones *v.* Jones, 18 Ala. 248; Cobb *v.* Thompson, 1 A. K. Mar. (Ky.) 507; Harper *v.* Hampton, 1 H. & J. (Md.) 622; Fletcher *v.* Spaulding, 9 Minn. 64.

[2] Nicolls *v.* Rodgers, 2 Paine (U. S.), 437.

[3] Carpenter *v.* Minturn, 6 Lans. (N. Y.) 56; Gans *v.* Frank, 36 Barb. (N. Y.) 320; Perkins *v.* Guy, 55 Miss. 155. In McMerty *v.* Morrison, 62 Mo. 140, the court

quent case in regard to personal actions. In all cases touching realty the *lex rei sitæ* prevails.[1]

STORY, J., in a case previously cited,[2] stated the inclination of his mind to be, that, where the statute of the *loci contractus* barred all remedy upon the claim, "there is a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity;" although the decision in the case was adverse to this view. At a later period he wrote his work on The Conflict of Laws, and from what he there says, it is evident that he changed his views in this respect. He says: "It may be stated that, as the law of prescription of a particular country, even in case of a contract made in such country, forms no part of the contract itself, but merely acts upon it *ex post facto*, in case of a suit, it cannot properly be deemed a right stipulated for or included in the contract."[3] SHAW, C. J., in a Massachusetts case,[4] treated the rule as well settled as stated in the text, but intimated that, if it was an open question, it might be attended with some difficulty. In a later case, it was held that an action for breach of promise of marriage brought by a foreigner within six years after coming to this country was not barred, although the promise was made more than twenty years previously in her native country.[5] In some of the States provision is made by statute that, in certain cases, and subject to certain conditions, the statute of another State, where the defendant has resided for the requisite period to bar the claim, may be interposed as a bar in the State where action is brought. This is the case in Massachusetts, Nebraska, Nevada, Kansas, Oregon, Iowa, Texas, Florida, and Ohio.[6] And in Wisconsin it is held that when both parties reside

say: "The statute of limitations of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its political jurisdiction, but the statute of the place where the contract was made cannot be pleaded. But when the statute of limitations where the contract was made operates to destroy or extinguish the right or debt itself, and the contract is sued in another State, the *lex loci contractus*, and not the *lex fori*, governs. Fears *v.* Sykes, 35 Miss. 633. When a right of action has expired by limitation of the statute of another State by which alone the right is created, no action can be maintained thereon in another State. Halsey *v.* McLean, 12 Allen (Mass.), 439.

[1] Pitt *v.* Lord Dacre, L. R. 3 Ch. D. 295; Story on Conflict of Laws, 581.

[2] Le Roy *v.* Crowningshield, 2 Mas. (U. S. C. C.) 151.

[3] Story on Conflict of Laws, 583.

[4] Bulger *v.* Roche, 11 Mass. 36.

[5] Goetz *v.* Voelinger, 99 Mass. 504. But now the rule is otherwise by statute of 1880, c. 98, and Stat. 1882, p. 1115. In Atwater *v.* Townsend, 4 Conn. 47, it was held that neither the statute of limitations nor a discharge under the insolvent laws of the *lex loci contractus* can be set up to bar a remedy. See Smith *v.* Spinola, 2 Johns. (N. Y.) 196; Sicard *v.* Whale, 11 id. 194; Whitmore *v.* Adams, 2 Cow. (N. Y.) 626; Shervell *v.* Hopkins, 1 id. 103; Beckwith *v.* Angell, 6 Conn. 322; Woodbridge *v.* Wright, 3 id. 523; Smith *v.* Healy, 4 id. 49. The last two cases relate to a discharge under insolvent laws.

[6] Nebraska Gen. Stat. c. 55, tit. 11; Nevada Comp. Laws, c. 50, § 33; Indiana Rev. Stat. 1872; Kansas Gen. Laws, c. 26, tit. 2, § 28; Oregon Gen. Laws, c. 1, tit. 11, § 26; Iowa Code, tit. 19, c. 99, § 1665; Massachusetts Stat. 1882, p. 1115;

therein until a debt is barred or a title made, the right is extinguished so that it would be a defence in another State.[1] Under these saving statutes, where a right is completely barred under the statutes of another State or country, it forms a valid defence in the State in the statute of which such saving clause exists.[2] But, in order to avail himself of that defence, it must be affirmatively stated in the plea or answer, and must be fully established by the defendant by proof, showing that the statute of the State relied on has fully run upon the claim, and that the conditions required to make such statute a bar existed. Independent of any such statutory provision, the rule is well settled, that when the citizen of one State seeks a remedy upon a contract or claim in the forum of another State, he thereby impliedly submits to all the laws of such State relating to the remedy, and has no cause of complaint if those laws deprive him of advantages that he might have had under the laws of his own State.[3] It is a rule of law,

Texas, Harr. Dig., Laws of Texas, 2389; Florida, Thomp. Dig. c. 2; Ohio, Statute of Ohio, 1841, § 4. See Appendix.

[1] Brown *v.* Parker, 28 Wis. 21; Knox *v.* Cleaveland, 13 id. 245.

[2] State *v.* Ladd, 1 Biss. (U. S. C. C.) 69; Harris *v.* Harris, 38 Ind. 402; Van Dorn *v.* Bodley, id. 402; Hoggett *v.* Emerson, 8 Kan. 262. In Nebraska, when a cause of action is fully barred by the law of another State where the defendant had previously resided, it also is a bar there. In Nevada, where a cause of action arose in another State or country, and by the law thereof an action cannot be maintained upon it there, no action can be maintained thereon in Nevada. A similar provision exists in the statute of Kansas. In Ohio and Oregon, when the cause of action arose out of the State, and between non-residents, and by the laws of the State or country where the cause of action arose an action cannot be maintained thereon, no action can be maintained thereon in those States. In Iowa, when a claim is barred by the laws of any State or country where the defendant has previously resided, it is also barred there. In Texas, the provision is similar to that in Oregon. In Florida, an inhabitant or resident of that State may set up the statute of the State where the contract was made, in bar.

[3] Blackburn *v.* Merton, 18 Ark. 384. The statute of a State acting upon the title to personal property may be set up in a foreign jurisdiction, as it relates to the right rather than to the remedy. Fears *v.* Sykes, 35 Miss. 633; but except where the statute extinguishes the right of action, in the absence of any such statutory provision in the State where action is brought, only the statute of such State can bar the remedy. Urton *v.* Hunter, 2 W. Va. 83; Decouch *v.* Lavetier, 3 Johns. Ch. (N. Y.) 190; Gassaway *v.* Hopkins, 1 Head (Tenn.), 383; Crawford *v.* Childress, 1 Ala. 482; King *v.* Lane, 7 Mo. 241; Egberts *v.* Dibble, 3 McLean (U. S.), 86; Cartier *v.* Paige, 8 Vt. 150; Jones *v.* Hayes, 4 McLean (U. S.), 521; Estes *v.* Kyle, Meigs (Tenn.), 34; State *v.* Swope, 7 Ind. 91; Pegram *v.* Williams, 4 Rich. (S. C.) 219; Thibodeau *v.* Levasseur, 36 Me. 362; Bissell *v.* Hall, 11 Johns. (N. Y.) 168; Woodbridge *v.* Austin, 2 Tyler (Vt.), 364; Wilkinson *v.* Holloway, 7 Leigh (Va.), 277; Thompson *v.* Tioga, &c. R. R. Co., 36 Barb. (N. Y.) 79; Paine *v.* Drew, 44 N. H. 306; Crocker *v.* Avery, 3 R. I. 178; Cobb *v.* Thompson, 1 A. K. Mar. (Ky.) 507; Flower *v.* Foreman, 23 How. (U. S.) 132; Harper *v.* Hammond, 1 H. & J. (Md.) 622; Richards *v.* Bickley, 13 S. & R. (Penn.) 395; Ruggles *v.* Keeler, 3 Johns. (N. Y.) 263; Bruce *v.* Luck, 4 Greene (Iowa), 143; Hawkins *v.* Barney, 5 Pet. (U. S.) 457; Jones *v.* Hook, 2 Rand. (Va.) 403; Pearsall *v.* Dwight, 2 Mass. 84; Ward *v.* Hallam, 1 Yeates (Penn.), 329; Toulandau *v.* Lachmeyer, 37 How. Pr. (N. Y.) 145; Levy *v.* Boas, 2 Bailey (S. C.), 217; Hinton *v.* Townes, 1 Hill (S. C.), 439;

too universally conceded to need supporting authorities, that contracts are to be construed according to the *lex loci contractus*, but that they are to be enforced according to the *lex fori*. This distinction is by no means peculiar to the common law, but is found in other municipal codes which adopt the civil law as their basis.[1] "Præscriptia et executio," says HUBERUS, "non pertinent ad valorem contractus sed ad tempus et modum actionis instituendæ, ad eo que recepta est optima ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato spectetur."[2] We have already seen that so much of the law of a foreign country as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of that country where the action is brought. The time of limitation of actions therefore is governed by the law of the country where the action is brought, and not by the *lex loci contractus*. But where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title, or cause of action itself, *ipso facto*, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction during the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy. By the French law, all rights of action relative to letters of exchange and bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, expire in five years, reckoning from the day of protest or from the last suing out of any judicial process, if there has been no judgment, or if the debt has not been acknowledged by any separate act. But the alleged debtors are held, if required, to affirm on oath that they are no longer indebted, and their widows, heirs, &c., that they *bona fide* believe there is no longer anything due. The French law of limitation, therefore, does not extinguish or annul the contract, but operates upon the remedy only. If, therefore, a party

Graves *v.* Graves, 2 Bibb (Ky.), 207. In Louisiana, the statute of another State may be set up to defeat an action upon two conditions: 1st, when the debt accrued between parties, both of whom resided out of the State, and where the debt was to be paid out of the State; and, 2d, where the defendant removes to the State after the statute bar has become complete. Walworth *v.* Routh, 14 La. An. 205. Sustaining the doctrine of the text, see Jones *v.* Jones, 18 Ala. 248; Medbury *v.* Hopkins, 3 Conn. 472; Hendricks *v.* Comstock, 12 Ind. 238; Fletcher *v.* Spaulding, 9 Minn. 64. And in those States where the statute lets in the statute of another State to bar the remedy, it is necessary that the statute bar of such State should be complete. Hays *v.* Cage, 2 Tex. 505; Smith *v.* Crosby, id. 414. And time that has partly run in one State cannot be tacked to the time that has run in the State where the action is brought to complete the bar. Perry *v.* Lewis, 6 Fla. 555.

[1] Traite de Assurance, c. 4.

[2] Prælec. de Conflicti Legum, vol. ii. Lib. 1.

who has contracted in France removes to this country, and is sued here upon the contract, the action will be governed by the law of the State in which the action is brought, and not by the French law of limitation of actions.[1]

SEC. 9. **Distinction where a Statute gives and limits the Remedy.** — There is an important distinction to be observed in the application of this rule. When the statute of a particular State or country gives a remedy which did not exist at common law, and at the same time limits the period within which action therefor shall be brought, the period of limitation thus named controls in whatever jurisdiction action may be brought.[2] A contrary rule would result in upholding a right of action where none existed by virtue of the common law, simply because the statutes of a foreign jurisdiction gave a remedy, although in fact, under such statute, the remedy was lost. Thus, in the case first cited in the preceding note, an action was brought in the United States Court for the Eastern District of Michigan by an administrator for the death of his testator by the explosion of a steamboat boiler. The explosion took place in the Province of Ontario; and, under a statute existing there, a remedy was given to an administrator or executor of a person whose death was caused by the negligence of another, if there would have been a liability therefor at the common law if death had not ensued. But this right of action existed only subject to the provision that "every such action shall be commenced within twelve months after the death of such deceased person." The action was not brought within twelve months after the testator's decease; and the court held that while an action under such a statute could be maintained in another State or country,[3] yet it could only be maintained subject to all the limitations and conditions imposed by the statute, and that the plaintiff must show that he has complied with all such conditions and limitations in every particular, or his action will fail. In creating the right, the legislature has the power to impose upon it any restrictions it sees fit, and the conditions so imposed qualify the right, and are an integral part thereof; they are conditions precedent, so to speak, that must be fully complied with, or the right does not exist. Such rights being in derogation of the common law, all restrictive language is construed against it.[4] It seems, also, that where such a right is given by statute, and a limitation is therein imposed as to the time within which the action shall be brought, and subsequent to the time

[1] Huber *v.* Steiner, 2 Sc. 326; British Linen Co. *v.* Drummond, 10 B. & C. 903; Le Roux *v.* Brown, 12 C. B. 801; Ruckmaboye *v.* Mottichund, 8 Moo. P. C. 4.

[2] Boyd *v.* Clark, U. S. C. C. (Mich.) October Term, 1881, reported 24 Alb. L. J. 508; Eastwood *v.* Kennedy, 44 Md. 563; Baker *v.* Stonebroker, 36 Mo. 349; Huber *v.* Steiner, 2 Bing. N. C. 202; Halsey *v.* McLean, 12 Allen (Mass.), 439.

[3] See to that effect Eastwood *v.* Kennedy, 44 Md. 563; Huber *v.* Steiner, 2 Bing. N. C. 202; Baker *v.* Stonebroker, 36 Mo. 349; Dennick *v.* Railroad Co., 103 U. S. 11.

[4] Pittsburgh, C., & St. Louis R. R. Co. *v.* Hine, 25 Ohio St. 629.

when a right accrued thereunder the right is enlarged or restricted, and the limitation clause is repealed, that the right can only be enforced under the statute as it stood when it accrued, and subject to all its conditions and limitations.[1]

SEC. 10. **Rule when Title to Personal Property is acquired by Possession under the Statute of a State.** —When personal property is held adversely in one State for a sufficient length of time to acquire a title thereto, under a statute existing relative thereto, there can be no reason why the title so acquired should not be recognized in every State, although the statute of such other State requires a longer possession, or, in fact, although no title by possession can ever be acquired to personal property in such other State; and such seems to be the rule.[2] In such a case, lapse of time not only bars the remedy, but also extinguishes the right to the property in question; and in such cases, as we have already seen, the courts recognize the statute of the foreign jurisdiction as controlling the rights of the parties.[3] In a case in the United States court[4] this question was ably considered, and the doctrine stated in the text is vindicated upon the ground that there is an essential distinction between a statute giving title by possession and one simply limiting the remedy. In the one case the right is extinguished, while in the other the right still exists, but the remedy therefor is taken away. In a case previously cited[5] in the same court this question was directly raised in a case where the possession of a slave was sought to be obtained in an action of detinue, and it was held that, as the laws of Virginia provided that five years' *bona fide* possession of a slave shall constitute a good title thereto, and as the vendee's vendor had acquired such title under that statute, he might set up such title in the courts of Tennessee as a defence to an action there brought to recover such slave.[6]

SEC. 11. **Constitutionality of Limitation Acts.** — Before proceeding to discuss the numerous questions arising under these statutes, it is advisable to ascertain how far, under the clause of the Constitution providing that no State shall pass any law impairing the obligation of contracts, the legislature of the several States may go in imposing or varying limitations affecting contracts then existing.

[1] Pittsburgh, C., & St. Louis R. R. Co. *v.* Hine, 25 Ohio St. 629.

[2] Shelby *v.* Guy, 11 Wheat. (U. S.) 361; Bracon *v.* Bracon, 5 Ala. 508; Goodman *v.* Monks, 8 Port. (Ala.) 84, 130; Fears *v.* Sykes, 35 Miss. 633; Blackburn *v.* Morton, 18 Ark. 384; Cargill *v.* Harrison, 9 B. Mon. (Ky.) 518. But see Jones *v.* Jones, 18 Ala. 248; Newby *v.* Blackley, 3 H. & M. (Va.) 57; Townsend *v.* Jameson, 9 How. (U. S.) 407. See also Story on Conflict of Laws, § 582, where that eminent author suggests this exception.

[3] Perkins *v.* Guy, *ante;* Gans *v.* Frank, *ante;* Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475; Beckford *v.* Wade, 17 Ves. 87; De La Vega *v.* Vianna, 1 B. & Ad. 284; Don *v.* Lipmann, 1 Cl. & F. 1; British, &c. Co. *v.* Drummond, 10 B. & C. 903.

[4] Townsend *v.* Jameson, 9 How. U. S.) 407; Brent *v.* Chapman, 5 Cranch (U. S.), 358.

[5] Shelby *v.* Guy, *ante.*

[6] See also to the same effect Brent *v.* Chapman, *ante;* Brown *v.* Brown, *ante;* Newby *v.* Blackley, *ante.*

It may be said that the obligation of a contract is the law that binds the party to perform his undertaking, and consists in the power and efficacy of the law which applies to and enforces performance, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself *proprio vigore*, but in the law applicable to the contract;[1] therefore, where rights are acquired, and have vested under a statute, they cannot be divested by a repeal or modification thereof.[2] But statutes relating merely to the remedy upon

[1] Ogden *v.* Saunders, 12 Wheat. (U. S.) 318; Lapsley *v.* Brashear, 4 Litt. (Ky.) 47; Blair *v.* Williams, id. 34; Sohn *v.* Watterson, 17 Wall. (U. S.) 596. In Harris *v.* Grey, 49 Ga. 585; Davidson *v.* Lawrence, id. 335; Kimbro *v.* Bank of Fulton, id. 419; George *v.* Gardner, id. 441, it was held that a limitation act passed March 16, 1869, barring after Jan. 1, 1870, actions the right whereof accrued prior to June 1, 1869, is not unconstitutional. Bentwick *v.* Franklin, 38 Tex. 358. In De Moss *v.* Newton, 31 Ind. 219, the court say: "Where a right springs, not from a contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought, and neither the fact that the period is short or long is one which will enable the court to declare the act void for unreasonableness. Adamson *v.* Davis, 47 Mo. 268. In Korn *v.* Brown, 64 Penn. St. 55, the section of the Pennsylvania statute barring a recovery on ground-rents, unless brought within twenty-one years, was held constitutional although retrospective. A statute that provides that the statute shall not run against the plaintiff if he resides in the State, but shall if he resides out of it, is held not to violate the provisions of the Federal Constitution, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Chemung County Bank *v.* Lowery, 93 U. S. 72. And the same has been held as to statutes barring judgments obtained in other States. Meek *v.* Meek, 45 Iowa, 294. That the statute may provide different periods of limitations as to non-residents, see Hawse *v.* Burgmire, 4 Col. 313. In Georgia, the question as to whether a statute of limitations applying to debts existing at the time of its passage violated the provisions of the constitution of that State inhibiting laws impairing the obligations of a contract was raised in several cases, and the court held that it did not. That these statutes simply relate to the remedy, and do not affect the obligations of the contract, see Davidson *v.* Lawrence, 49 Ga. 335; Harris *v.* Grey, id. 585; Kimbro *v.* Fulton Bank, id. 419; George *v.* Gardner, id. 441. This question was also raised in the United States Supreme Court, and was similarly decided, Sohn *v.* Watterson, 17 Wall. (U. S.) 596, the court observing that ordinarily the true rule for applying these statutes to rights of action already accrued is to allow the party the statutory time for suing, computing it from the passage of the act, and to consider the limitation as commencing at the time when the cause of action is first subjected to the operation of the statute.

[2] Southard *v.* Central R. R. Co., 26 N. J. L. 13; Benson *v.* The Mayor, 10 Barb. (N. Y.) 223; Houston *v.* Boyle, 10 Ired. (N. C.) 496; Oriental Bank *v.* Freize, 18 Me. 109; Coffin *v.* Rich, 45 id. 507; Davis *v.* O'Ferrall, 4 Greene (Iowa), 168. In Girdner *v.* Stephens, 1 Heisk. (Tenn.) 280, sec. 4 of the schedule of the amended constitution of 1865, and sec. 4 of the schedule of the new constitution of 1870, and the act of May 30, 1865, c. 10, § 1, so far as their terms and effect authorized the bringing of an action to recover on claims of any kind which by existing laws were already barred, was held unconstitutional, because interfering with vested rights. See Adamson *v.* Davis, 47 Mo. 268, also 272 and 273. To the same effect, Thompson *v.* Read, 41 Iowa, 48; Pitman *v.* Bump, 5 Oregon, 17.

a contract are not vested rights, and consequently do not impair the obligation of contracts,[1] consequently the remedy of a party upon an existing contract may be changed, although the law effecting the change affects actions then pending.[2] Statutes of limitation relate only to the remedy,[3] and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action;[4] but it cannot limit existing

[1] Oriental Bank *v.* Freize, *ante;* Read *v.* Frankfort Bank, 23 Me. 318; Evans *v.* Montgomery, 4 W. & S. (Penn.) 218; Hope *v.* Johnson, 2 Yerg. (Tenn.) 125; Curry *v.* Sanders, 35 Ala. 280; Oliver Lee & Co.'s Bank, 21 N. Y. 9; Cutts *v.* Hardee, 38 Ga. 350; Hope *v.* Johnson, 2 Yerg. (Tenn.) 123; Cook *v.* Grey, 2 Houst. (Del.) 454; Ralston *v.* Lothair, 18 Ind. 303. "If," says the court in Terry *v.* Anderson, 95 U. S. 628, "the legislature may prescribe a limitation where none existed before, it may change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced." The legislature may bar actions upon judgments of other States. Meek *v.* Meek, 45 Iowa, 294.

Upon the general proposition and holding that the legislature has power to change the period of limitations as to all claims not already barred, allowing a reasonable time for bringing actions thereon, is valid, see Hyman *v.* Bayne, 83 Ill. 256; Dyer *v.* Gill, 32 Ark. 410; Pearsall *v.* Kenan, 79 N. C. 472; People *v.* Wayne Co. Judge, 37 Mich. 287; Sampson *v.* Sampson, 63 Me. 328; Krone *v.* Krone, 37 id. 308; Johnson *v.* Railroad Co., 54 N. Y. 416. And even though no provision therefor is made in the new law, if it does not expressly take away such right, it will be construed as giving a reasonable time after its passage before existing claims are barred. Dale *v.* Frisbie, 59 Ind. 520; Button *v.* Guy, 12 S. C. 42. That legislature may give a statute a retroactive effect, see Ludwig *v.* Stewart, 32 Mich. 27; Horbach *v.* Miller, 4 Neb. 31. Whatever may be the rule as to contracts, the legislature has unrestricted power to change the period of limitations as to actions *ex delicto.* Guilotell *v.* Mayors, 55 How. Pr. (N. Y.) 114. And the same is also true as to all rights created by statute. De Moss *v.* Newton, 31 Ind. 219.

[2] Read *v.* Frankfort Bank, *ante;* Woods *v.* Buie, 6 Miss. 285; Evans *v.* Montgomery, 4 W. & S. (Penn.) 218; Ralston *v.* Lothair, *ante;* Tucker *v.* Harris, 13 Ga. 1. But it cannot, after the rights of a party have been adjudicated, interfere with the process to enforce that right so as to materially lessen the efficiency of the right of the judgment creditor. Oliver *v.* McClure, 28 Ark. 555. The remedy provided for the enforcement of contracts may be changed at the will of the legislature, provided the obligation of the contract is not thereby weakened, lessened, or impaired, Holland *v.* Dickerson, 41 Iowa, 367; and this is so, even though the act is retrospective. Lane *v.* Nelson, 79 Penn. St. 407; Baldwin *v.* Newark, 38 N. J. L. 334; Tilton *v.* Swift, 40 Iowa, 78. Special statutes affecting or applying only to a single city or county, unless such legislation is expressly prohibited in the constitution, are valid. Nash *v.* Fletcher, 44 Miss. 609. The period of limitation may be shortened. Guilotell *v.* Mayor of New York, 55 How. Pr. (N. Y.) 114.

[3] Cox *v.* Berry, 13 Ga. 306; Edwards *v.* McCaddon, 20 Iowa, 520; Mechanics', &c. Bank (appeal from Probate), 31 Conn. 63; Wintermire *v.* Westover, 14 N. Y. 16; Pearce *v.* Patton, 7 B. Mon. (Ky.) 162.

[4] Ludwig *v.* Stewart, 32 Mich. 27; Thompson *v.* Read, 41 Iowa, 48; Pitman *v.* Bump, 5 Oreg. 17; Memphis *v.* United States, 97 U. S. 293; Pearsall *v.* Kenan, 79 N. C. 472; Dyer *v.* Gill, 32 Ark. 410; Terry *v.* Anderson, 95 U. S. 628. Relating only to the remedy, the statute is not a part of the contract until the statutory bar has be-

claims without allowing a reasonable time after its passage for parties to bring an action.[1]

come complete; consequently, before that time the period of limitation may be extended or lessened by the legislature without becoming obnoxious to any constitutional objection. Edwards *v.* McCaddon, 20 Iowa, 420; Beal *v.* Nason, 14 Me. 344; Newkirk *v.* Chapron, 17 Ill. 344; Wright *v.* Oakley, 5 Met. (Mass.) 400; Battles *v.* Fobes, 18 Pick. (Mass.) 532. The repeal or amendment of a statute of limitations does not apply to a claim already barred by the statute, because by the lapse of the statutory period the rights of the parties have become vested, and the legislature cannot detract from or enlarge them. Battles *v.* Fobes, 18 Pick. (Mass.) 532; Seymour *v.* Deming, 9 Cush. (Mass.) 529; Willard *v.* Clarke, 7 Met. (Mass.) 435; Darling *v.* Wells, 1 Cush. (Mass.) 508; Brigham *v.* Bigelow, 12 Met. (Mass.) 268; Garfield *v.* Bemis, 2 Allen (Mass.), 445. Thus, the legislature cannot give a remedy on a claim already barred by the statute, Loring *v.* Boston, 12 Gray (Mass.), 409; Kinsman *v.* Cambridge, 121 Mass. 558; nor deprive a party of the benefits of such bar, Wright *v.* Oakley, *ante;* Battles *v.* Fobes, *ante.*

[1] Horbach *v.* Miller, 4 Neb. 31; Halcombe *v.* Tracy, 2 Minn. 241; Lockhart *v.* Yeiser, 2 Bush (Ky.), 231; W. S. R. R. Co. *v.* Stockett, 21 Miss. 395; Beal *v.* Nason, 14 Me. 344; Call *v.* Hagger, 8 Mass. 430. It was held at an early day in the history of our statutes that they do not come under the bar of the Constitution of the United States or of the State constitutions, except where they are retrospective, in the legal sense of the term; that is, unless they impaired vested rights. Gospel Society *v.* Wheeler, 2 Gall. (U. S. C. C.) 105; Ogden *v.* Saunders, 12 Wheat. (U. S.) 349; Wintermire *v.* Westover, 14 N. Y. 16; Bush *v.* Van Kleck, 7 Johns. (N. Y.) 447; Calder *v.* Bull, 3 Dall. (Penn.) 386; Sturges *v.* Crowninshield, 4 Wheat. (U. S.) 122. A statute that barred a past right of action, without any provision for a period within which an action might be brought, would not only be unreasonable and obnoxious to the objection that it impaired the rights of private property, but subject to this exception such laws have been held valid, and applying to the remedy merely their retrospective operation is no objection to them. Hope *v.* Johnson, 2 Yerg. (Tenn.) 123; United States *v.* Samperyac, 1 Hempst. (U. S. C. C.) 118; Cutts *v.* Harder, 38 Ga. 350; Rathbone *v.* Bradford, 1 Ala. 312; Steamboat Co. *v.* Barclay, 30 id. 120; Holcombe *v.* Tracy, 2 Minn. 241; Lockhart *v.* Yeiser, 2 Bush (Ky.), 231; Cook *v.* Wood, 1 McCord (S. C.), 139; Beltzhoover *v.* Yewell, 1 G. & J. (Md.) 212; Cox *v.* Berry, 13 Ga. 306; Billings *v.* Hull, 7 Cal. 1; Blackford *v.* Peltier, 1 Blackf. (Ind.) 36; Griffin *v.* McKenzie, 7 Ga. 163; Ward *v.* Kilts, 12 Wend. (N. Y.) 137; Eckstein *v.* Shoemaker, 3 Whart. (Penn.) 15; Frey *v.* Kirk, 4 G. & J. (Md.) 509; Hawkins *v.* Barney, 5 Pet. (U. S.) 485; Charlestown Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420.

The rules fairly deducible from the reported cases are, that it is competent for the legislature to make a statute retrospective where it does not impair the obligation of a contract or a vested right. Satterlee *v.* Matthewson, 16 S. & R. (Penn.) 169; Weiser *v.* Hade, 52 Penn. St. 472. Statutes relating merely to the remedy are not a part of contracts made while it is in force; therefore the legislature may alter, modify, or repeal the same at any time before rights have become complete under them, and as statutes of limitation merely relate to the remedy, it follows that the legislature may alter the same at any time before a claim has become barred under them. Miller *v.* Com., 5 W. & S. (Penn.) 488. In Bigelow *v.* Bemis, 2 Allen Mass.), 496, BIGELOW, J., says: "It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction on the exercise of this power is that the legislature cannot remove a bar or limitation which has already become complete, and that no new limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring actions before their claims

It has been held in a case decided by a majority of the Supreme

are absolutely barred by a new enactment. See also to same effect Dillon *v.* Dougherty, 2 Grant's Cas. (Penn.) 99; Morford *v.* Cook, 24 Penn. St. 92; Call *v.* Hagger, 8 Mass. 423; Smith *v.* Morrison, 22 Pick. (Mass.) 430; and the cases cited *ante*, as well as those hereafter cited in this note. In Prentice *v.* Dehon, 10 Allen (Mass.), 353, and Ball *v.* Wyeth, 99 Mass. 338, it was a query with the court whether the legislature possessed the power to give a remedy upon a claim already barred; but as this question has invariably been decided in the negative, it can hardly be regarded as an open one, although we confess that, upon the theory adopted by the courts, we see no reason why the legislature might not exercise this power. Under these statutes generally the right is not extinguished, but only the right of action thereon is taken away. The claim may be sued in another State and a judgment obtained, and an action upon that judgment may be maintained in the courts of the State by the statute of which the claim on which the judgment was obtained was barred. Now, if the person against whom the claim exists acquires such a vested right under the statute, that after the statute has run upon the claim the legislature cannot give a remedy thereon, it must be upon the ground that the claim has been extinguished by the statute, in which event it ceases to be an enforceable obligation anywhere, whereas the courts hold, as we have seen, that the right is not extinguished, but only the remedy thereon taken away. In Campbell *v.* Holt, 115 U. S. 620, this doctrine has been held, and a strong intimation that such doctrine would be held in New York, should the question ever be raised there, has been given in a recent case. In New Hampshire, in Woart *v.* Winnick, 3 N. H 473, it was held that an act repealing an act of limitation was, as to all actions pending at the time of the repeal, retrospective and contrary to the State constitution; and this, of course, would be the rule where the constitution prohibits retrospective laws. The law seems to be well settled that the legislature may change the statute even as to existing claims, if a reasonable time is allowed for the bringing of actions thereon. Nash *v.* Fletcher, 44 Miss. 609; Patterson *v.* Gaines, 6 How. (U. S.) 550; Elliott *v.* Lochrane, 1 Kan. 126; Pierce *v.* Tobey, 5 Met. (Mass.) 158; State *v.* Clark, 7 Ind. 468; Beesley *v.* Spencer, 25 Ill. 216; Root *v.* Bradley, 1 Kan. 437; Wright *v.* Keithler, 7 Iowa, 92; Cox *v.* Brown, 6 Jones (N. C.) L. 100; Pierce *v.* Patton, 7 B. Mon. (Ky.) 172; Callaway *v.* Molley, 31 Mo. 393; Sleeth *v.* Murphy, 1 Morris (Iowa), 321; Howel *v.* Howell, 15 Wis. 55; Gilman *v.* Cutts, 23 N. H. 376; Beal *v.* Nason, 14 Me. 344; Martin *v.* Martin, 3 Ala. 560; Willard *v.* Harvey, 24 N. H. 344; Webster *v.* Cooper, 14 How. (U. S.) 488; Railroad Co. *v.* Stockett, 13 S. & M. (Miss.) 375; Fiske *v.* Briggs, 6 R. I. 557; Bank *v.* Dutton, 9 How. (U. S.) 522; Kilburn *v.* Lackman, 8 Iowa, 380; Winston *v.* McCormick, 1 Ind. 56; Pritchard *v.* Spencer, 2 Ind. 486; Briscoe *v.* Ankelette, 28 Miss. 361; Slater *v.* Com., 3 Ohio St. 80; Holcombe *v.* Tracy, 2 Minn. 241; De Cordova *v.* Galveston, 4 Tex. 470. Unless the statute expressly so provides, a change in the law does not operate upon claims then existing, but only upon those subsequently arising. Gibbons *v.* Goodrich, 3 Ill. App. 590; Van Hook *v.* Whitlock, 3 Paige Ch. (N. Y.) 305; Deal *v.* Patterson, 14 La. An. 728; Culvert *v.* Lanner, 10 Ark. 147; Didier *v.* Davidson, 2 Barb. Ch. (N. Y.) 477; Ashbrooke *v.* Quarle's Heirs, 15 B. Mon. (Ky.) 20; Calkins *v.* Calkins, 3 Barb. (N. Y.) 305; Lucas *v.* Tunstall, 5 Ark. 448; Ridgeley *v.* Steamboat Reindeer, 27 Mo. 442; People *v.* Supervisors, 10 Wend. (N. Y.) 306; Clemens *v.* Wilkinson, 10 Miss. 97; Gordon *v.* Mounts, 2 Greene (Iowa), 343; McKenney *v.* McKenney, 8 Ohio St. 423; Williamson *v.* Field, 2 Sandf. (N. Y.) Ch. 533; Thompson *v.* Alexander, 11 Ill. 54; Dickerson *v.* Morrison, 5 Ark. 264; Scarborough *v.* Dugan, 10 Cal. 305; Brown *v.* Wilcox, 10 Miss. 97; Paddleford *v.* Dunn, 14 Mo. 517; Hinch *v.* Weatherford, 2 Greene (Iowa), 244; Boyd *v.* Barringer, 23 Miss. 269. That a statute may extend the time of limitation upon existing claims has been frequently held, but it cannot, and does

Court of the United States[1] that in actions upon debt, contract, or any class of actions in which a party does not become invested with the title to property by the statute of limitations, that the legislature may by a repeal of the statute of limitations, even after the right of action thereon is barred, restore to the plaintiff his remedy thereon, and divest the other party of the statutory bar. The doctrine of this case is undoubtedly technically correct, and was suggested in the first edition of this work, in Note 1, page 28. It is, however, opposed to the great weight of authority in this country, and is opposed to the policy of these statutes. There can be no question that the legislatures of the several States by the passage of the statute of limitations intended a permanent divestment of a right of action in all matters to which the statute relates, when it had run against them, and they had thereby become barred. And while it may be, as I have already suggested, that the reasoning of the court is correct, yet the wisdom of the doctrine announced is questionable.[2]

There is another rule that must be borne in mind in reference to all statutes, which is, that they are to be so construed as to have a prospective effect merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed;[3] and

not, revive those already barred, Bradford *v.* Strine, 13 Fla. 393; Rogers *v.* Handy, 24 Vt. 620; Winston *v.* McCormick, 1 Smith (Ind.), 8; Wright *v.* Oakley, 5 Met. (Mass.) 400; Morford *v.* Cook, *ante;* Garfield *v.* Bemis, 2 Allen (Mass.), 445; Baldro *v.* Tomlie, 1 Oreg. 176; Jay *v.* Thompson, 1 Doug. (Mich.) 373; Hill *v.* Knickie, 11 Wis. 442; Sprecker *v.* Wakely, id. 432; Hawkins *v.* Campbell, 5 Ark. 512; Cauch *v.* McKee, id. 484; Wires *v.* Farr, 25 Vt. 41; Walker *v.* Bank, 6 Ark. 561; Davis *v.* Minor, 1 How. (Miss.) 183; Rabb *v.* Harland, 7 Penn. St. 292; Stipp *v.* Brown, 2 Ind. 647; Clark *v.* Bank, 10 Ark. 512; Brown *v.* Wilcox, 14 S. & M. (Miss.) 127; McKinney *v.* Springer, 8 Blackf. (Ind.) 506; Forsyth *v.* Ripley, 2 Greene (Iowa), 181; Knox *v.* Cleaveland, 13 Wis. 245; Dillon *v.* Dougherty, 2 Grant's Cas. (Penn.) 99; Yancey *v.* Yancey, 5 Heisk. (Tenn.) 353; but acts only on existing rights, Cox *v.* Davis, 17 Ala. 714; Chandler *v.* Chandler, 21 Ark. 95; Henry *v.* Thorpe, 14 Ala. 103; Coady *v.* Reins, 1 Mon. T. 424.

[1] Campbell *v.* Holt, 155 U. S. 620.

[2] Martin *v.* Martin, 35 Ala. 560; McCracken Co. *v.* Mercantile Trust Co., 84 Ky. 344; Kinsman *v.* Cambridge, 121 Mass. 528; Atkinson *v.* Dunlap, 50 Me. 511; Dyer *v.* Gill, 32 Ark. 410; Willoughby *v.* George, 5 Col. 80; Mere, &c. *v.* Sehner, 37 Md. 180; Ludwig *v.* Stewart, 32 Mich. 27; Power *v.* Telford, 60 Miss. 195; Pitman *v.* Bump, 5 Oreg. 15; Rockport *v.* Walden, 54 N. H. 167. See notes pages 24 to 35.

[3] Com. *v.* Sudbury, 106 Mass. 268; Whitman *v.* Hapgood, 10 Mass. 437; Garfield *v.* Bemis, 2 Allen (Mass.), 445; Jarvis *v.* Jarvis, 3 Edw. Ch. (N. Y.) 462; People *v.* Supervisors of Columbia, 43 N. Y. 130; People *v.* Supervisors of Ulster, 63 Barb. (N. Y.) 83; New York, &c. R. R. Co. *v.* Van Horn, 57 N. Y. 473; Hoch's Appeal, 72 Penn. St. 53; Oliphant *v.* Smith, 6 Watts (Penn.), 449; Philadelphia *v.* Passenger R. R. Co., 52 Penn. St. 177; Steckel's Appeal, 64 id. 493; Journey *v.* Gibson, 56 id. 57; State *v.* Vreeland, 34 N. J. L. 438; Belvidere *v.* Warren R. R. Co., id. 193; Baldwin *v.* Newark, 38 id. 158; *Ex parte* Graham, 13 Rich. (S. C.) 277; Finney *v.* Ackerman, 21 Wis. 268; Hopkins *v.* Jones, 22 Ind. 210; Miller *v.* Com., 5 W. & S. (Penn.) 488; Benjamin *v.* Eldridge, 50 Cal. 612; Smith *v.* Humphrey, 20 Mich. 398; Stanbaugh *v.* Snoblin, 32 id. 296; Harrison *v.* Metz, 17

under this rule a change in the statute of limitations would not affect existing claims, unless such is clearly the intention of the legislature; and especially would this be the case where actions are pending upon such claims when the statute is passed.[1] And if the statute is to have such effect, either by necessary inference or from its express terms, it is held by some of the cases to be void, unless it gives a reasonable time for bringing actions before it goes into operation;[2] but, upon the theory that the statute only relates to the remedy, it would seem that it is competent for the legislature to repeal the statute *in toto*, and make such repeal operative as to all existing claims upon which the statute has not run.[3] The courts, however, make an important exception as to the power of the legislature to change the law of limitations as to existing rights, which is, that it has not the power to shorten the

id. 377; Ludwig *v.* Stewart, 32 id. 27; Price *v.* Hopkins, 13 id. 318.

[1] Hooker *v.* Hooker, 18 Miss. 599; Battles *v.* Fobes, *ante;* Wright *v.* Oakley, 5 Met. (Mass.) 400. Thus, in Massachusetts, where the statute was silent as to the matter, it was held that a statute which shortened the period of limitations of actions by creditors against executors or administrators from four to two years did not apply to executors or administrators who gave bonds before the law took effect. King *v.* Tirrell, 2 Gray (Mass.), 331.

[2] Call *v.* Hagger, 8 Mass. 430; Willard *v.* Harvey, 24 N. H. 344; Blackford *v.* Peltier, 1 Blackf. (Ind.) 36; Cook *v.* Kimball, 13 Minn. 324; Osborn *v.* Jaines, 17 Wis. 573; Proprietors, &c. *v.* Laboree, 2 Me. 294; Maltby *v.* Cooper, 1 Morr. (Iowa) 59; Society *v.* Wheeler, 2 Gall. (U. S. C. C.) 141. In State *v.* Vreeland, 34 N. J. L. 438, it was held that an act which merely limits the time within which an action shall be brought will not apply to a suit pending when the act goes into effect, although it was not brought until after the act was passed. Black *v.* Swanson, 49 Ga. 424. In Libbett *v.* Maultsby, 71 N. C. 345, it was held that, where the right of action by a *cestui que trust* accrued prior to the adoption of the code in August, 1868, the limitation prescribed therein did not apply, but was governed by the law as it stood before the enactment of the code; and that, as there was no statute limiting the time when such actions should be commenced, it was left to the principles established by courts of equity in such cases. In Sohn *v.* Watterson, 17 Wall. (U. S.) 596, it was held that a statute of limitations may have effect upon actions which have already accrued to the day of passage as well as upon those which accrue afterwards, but that such will not be presumed to be the intent of the legislature. That, ordinarily, the true rule for applying a statute of limitations to rights of action already accrued is to allow the party the statutory time for suing, computing it from the passage of the act, to consider the limitation as commencing at the time when the cause of action is first subjected to the operation of the statute of limitations. In Sampson *v.* Sampson, 63 Me. 328, it was held that it was competent for the legislature to shorten the period of limitations as to existing claims provided sufficient time is allowed for bringing actions thereon before the statute runs.

[3] Conkey *v.* Hart, 14 N. Y. 22; Stocking *v.* Hunt, 3 Den. (N. Y.) 274; Hill *v.* Boyland, 40 Miss. 618. Statutes of limitation pertain to the remedy, and not to the essence of the contract; and it is in the power of the State legislatures to regulate the remedy and modes of proceeding in relation to past as well as future contracts, subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon its enforcement new burdens and restrictions which materially impair the value and benefit of the contract. Briscoe *v.* Anketell, 28 Miss. 361; Swickard *v.* Bailey, 3 Kan. 507; Nelson *v.* Snorth, 1 Overt. (Tenn.) 33.

period of limitation upon municipal bonds issued for sale in a foreign market. In such cases, the statute in force when the bonds were issued is treated as being a part thereof, so that it cannot, as to such bonds, be repealed;[1] and especially would this be the case if the limitation was fixed by the statute authorizing the issue of the bonds.

SEC. 12. **What Statute governs.** — If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. That is, the period provided by the new law must run upon all existing claims, in order to constitute a bar.[2] In other words, the statute in force at the time the action is brought controls,[3] unless the time limited by the

[1] Peerless *v.* City of Watertown (Wis.), 6 Biss. (U. S. C. C.) 79.

[2] Henry *v.* Thorpe, 14 Ala. 103; Martin *v.* Martin, 35 id. 560; Howell *v.* Howell, 15 Wis. 55; United States *v.* Ballard, 3 McLean (U. S.), 469; Forsyth *v.* Ripley, 2 Greene (Iowa), 181. But see Pollard *v.* Tait, 38 Ga. 439. In Gilman *v.* Cutts, 23 N. H. 376, an action was brought on a note dated Oct. 1, 1838, payable on demand. The plaintiff brought his action Jan. 27, 1849. A new statute of limitations took effect March 1, 1843, at which time the note was not barred by the old statute. The court held that the new statute was the one applicable to the action. In Indiana, it is said to be a general rule that the statute in force at the commencement of the action controls. State *v.* Clark, 7 Ind. 468. See also Moore *v.* Lobbin, 26 Miss. 394; Hazlett *v.* Critchfield, 7 Ohio (Part 2), 153.

[3] Patterson *v.* Gaines, 6 How. (U. S.) 556; Marston *v.* Seabury, 3 N. J. L. 435; Pritchard *v.* Spencer, 2 Ind. 486; Root *v.* Bradley, 1 Kan. 430; Walker *v.* Bank of Mississippi, 7 Ark. 500; Phares *v.* Walters, 6 Iowa, 106; Moore *v.* Lobbin, 26 Miss. 394; Gilman *v.* Cutts, 23 N. H. 376. Provided a reasonable time has been given for the bringing of actions upon existing claims. Sampson *v.* Sampson, 63 Me. 328. In Guilotell *v.* Mayor of New York, decided by the New York Court of Appeals, Jan. 7, 1882, 25 Alb. Law Jour. 315, in an action for personal injuries caused by a defective sidewalk, it appeared that the injury occurred in 1873. At that time, by the former code, the limitation was six years. "By the charter of New York a demand must be made upon the comptroller, requiring him to adjust a demand against the city thirty days before bringing an action thereon." On the 26th of May, 1876, the code was amended so as to limit an action for an injury to the person to one year after its accruing. This amendment was to take effect July 1, 1876. Plaintiff commenced this action in March, 1877. It was held that, irrespective of the question of the power of the legislature to enact statutes of limitation that operate retrospectively, the statutes of six years and not that of one applied to plaintiff's right of action. The provisions of section 73 of the old code, that "this title shall not extend" "to cases where the right of action has already accrued, but the statutes now in force shall be applicable to such cases," were not limited to the date of the adoption of that code, but operated prospectively. The words "already" and "now" in that section are to be taken distributively, and apply not merely to the date of the original enactment, but to any subsequent amendment as of the date of such amendment. Causes of action "already accrued" are intended and saved, and the "statutes now in force" applied as well at the date of a change effected by an amendment as at the date of the change accomplished by the original law. In Ely *v.* Holton, 15 N. Y. 595, in construing another section of the old code, this court gave such distributive character to the use of the word "thereafter," hold-

old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar.[1] The question, however, as to whether the statute is to have a retrospective operation is one of construction, to be determined from the language of the act and the intention of the legislature to be gathered from the act itself and the subject-matter to which it applies; the rule being, as previously stated, that a statute will not be permitted to have a retrospective operation unless such was clearly the intention of the legislature.[2]

In a Georgia case,[3] where a statute was passed Jan. 1, 1863, providing for the acquisition of title to land by prescription as a substitute for a previous statute, the court held that possession which had been running before that act was passed, and was ripening into a title, was not lost, as such was not the evident intention of the legislature, and the defendant was permitted to tack the time already passed to that required by the new statute.[4] In Michigan,[5] a statute passed in 1867 provided that "every action upon a judgment rendered in a court of record of the United States, or this or any other State, shall be brought

ing it to apply at the date of the enactment, and also at the date of an amendment. See also Matter of Peugnet, 67 N.Y. 444. See Acker *v.* Acker, 80 N. Y. 143, where it was held that unless the new statute saves existing claims from its operation, it applies to them as well as others. A harsh and unreasonable inference of legislative intention is not to be drawn, when the language of the act fairly and naturally admits of one not only more just and wise, but in better harmony with an intention already expressed, and a general system intended to be consistent and uniform. Plaintiff's action was not barred by the amendment of 1876.

[1] Baldro *v.* Tolmie, 1 Oreg. 176; Bradford *v.* Brooks, 2 Aik. (Vt.) 284; McKinney *v.* Springer, 8 Blackf. (Ind.) 506; Woart *v.* Winnick, 3 N. H. 473; Lewis *v.* Webb, 3 Me. 326; Holden *v.* James, 11 Mass. 396; Piatt *v.* Vittier, 1 McLean (U. S.), 146; Davis *v.* Minor, 2 Miss. 183; Stipp *v.* Brown, 2 Ind. 647. In Kinsman *v.* City of Cambridge, 121 Mass. 558, it was held that the statute of 1874, extending the time for filing a petition for damages for land taken to widen a street, did not revive an action already barred by the statute existing before the new act was passed.

[2] For instances in which it has been held that a statute of limitation does not apply to causes of action which existed before its passage, see Weber *v.* Manning, 4 Mo. 229; Thompson *v.* Alexander, 11 Ill. 54; Hall *v.* Minor, 2 Root (Conn.), 223; Central Bank *v.* Solomon, 20 Ga. 408; Paddleford *v.* Dunn, 14 Mo. 517; Ashbrook *v.* Quarles, 15 B. Mon. (Ky.) 20; Moore *v.* McLendon, 10 Ark. 512; Calvert *v.* Lowell, id. 147; Deal *v.* Patterson, 12 La. An. 602; Stine *v.* Bennett, 13 Minn. 153; Whitworth *v.* Ferguson, 18 La. An. 60. In Eaton *v.* Supervisors of Manitowac, 40 Wis. 668, an act prescribing a new limitation of time for suing a county to recover back sums of money paid to it upon illegal tax certificates was passed in April, 1867, but was not to take effect until Jan. 1, 1868; and the court held that the purpose and effect of this provision was to prevent the bar of the statute taking effect upon rights of action acquired before Jan. 1, 1868, and that this was a reasonable period within which to bring an action.

[3] Pollard *v.* Tait, 38 Ga. 439.

[4] But see Henry *v.* Thorpe, 14 Ala. 103, where a contrary rule was established.

[5] Harrison *v.* Metz, 17 Mich. 377.

within ten years next after the judgment was entered and not afterwards; and any action upon such judgment which shall not be commenced within the time above specified shall be forever thereafter barred," was held to be prospective and applicable only to judgments rendered after the act took effect. In Pennsylvania, an act of limitation was passed in 1785, making twenty-one years' adverse possession of lands necessary to give title to the person in possession, and it was held that the act was retrospective, and applied as well to rights then existing as to those afterwards arising.[1] In Massachusetts, in an early case,[2] SHAW, C. J., in discussing the question as to whether a person has a vested right to plead the statute, intimated that it might not be proper in technical strictness to say that he had, especially to the extent that it could not be taken away by the legislature. But in that case, while the court expressed a doubt upon this point, it nevertheless refused to give such an application to the statute under consideration, or to admit that the legislature possessed the power to take away such right after the bar had become complete. And in a later case before the courts of that State [3] the same doubt upon this question was expressed. But whatever doubt may exist upon this point in Massachusetts, the courts elsewhere have entertained none, but have universally held that, after the statute bar has become complete, the debtor has acquired a vested right under these statutes, which the legislature cannot defeat or take away by subsequent legislation.[4]

There is much ground for argument upon either side of this question, and many plausible reasons can be advanced both for and against the general doctrine held as indicated *supra*. It is generally conceded that these statutes only relate to the remedy, and do not operate to extinguish the right. In other words, they are not treated as elements entering into the contract, so that the legislature is precluded from shortening or lengthening the period of limitation at any time before the bar has become complete.[5]

SEC. 13. **Effect of Change of Statute as to Crimes.** — In reference to crimes, where the statute fixes a period within which an indictment for certain offences shall be found, while perhaps it cannot technically

[1] Parker *v.* Gonsalus, 10 S. & R. (Penn.) 147.

[2] Wright *v.* Oakley, 5 Met (Mass.) 400.

[3] Ball *v.* Nye, 99 Mass. 38.

[4] Atkinson *v.* Dunlap, 50 Me. 111; Bogg's Appeal, 43 Penn. St. 512; Ryder *v.* Wilson, 40 N. J. L. 9; Sprecker *v.* Wakeley, 11 Wis. 432; Baldro *v.* Tolmie, 1 Oregon, 176; Piatt *v.* Vittier, 1 McLean (U. S. C. C.), 146; Holden *v.* James, 11 Mass. 396; Woart *v.* Winnick, 3 N. H. 473; Bradford *v.* Brooks, 2 Aiken (Vt.), 284; Lewis *v.* Webb, 3 Me. 326; Woodman *v.* Fulton, 47 Miss. 682; Naught *v.* O'Neal, 1 Ill. 36; Girdner *v.* Stephens, 1 Heisk. (Tenn.) 280; Parish *v.* Eager, 15 Wis. 532; Stipp *v.* Brown, 2 Ind. 647; McKinney *v.* Springer, 8 Blackf. (Ind.) 506; Martin *v.* Martin, 35 Ala. 560.

[5] Gilman *v.* Cutts, 23 N. H. 376; Martin *v.* Martin, 35 Ala. 560; Howell *v.* Howell, 15 Wis. 55; Cook *v.* Kendall, 13 Minn. 324; Forsyth *v.* Ripley, 2 Greene (Iowa), 181.

be said that the criminal, by the lapse of the statutory period, has acquired a vested right under the statute, yet it may be said that while the State retained the power to prosecute and punish for the crime at any time before the statute had run thereon, by having neglected to do so it is at least treated as having condoned the crime, so that it is afterwards estopped from prosecuting for it, as much as it would be from withdrawing an absolute and unconditional pardon after it had once been granted and delivered. But it has recently been held by a court of high authority in this country that the same principle applies in this respect in criminal as in civil cases.[1] "Before committing any offence," says DIXON, J., in a very able and exhaustive opinion in the case referred to, "the citizen had a natural and absolute right to life and liberty. By his offence the State acquired the right to deprive him of either to the extent prescribed by the violated law. The citizen remained in the possession of life and liberty, but his possession was liable to be disturbed by means of a prosecution to be instituted by the State according to law. His offence, however, was local, and subjected his possession to impairment only within the jurisdiction whose laws he had broken. In these respects the relation between the offender and the State corresponds to that between one having the possession of lands, without the right of possession, and one entitled to invade that possession by action at law. In both cases there is a right of suit which must be pursued, if at all, within and under the laws of a single jurisdiction, and in both cases the wrong-doer holds a possession which only such legal prosecution can take away.

"In view of this position of things the statute of limitation declares that no person shall be prosecuted, tried, or punished for an offence, unless the indictment be found within two years after the crime. This in effect enacts that when the specified period shall have arrived the right of the State to prosecute shall be gone and the liability of the offender to be punished — to be deprived of his liberty — shall cease. Its terms not only strike down the right of action which the State had acquired by the offence, but also remove the flaw which the crime had created in the offender's title to liberty. In this respect its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the State has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the

[1] Moore *v.* State, 40 N. J. L. 384.

same force regarding crimes, they annihilate the State's power to punish, and restore the offender's rights to their original status."

And the court further held that this condition is unassailable by subsequent legislation, repudiating the doctrine advanced by Mr. Bishop[1] in the work referred to, that a criminal statute of limitation simply withholds from the courts jurisdiction over the offence after the specified period, and that it is competent for the legislature to revive the old jurisdiction, or create a new one, when the prosecution may proceed. The doctrine stated by this text-writer is not only without any foundation in reason, but is also wholly unsustained by authority.

DIXON, J., in the case last cited, in commenting upon this statement, pertinently said: "Evidently this doctrine would upset the uniform train of decisions in civil causes, and, moreover, it would be a strained and unnatural construction of our act, to say that it simply withholds jurisdiction from the courts. Its language is, 'No person shall be prosecuted, tried, or punished.' It does not relate to the courts, but to the person accused. The answer, which under it the respondent must make to an accusation before the tribunal which once had the right to punish him, is not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that after inquiry the court must pronounce judgment or acquittal. And probably no one would contend that, after such judgment, any change in the law would legally subject the defendant to a second prosecution. Yet an acquittal by a court without jurisdiction is void.[2] It cannot be maintained, then, that the act impairs jurisdiction."

In reference to changes in the period of limitations made before the statute bar has become complete, it is held, in reference to criminal as in civil actions, that the legislature may in such cases either repeal, extend, or otherwise change the statute, and make it applicable to offences already committed.[3] In the case last cited the legislature amended the statute relating to the limitation of the crime of forgery, so as to extend the period of limitation from two to five years. Previous to such change the crime with which the respondent was charged had been committed, and he claimed that the legislature had no power to change the statute so as to deprive him of the benefit of the statute existing when the crime was committed. But the court held otherwise, and GREEN, J., in passing upon this question, said: "At the time the act of 1877 was passed the defendant was not free from conviction by force of the two years' limitation of 1860. He therefore had acquired no right to acquittal on that ground. Now, an act of limitation is an act of grace purely on the part of the legislature. Especially is this the case in the matter of criminal prosecutions. The State makes no contract with criminals, at the time of the passage of

[1] Statutory Crimes, § 266.
[2] 1 Hawkins, P. C. c. 35.
[3] Com. *v.* Duffy (Penn.), 23 Alb. L. J. 292.

an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are matters of public policy only. They are entirely subject to the will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that, in any case where a right to acquittal has not been absolutely acquired by the period of limitation, that period is subject to enlargement or repeal, without being obnoxious to the constitutional prohibition against *ex post facto* laws." In New York such statutes are held not to apply to crimes committed before the statute was changed, unless expressly included therein, adopting the rule in that respect applicable in civil cases,[1] leaving the question as to what the rule would be where the statute is expressly applied to crimes already committed, but not barred, undecided.

SEC. 14. **Rule when Title to Land is concerned.** — When a title to land has been acquired by adverse possession under a statute, the legislature does not possess the power to destroy the same, and a repeal of the statute does not divest the title; but at any time before title has become vested it may be repealed or altered, either by shortening or lengthening the period required to make the title absolute.[2]

[1] People *v.* Lord, 12 Hun (N. Y.), 282. [2] Knox *v.* Cleveland, 13 Wis. 245.

Addendum K

THE OXFORD COMMENTARIES
on the State Constitutions of the United States

The UTAH State Constitution

Jean Bickmore White

OXFORD

Joseph L. Rawlins, worked carefully with both parties to assure passage of the Enabling Act. This Act was passed and signed by President Cleveland on 16 July 1894. It contained several requirements, including a provision banning polygamy "forever," a mandate that shaped the deliberations of the constitutional convention that was established by the Act.[23]

Later in 1894, after lively campaigning, the Territory held its first election based on national rather than religious party lines, and elected 107 delegates to a constitutional convention to be held early in 1895. To reach this point, Mormons had to abandon the dream of a self-sufficient, religion-based commonwealth, to give up political power for a party system like those in the rest of the country, and to change the marriage practices that had drawn the wrath of the nation. Non-Mormon leaders had come to realize that without statehood, the area would never be able to attract eastern capital and develop its economy. The constitutional convention would test the commitment of both Mormons and non-Mormons to unite in a common cause—statehood for Utah.

■ THE CONSTITUTIONAL CONVENTION OF 1895

The men who met on 4 March 1895 to write a constitution, under the guidance of a long-sought enabling act of Congress, approached their jobs with high hopes, but also with some fears. After so many failures to gain statehood, debates in the convention were peppered with warnings that nothing should be done to jeopardize it now. They were determined to "play it safe," to avoid experimentation, and to copy provisions from the constitutions of other states to avoid uncertainty. Their unique territorial history, with its deep social, political, and economic divisions along religious lines, reminded them that it was crucial to bridge these divisions in the convention. A rebirth of the old animosities might defeat the document at the polls in November. Economic prosperity was a primary aim of all the delegates, and they knew it could only come after large investments of eastern capital. Another aim of the convention, though seldom articulated, was to improve the national image of Utah.

These hopes were part of a goal repeatedly expressed—to attract eastern capital and build industrial prosperity in the new state. The emphasis on economic development, a theme common to other western states, was heightened by the severe effects of the 1890s depression in Utah. Unemployment was dangerously high: some estimates placed it at nearly half of the labor force in Salt Lake City.[24]

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[23] Sec. 3, "An Act to Enable the People of Utah to Form a Constitution and State Government . . .," Ch. 138, 28 Stat. 107, 16 July 1894.

[24] Leonard J. Arrington, "Utah and the Depression of the 1890s," *Utah Historical Quarterly* 29 (January 1961): 5–6.

Addendum L

THE WESTERN JURIST.

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THE WESTERN JURIST.

OCTOBER, 1867.

THE CONSTITUTIONAL PROTECTION OF VESTED RIGHTS.

Under the Constitutional provision which protects every man against being deprived of property except by the law of the land, it frequently becomes important to determine what is a *vested right*, so as to fall within the protection of this principle, and thereby be placed beyond legislative interference.

And it would seem that a right is not thus protected, unless it is some thing more than a mere expectation, and has already become a title to the present or future enjoyment of property, or the present or future enforcement of a contract, or a legal exemption from a demand made by another. As Mr. Justice Woodbury expresses it, acts of the Legislature can not be regarded as opposed to fundamental maxims of legislation, "unless they impair rights which are vested; because most civil rights are derived from public laws; and if, before the rights become vested in particular individuals, the convenience of the State produces amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee (*a*)." And Chancellor Kent, in speaking of retrospective statutes says,

(*a*) *Merrill* v. *Sherburne*, 1 N. H. 213.

that such a statute, "affecting or changing vested rights, is very generally considered in this country as founded on unconstitutional principles, inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights (*b*)."

To particularize: *a mere expectation of property in the future is not a vested right.* On this ground it is that the rule of descent may be changed so as to operate upon all estates not already passed to the heir by the death of the owner. No one is heir to the living; and the heir-expectant has no other reason to rely upon succeeding to the property, than the promise held out by the statute of descents. But this promise is no more than a legislative declaration of its present view of public policy in regard to the order of succession; a view which may at any time change; when the promise will be withdrawn, and a new line of descent declared. The expectation is not property; it can not be sold or mortgaged; and it is not in any way taken notice of by the law until the moment of the ancestor's death, when the law of descents comes in, and for reasons of general policy transfers the estate to certain persons, to the exclusion of all others. And it is not until that moment that there is a vested right in the heir to be protected by the Constitution.

The nature of estates is therefore, to a certain extent, subject to legislative control. In this country estates-tail are very generally changed to estates in fee-simple by statutory provisions, and the validity of these statutes is not disputed. They operate to increase and render more valuable the interest which the present owner of the land possesses, and are not, therefore, open to objection by him. But no other person in these cases has a vested right, either in possession or reversion; and the expectation of the heir-presumptive must be subject to the same control as in other cases (*c*).

(*b*) 1 Kent, 455.

(*c*) 1 *Washb. Real Pr.* 81 to 84, and notes. The exception to this rule, if any, must be in case of tenant in tail after possibility of issue extinct; where the estate of the tenant has ceased to be an inheritance, and a reversionary right has become vested.

The cases of rights in property to result from the marriage relation may be referred to the same principle. At the common law the husband, immediately on the marriage, succeeded to certain rights in the real and personal estate which the wife then possessed. These rights were at once vested, and could not be divested by any subsequent change in the law. But other interests were merely in expectancy. He would have a right as tenant by the curtesy, initiate, in the wife's estates of inheritance, the moment a child was born of the marriage who might by possibility become heir to them. The right would be property, subject to conveyance and to be taken for debts; and must therefore be regarded as a vested right, not subject to legislative interference. But while it remains in mere expectancy — that is, before it becomes initiate — the Legislature has full power to modify or abolish it (*d*). And the same rule will apply to dower, with this distinction: that the inchoate right is not regarded as property, or any thing but a mere expectancy, at any time before it is consummated by the husband's death (*e*). In neither of these cases does the marriage alone give a vested right, but only a capacity to acquire a right. And the same may be said with respect to the husband's expectant interest in the after-acquired personalty of the wife: that it is subject to any changes in the law made before his right becomes vested by the acquisition (*f*).

Again: *the right to a particular remedy is not a vested right.* This is the general rule; and the exceptions are of those peculiar cases where the remedy is part of the right itself, and can not be taken away without impairing it. As a general rule, every State has complete control over the remedies which it shall afford to parties in its courts (*g*). It may abolish one class of courts and create another. It may give a new or additional remedy for a right already in existence (*h*), and it may abolish

(*d*) *Hathorn* v. *Lyon*, 2 Mich. 93; *Tong* v. *Marvin*, 15 Mich.

(*e*) *Barbour* v. *Barbour*, 46 Me. 9; *Lawrence* v. *Miller*, 2 N. Y. 245; *Wait* v. *Wait*, 4 N. Y. 108, per Harris, J. *Lucas* v. *Sawyer*, 17 Iowa, 517.

(*f*) *Westervelt* v. *Gregg*, 12 N. Y. 288; *Norris* v. *Beyea*, 13 N. Y. 273; *Kelso* v. *McCarthy*, 3 *Bradf.* 7. And see *Plumb* v. *Sawyer*, 21 Conn. 351; *Clark* v. *McCreary*, 12 S. & M. 347; *Barnet* v. *Barnet*, 15 S. & R. 72.

(*g*) *Lord* v. *Chadbourne*, 42 Maine, 429. *Rozier* v. *Hale*, 10 Iowa, 470; *Holloway* v. *Sherman*, 12 Iowa, 282; *McCormick* v. *Rusch*, 15 Iowa, 127.

(*h*) *Hope* v. *Jackson*, 2 Yerg. 125; *Foster* v. *Essex Bank*, 16 Mass. 245; *Paschall* v. *Whitsett*, 11 Ala. 472; *Commonwealth* v. *Commissioners*, &c. 6 Pick. 508 *Whipple Farrar*, 3 Mich. 436.

old remedies and substitute new. If a statute providing a remedy is repealed while proceedings are pending, the proceedings will thereby be determined (*i*); and any rule or regulation in regard to the remedy, which does not, under pretense of regulating it, impair the right itself, can not be regarded as beyond the proper province of legislation.

In this connection it may be proper to speak of *limitation laws*, which sometimes have the effect to deprive a party altogether of his property, and yet are in strict conformity with "the law of the land," and unobjectionable in principle. A limitation law fixes upon a reasonable time within which a party is allowed to bring suit to recover his rights, and if he fails to do so, establishes a legal presumption against him that he has no rights in the premises. It is a statute of repose. Every government is bound in good faith to furnish its citizens all needful legal remedies; (*j*) but it is not bound to keep its courts open forever for one who neglects or refuses to apply for redress until it may be fairly supposed that the means by which the other party might disprove the claim are lost in the lapse of time (*k*).

Where the period prescribed by statute has already run so as to extinguish a claim which one might have had to property in the possession of another, the title to the property, irrespective of the original right, will be regarded as having become vested in the possessor so as to entitle him to the same protection that the owner of property is entitled to in other cases (*l*). The limitation law could not afterward be repealed so as to disturb this title by the retroactive effect of the repeal. "The right being gone, of course the remedy fell with it; and as there could be no remedy without a corresponding right, it was useless for the Legislature to restore the former, so long as it was prohibited by the Constitution from interfering or meddling with the latter (*m*).

All limitation acts, however, must proceed upon the idea that

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(*i*) *Bank of Hamilton* v. *Dudley*, 2 Pet. 492; *Ludlow* v. *Jackson*, 3 Ohio 553.

(*j*) *Call* v. *Hazen*, 8 Mass., 430.

(*k*) *Stearns* v. *Gittings*, 23 Del., 387; *Beal* v. *Nason*, 2 Shep., 344; *Bell* v. *Morrison*, 1 Pet., 360.

(*l*) *Shelby* v. *Gray*, 1 Wheat., 361; *Brent* v. *Chapman*, 5 Cranch, 358.

(*m*) *Knox* v. *Cleveland*, 13 Wis. 249; See *Sprecher* v. *Wakelee*, 11 Wis. 432; *Hill* v. *Kricke*, 11 Wis. 442; *McKinney* v. *Springer*, 8 Blackf. 506; *Stipp* v. *Brown*, 2 Ind. 647; *Wries* v. *Farr*, 25 Vt. 41; *Holden* v. *James*, 11 Mass. 396; *Lewis* v. *Webb*, 3 Greenl. 326; *Woart* v. *Wrinnick*, 3 N. H. 473; *Martin* v. *Martin*, 35 Ala. 560.

the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law (*n*). When they relate to property, it seems not to be essential that the adverse claimant should be in actual possession, if he is asserting his right in other modes (*o*); but one who is himself in the legal enjoyment of the rights he claims, can not have them forfeited to another for failure to bring suit against that other within a time specified, to test the validity of a claim which the latter makes but takes no steps to inforce. It was therefore held that a statute which, after the lapse of five years, made a tax deed conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land (*p*).

All statutes of limitation, also, must proceed upon the idea that the party has had opportunity to try his rights in the courts. A statute which should bar the existing rights of claimants, without affording this opportunity after the time when the statute should take effect, would not be an act of limitation, but an unwarrantable attempt to extinguish vested rights, whatever it may purport to be by its terms. It is essential that they allow a reasonable time after they are passed for the commencement of suits upon existing causes of action (*q*); though what shall be considered reasonable time, must be determined by the Legislature, and it does not pertain to the jurisdiction of courts of justice to inquire into the wisdom of its decision (*r*).

Again: *a right to be governed by existing rules of evidence is not a vested right.* These rules pertain to the remedy which a State gives to its citizens; and are not regarded as entering into or forming a part of a contract, or as being of the essence of a right. They are, therefore at all times subject to modification and control by the Legislature, like other rules affecting the remedy (*s*), and the changes may be made applicable to existing causes of action, even in those States where retrospective laws are forbidden. For the law as changed would only prescribe rules by which causes should be tried in the future; and it could not, therefore, properly be called retrospective, notwithstanding some of the subjects upon

(*n*) *Stearns* v. *Gittings*, 23 Ill. 389, per Walker J.

(*o*) *Stearns* v. *Gittings*, 23 Ill. 389, per Walker J.

(*p*) *Groesbeck* v. *Seeley*, 13 Mich. 329.

(*q*) *Price* v. *Hopkins*, 13 Mich. 318; *Stearns* v. *Gittings*, 23 Ill. 387,

(*r*) *Call* v. *Hagger*, 8 Mass. 430; *Blackford* v. *Peltier*, 1 Blackf. 36.

(*s*) *Kendall* v. *Kingston*, 5 Mass. 533; *Ogden* v. *Saunders*, 12 Wheat. 349; *Fales* v. *Wadsworth*, 23 Maine, 553; *Karney* v. *Paisley*, 13 Iowa, 89.

which it might act were in existence before (*t*). It has, therefore, been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties to suits to testify, was not objectionable as applied to previous causes of action (*u*). So of the statute which modifies the common law rule excluding parol evidence to vary the terms of a written contract (*v*). So of a statute making the protest of a promissory note evidence of the facts therein stated (*w*). These and the like cases will illustrate the general rule, that the whole subject is under the control of the Legislature, which prescribes such rules, both as to existing and future rights, as in its judgment will most completely subserve the ends of justice (*x*).

A strong instance in illustration of legislative control over evidence, will be found in the laws of some of the States in regard to conveyances of lands upon sales for taxes. Independent of special statutory rule upon the subject, such conveyances would not be evidence of title. They are executed under a statutory power, and it devolves upon the claimant under them to show that the proceedings prescribed by statute have been had. But it can not be doubted that this rule may be so changed as to make the deed *prima facie* evidence that all the proceedings have been regular, and that the purchaser has thereby acquired a complete title (*y*). The burden of proof is thereby changed from one party to the other; the legal presumption which the statute creates in favor of the purchaser, being sufficient, in connection with the deed, in the absence of countervailing testimony, to establish his case. Statutes making defective records evidence of valid conveyances are of a similar character, and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void (*z*). But they divest no title, and are not even

(*t*) *Rich* v. *Flanders*, 39 N. H. 323.

(*u*) *Rich* v. *Flanders*, 39 N. H. 323. A very full and satisfactory examination of the subject will be found in this case.

(*v*) *Gibbs* v. *Gale*, 7 Md. 76.

(*w*) *Fales* v. *Wadsworth*, 10 Shep. 553.

(*x*) *Per Marshall, Ch. J., in Ogden* v. *Saunders*, 12 Wheat. 349; *Kendall* v. *Kingston* 5 Mass. 534; *Webb* v. *Den.* 17 How. 577; *Delaplaine* v. *Cook*, 7 Wis. 54.

(*y*) *Hand* v. *Ballou*, 3 *Kern.* 543; *Delaplaine* v. *Cook*, 7 Wis. 54; *Lumsden* v. *Cross*, 10 Wis. 289; *Lacy* v. *Davis*, 4 Mich. 140; *Amberg* v. *Rogers*, 9 Mich. 332; *Wright* v. *Dunham*, 13 Mich. 414; *Allen* v. *Armstrong*, 16 Iowa, 506; *Adams*, v. *Beale*, 19 Iowa, 61.

(*z*) *Webb* v. *Den.* 17 How. 577.

retrospective. They establish what the Legislature regards a reasonable and just rule for the presentation by the parties of their rights before the Courts in the future.

But there are fixed bounds to the power of the Legislature over this subject. As to what shall be the evidence, and who in each case shall assume the burden of proof, its power is unrestricted, so long as the rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon similar reasons, it would not be in the power of the Legislature to provide that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations "the law of the land" requires a trial; and there is no trial if only one party is suffered to produce his evidence. A statute making a tax deed complete evidence of title, and precluding the original owner from showing its invalidity, would, therefore, be void, as being not a law regulating evidence, but an unconstitutional confiscation of property (*a*). And a law which should make the opinion of an officer conclusive evidence of the illegality of an existing contract would be equally void (*b*), though perhaps if parties should enter into a contract while such a law was in force, its provisions might properly be regarded as assented to and binding upon them.

As to the circumstances under which a man may be said to have a vested right in a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand can not have it revived against him, and he who has become released from a demand by the operation of the statute of limitations, is equally protected. In both cases the right is gone; and to restore it would be to make a new contract for the parties; a thing quite beyond the power of legislation. But there are many cases under existing laws where defenses are allowed upon contracts, or in respect to legal proceedings, which are based upon mere informalities, and where strict justice would sometimes justify the Legislature in interfering to take away the defense if it has the power so to do.

In regard to these cases we think investigation will show that

(*a*) *Groesbeck* v. *Seeley*, 13 Mich. 329; see *Wantlan* v. *White* 19 Ind. 470.
(*b*) *Young* v. *Beardsley*, 11 Paige, 93.

a party has no vested right in a defense based upon an informality not affecting his substantial interests. And this leads us to examine more particularly a class of statutes which are constantly coming under the consideration of the courts, and which are known as retrospective laws.

There are numerous cases which hold that retrospective laws are not obnoxious to constitutional objection; while in others they have been held to be void. The different decisions have been based upon facts which made different rulings applicable. There is no doubt of the right of the Legislature to make laws which reach back to, and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the state constitution, and provided further that no other objection exists to them than their retrospective character. But legislation of this description is quite liable to abuse; and it is a sound rule of construction to give a statute a prospective operation only, unless its terms show a legislative intent that it should have retrospective effect (*c*). And some of the States have deemed it important to forbid such laws altogether by their constitutions.

A retrospective law, curing defects in legal proceedings, where they are of the nature of irregularities only, and do not extend to matters of jurisdiction, is not subject to constitutional objection. Of this class are statutes to cure irregularities in the assessment of property for taxation, and the levy of taxes thereon; irregularities in the organization or elections of corporations (*d*); irregularities in votes or other action by municipal corporations, and the like, where a statutory power has failed of due execution, through carelessness of officers or other cause. And some statutes go still further, and where a municipal or other corporation has assumed to perform an act *ultra vires*, confer the power retrospectively by validating the act done.

We know of no better rule to apply to cases of this description than this: If the thing wanting, or which has failed to be done, and which constitutes the defect in the proceedings, is some thing which the Legislature might have dispensed with the necessity

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(*c*) *Dash* v. *Vankleek*, 4 Johns. 495; *Norris* v. *Beyea*, 13 N. Y. 273; *Perkins v. Perkins*, 7 Conn. 558; *Plumb* v. *Sawyer*, 21 Conn. 351; *Briggs* v. *Hubbard*, 19 Vt. 86; *Hastings* v. *Lane*, 1 Shep. 134; *Guard* v. *Rowan*, 2 Scam. 499; *Thompson* v. *Alexander*, 11 Ill. 54; *Garrett* v. *Beaumont*, 24 Miss. 377; *State* v. *Barber*, 3 Ind. 258; *Allbyer* v. *State*, 10 Ohio N. S. 553. *Bartruff* v. *Remey*, 15 Iowa, 257.

(*d*) *Syracuse Bank* v. *Davis*, 16 Barb. 188.

for by prior statutes, then a subsequent statute dispensing with it retrospectively must be sustained. And so if the defect consists in the doing something which the Legislature might have made immaterial by prior law, it may also be made immaterial by subsequent law. On this point it may be sufficient to refer to statutes curing defects in partition sales (*e*), and in sales of real estate on execution (*f*), as illustrative of the whole class.

In a Connecticut case it appeared that certain marriages had been celebrated by persons in the ministry who were not authorized to perform that ceremony; and that the marriages were consequently void. The Legislature afterward passed an act making them valid; and the court sustained the act. It was assailed as an exercise of judicial power, which it clearly was not; as it purported to settle no controversies, but merely to give effect to the desire of the parties, which they had already attempted to carry out by means of the invalid ceremony. It was also insisted that it was void because having a retrospective operation on such vested rights of property as are affected by the marriage relation, even though it might be valid for the purpose of effectuating the marriage. The learned court in disposing of the case seem to express the opinion that if the Legislature can have power to render the marriage valid, still more clearly must they have power to affect incidental rights. "The man and woman were unmarried, notwithstanding the formal ceremony which passed between them, and free, in point of law, to live in celibacy, or to contract matrimony with any person at pleasure. It is a strong exercise of power to compel two persons to marry, without their consent; and a palpable perversion of strict legal right. At the same time the retrospective law, thus far directly operating on vested rights, is admitted to be unquestionably valid, because manifestly just (*g*)."

It is not to be inferred from this extract that the court understood the Legislature to possess the power to marry persons against their will. The control which the Legislature possesses over the domestic relations can hardly extend so far. The Legislature may divorce parties — but to marry them without their

(*e*) *Kearney* v. *Taylor*, 15 How. 494.

(*f*) *Beach* v. *Walker*, 6 Conn. 197; *Booth* v. *Bootly*, 7 Conn. 350. And see *Mather* v *Chapman*, 6 Conn. 54; *Norton* v. *Pettibone*, 17 Conn. 319; *Schenley* v. *Commonwealth*, 36 Penn. St. 29.

(*g*) *Goshen* v. *Stonington*, 4 Conn. 224, per Hosmer, J.

consent, we conceive to be decidedly against "the law of the land." And the court must here be understood to speak with exclusive reference to the case before them, where the Legislature were simply, by retrospective act, removing an impediment to the marriage to which the parties had assented, and which they had attempted to form.

On the same principle legislative acts validating invalid contracts have been sustained. Where these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of personal disability to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, they can not well be obnoxious to constitutional objection (*h*).

In the State of Ohio certain deeds by married women were ineffectual for the purposes of record and evidence, by reason of the omission of the officer taking the acknowledgment to state in his certificate that before and at the time of the grantor making the acknowledgment he made the contents known to her, by reading or otherwise. An act was afterward passed which provided that "any deed heretofore executed pursuant to law, by husband and wife, shall be received in evidence in any of the Courts of this State, as conveying the estate of the wife, although the magistrate taking the acknowledgment of such deed shall not have certified that he read or made known the contents of such deed, before or at the time she acknowledged the execution thereof." It was held that this statute was unobjectionable. The deeds with the defective acknowledgment were notwithstanding effectual for the purpose of conveying the grantor's estate, and no vested rights were disturbed or wrong done by giving them effect as evidence (*i*).

Other cases go much farther than this, and hold that although the original deed was ineffectual for the purpose of conveying the title, the healing statute may accomplish the intent of the parties

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(*h*) *Savings Bank* v. *Allen*, 28 Conn. 97; *Savings Bank* v. *Bates*, 8 Conn. 505; *Andrews* v. *Russell*, 7 Blackf. 474; *Grimes* v. *Doe*, 8 Blackf. 371; *Satterlee* v. *Matthewson*, 16 S. & R. 169, and 2 Pet. 380; *Watson* v. *Mercer*, 8 Pet. 88; *Dulany* v. *Tilghman*, 6 Gill. and J. 461.

(*i*) *Chestnut* v. *Shane's Lessee*, 16 Ohio 599; overruling *Connell* v. *Connell*, 6 Ohio 358; *Good* v. *Zecher*, 12 Ohio, 358; *Meddoch* v. *Williams*, 12 Ohio, 377; and *Silliman* v. *Cummins*, 13 Ohio, 116. See also *Newman* v. *Samuels*, 17 Iowa, 528.

by giving it that effect (*j*). At first blush these cases might seem to go beyond the mere confirmation of a contract, and to be objectionable as depriving a party of property without due process of law; since they proceed upon the assumption that the title still remains in the grantor, and that the healing act is required for the purpose of divesting him of it, and passing it over to the grantee. There is some apparent force, therefore, in the objection that such a statute, if valid, deprives the party of vested rights. But the objection is more specious than sound. If all that is wanting to a valid contract or conveyance is the observance of some legal formality, the party may have a legal right to avoid it; but this right is coupled with no equity, even though the case be such that no remedy can be afforded the other party in the Courts. The right which the healing act takes away is the right in the party to avoid his contract; a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect (*k*). As put by Chief Justice Parker of Massachusetts, a party can not have a vested right to do wrong (*l*), or as stated by the Supreme Court of New Jersey, "Laws curing defects which would otherwise operate to frustrate what must be presumed to be the desire of the party affected, can not be considered as taking away vested rights. Courts do not regard rights as vested contrary to the equity and justice of the case (*m*)."

The operation of these cases, however, must be carefully confined to the parties to the original contract or deed, and to such other persons as only stand in the same position. Subsequent *bona fide* purchasers can not be deprived of the property which they have acquired, by a retrospective act changing the legal position of their grantors in regard to the thing purchased. While an invalid deed may be made good as between the parties, yet if, while it still remained invalid, and the grantor still retained the legal title to the land, a third person should purchase it, and receive a sufficient conveyance, with no notice of any fact which would preclude his acquiring an equitable as well

(*j*) *Lessee of Watson* v. *Bailey*, 1 Binney 470; *Barnet* v. *Barnet*, 15 S. & R. 72; *Tate* v. *Stoolzfoos*, 16 S. & R. 35; *Watson* v. *Mercer*, 8 Pet. 88; *Carpenter* v. *Pennsylvania*, 17 How. 456; *Davis* v. *State Bank*, 7 Ind. 317; *Goshorn* v. *Purcell*, 11 Ohio N. S. 641.

(*k*) *Gibson* v. *Hibbard*, 13 Mich. 214; *State* v. *Norwood*, 12 Md. 195.

(*l*) *Foster* v. *Essex Bank*, 16 Mass. 245

(*m*) *State* v. *Newark*, 3 Dutch. 197.

as a legal title thereby, it would not, we apprehend, be within the power of the Legislature afterward to deprive him of his title through confirmation of the original deed. The position of the case is altogether changed by the purchase, inasmuch as the legal title is now united with an equity as strong as that which existed in favor of him who purchased first. Under such circumstances even the courts of equity must recognize the right of the second purchaser as best, and it is secure against legislative interference (*n*).

In the case of a contract by a municipal corporation in excess of its authority, if the contract was one which the Legislature might originally have authorized, it is competent to confirm it by a subsequent enactment (*o*). Where municipal subscriptions to railroads and other similar improvements have been held valid, it has not usually been deemed of importance whether the legislative authority followed or preceded the subscription (*p*).

In none of the cases to which we have referred was it deemed an objection that the legislative act curing the defect was passed after suit brought in which it was sought to take advantage of the invalidity. The bringing of a suit vests no right to a particular decision; and the case must be determined on the law as it stands when judgment is rendered (*q*).

A statutory privilege, like the exemption of property from execution, is not a vested right (*r*); an exemption from taxation would stand upon the same principle, except where it rested

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(*n*) *Brinton* v. *Seevers*, 12 Iowa, 389; *Southard* v. *Central R. R. Co.* 2 Dutch. 13.

(*o*) *Shaw* v. *Norfolk County*, 5 Gray, 180.

(*p*) *McMillan* v. *Boyles*, 6 Clarke, Iowa, 330; (but compare *State et rel etc.* v. *county of Wapello*, 13 Iowa, 388); *Gould* v. *Sterling*, 23 N. Y. 457; *Thompson* v. *Lee County*, 3 Wallace, 327; *Bridgeport* v. *Housatonic R. R. Co.* 15 Conn. 475; *Board of Commissioners* v. *Bright*, 18 Ind. 93. The case of *Hasbrouch* v. *Milwaukee*, 13 Wis. 37, which holds the subsequent act ineffectual unless the municipality assent to it, does not seem to be in harmony with the general current of authority. See *Thomas* v. *Leland*, 24 Wend. 65; *Gilford* v. *Supervisors of Chenango*, 18 Barb. 615, and 13 N. Y. 143 *Brewster* v. *Syracuse*, 19 N. Y. 116.

(*q*) *Bacon* v. *Chandler*, 6 Mass. 309; *Watson* v. *Mercer*, 8 Pet. 88; *Mather* v. *Chapman*, 6 Conn. 54; *Rich* v. *Flanders*, 39 N. H. 323; *State* v. *Manning*, 11 Texas' 402. So if the case is appealed, and the law is changed pending the appeal, the appellate court must decide according to the law when their decision is given. *State* v. *Norwood*, 12 Md. 195. But see *Hedger* v. *Rennaker*, 3 Met. Ky. 255.

(*r*) *Bell* v. *Courve*, 13 W. & S. 238.

upon a consideration, so as to be protected as a contract. And a penalty given by statute may be taken away in like manner at any time before judgment recovered by the party to whom it is given (*s*).

Having thus endeavored to point out what are and what are not to be regarded as vested rights, within the principle of constitutional protection, it may be well to refer to other cases where legislation has sought to control parties as to the manner in which they should make use of their property, or to create claims against the will of the owners. We do not allude now to the control which the State may exercise through its police power, and which is far-reaching in its effects; but to that which, under a claim of State policy, and without any reference to wrongful act or omission of the owner, would exercise a supervision over his enjoyment of vested rights; or in other cases would compel him to recognise and satisfy demands upon it which he has never assented to create.

The first class of cases must be so few and so baseless in principle as to render it unnecessary to take time for their discussion. The State of Kentucky at one time passed an act to compel the owners of lands to make certain improvements upon them within a specified time, and declared them forfeited to the State in case the improvements were not made. It would be difficult to frame, from the general rules of government, any plausible argument in support of such a statute. It was not the exercise of the right of eminent domain; it was not taxation; it was not a police regulation. It was purely and simply a law to forfeit a man's property because he failed to improve it to the legislative satisfaction. To such a power, if vested in the government, there could be no limit but its own discretion; and it might authorize the officer of the law to enter the dwelling of the citizen and forfeit his furniture if it fell below, or his food if it exceeded, an established standard (*t*).

But different considerations present themselves where one man has been in possession of the land of another, and made improvements upon it in good faith, and in the expectation that he was to reap the benefit of them. If this has been done with the assent of the owner, express or implied; or if it has been suffered

(*s*) *Oriental Bank* v. *Freeze*, 6 Shep. 109.

(*t*) See *Gaines* v. *Buford*, 1 Dana, 499, and *Violet* v. *Violet*. 2 Dana 326.

through his negligence, and he afterward recovers the land and appropriates the improvements, there will exist against him at least a strong equitable claim for their value, and perhaps no sufficient reason why it should not be converted by legislation into a legal demand. It is certain that statutes of this description have frequently been sustained by the courts. Sometimes the negligence of the owner in asserting his right has been treated as justifying the legislative recognition of the equity (*u*); and some statutes only allow a recovery for improvements by one who has been in the undisturbed possession of the land for a certain number of years. But the element of negligence is probably not important to the support of the statute. "The right of the occupant to recover the value of his improvements," says a recent case, "does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity; that the occupant in good faith, believing himself to be the owner, has added to the permanent value of the land by his labor and his money, is in equity entitled to such added value, and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements without compensation to him who made them" (*v*).

Although the "betterment" laws compel a man to pay for improvements he has not contracted for, they present no feature of officious interference by government with private property. The improvements having been made by one man in good faith, are now to be appropriated by another. The parties can not be placed in *statu quo*, and the statute therefore accomplishes justice as near as practicable by compelling him who is to appropriate the betterments to pay their value. The case is peculiar, but a statute can not be unconstitutional which adjusts the rights of parties as nearly as possible according to natural justice.

Ann Arbor, Mich. T. M. C.

(*u*) *Brown* v. *Storm*, 4 Vt. 37.

(*v*) *Whitney* v. *Richardson*, 31 Vt. 306. For other cases in which similar laws have been held constitutional, see *Armstrong* v. *Jackson*, 1 Blackf. 374; *Fowler* v. *Halbert*, 4 Bibb, 52; *Ross* v. *Irving*, 14 Ill. 171; *Pacquette* v. *Pickness*, 19 Wis. 219; *Saunders* v. *Wilson*, 19 Texas, 194. *Childs* v. *Shower*, 18 Iowa, 261. They have very frequently been enforced without question.

Addendum M

THE HERALD.

SALT LAKE CITY, UTAH.

SUNDAY, - - MAY. 10, 1891

THE DAILY HERALD is published every morning, Mondays excepted, at THE HERALD Block, corner West Temple and First South streets, Salt Lake city, by THE HERALD COMPANY. Subscription price, in advance, $10.00 per annum, post paid.

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THE WELCOME.

The people of Salt Lake city and those who came in from the surrounding towns to see the President and participate in the reception proceedings have no occasion to censure themselves for anything which occurred on Saturday. They all did grandly, acquitting themselves with honor. The city was gaily decorated, the people were out in full force and full of patriotic enthusiasm, and they were sincere and honest in the welcome which they extended and the respect they showed to the nation's executive. Nothing but the loudest praise can be bestowed upon the masses, who will long remember the day as distinctly marked in their lives.

It is to be regretted that this honest praise cannot be extended to all who had to do with the event. It has been apparent from the time the coming was announced that it was the deliberate and cunning purpose of a few to make the President's visit here anything but what it should be. The little coterie of politicians who assume to "run" things hereabouts laid out to "capture" HARRISON, to keep him away from others, and to use him for their purposes, exclusively. In pursuance of this contemptible scheme the pee wee governor sneaked off to Oregon—crossing an entire state in his journey, and grossly insulting the good people of Idaho—and impudently camped with the President so as to see to it that nobody was admitted to HARRISON who was not agreeable to the pee wee. Then the ceremonies here were carefully arranged in a manner to belittle the people and magnify the gang; to give the President a wrong impression of what had been done in this country and of who did it.

And THE HERALD is bound to confess that the scheme was to a certain extent successful. The tricksters played their cards well for their purpose, but we believe that in the long run they will learn that they made a mistake, for the town is full of grumblings and criticisms against the schemers, the upstart THOMAS being roundly denounced by men of his own party who have heretofore insisted that he was not the narrow-minded, contemptible sneak that those who knew him best long since discovered him to be.

Of course we regret that the unfriendly influence had its effect upon the mind of the President. We are sorry that the President could not recognize what had been done in this country and who had done it. We are sorry that he was blind to the progress which has been made in the past few years, and could not see that conditions have changed and a new era been entered upon. We regret that in talking to the people who gathered to shout him welcome and do him honor that he did not deliver an address as of to-day, and not as of five or eight years ago. If he had permitted himself to see things as they are and to recognize accomplished facts, he would have loomed in the eyes of the people as a broad-minded, clear headed statesman. He did not, however, permit himself to do this, and the result is that while the people feel that they have done their duty, their admiration for the President has been considerably lowered. They excuse him, in a degree, for they feel that he has been preyed upon and his mind poisoned by the enemies of the territory, by the men who would rather see destruction come upon the community than that they should lose the power which they hold and exercise for the oppression of the masses.

We can assure the schemers, and with them their victim, President HARRISON, that yesterday's incidents will not soon be forgotten in this community. All that occurred, from the sneaking off to Oregon by the governor, down to the unworthy insinuations in President HARRISON'S speech, will be retained in the memory to be recalled when it shall become desirable to work revenges.

TEACHERS should always speak gently to children when teaching them. Here is an example of fear: Sunday school superintendent: "Who led the children of Israel into Canaan? Will one of the smaller boys answer?" No reply. Superintendent (somewhat sternly): "Can no one tell? Little boy on that seat next to the aisle, who led the children of Israel into Canaan?" Little boy (badly frightened), "It wasn't me. I—I just moved yere last week."

THE NAME "London" has three different meanings. (1) the City of London; (2) the metropolis of County of London; (3) the "Metropolitan Area." The "Metropolis" in 1855 was under two millions and a half. The City of London contains 650 acres; the county council district, 75,451 acres, and the metropolitan police district, 451,559 acres. The London postal district, though far more extensive than the county of London, does not include the whole of the police district. There are seventeen governing bodies; five of them elected by the rate-payers, one by the board of guardians, four by vestries, one nominated by the lord chancellor, two by the home secretary, three by the Queen and one by justices.

THE DAY may shortly come predicted by the old prophets who, looking down the vista of time, could see by the possibilities of human nature when men

> Would hang the trumpet in the hall
> And study war no more.

The prophet poets saw this, no doubt, as the result of religion and morality among the nations, but we may see it through other channels. A general of the British army lately said, that paradoxical as it may seem, the prospects of peace throughout the world were never surer than at this moment, owing to the fearful perfection to which weapons of warfare and destruction have been brought. So long is now the range and so great the accuracy of the rifle and the field gun, and so weird and strange is the influence following the introduction of smokeless powder that the greatest military nation would long hesitate before plunging into war, the condition of which must be so uncertain and terrible. An interesting fact in illustration of this occurred the other week, when the Emperor of Germany was exercising a body of troops, a portion of whom were supplied with smokeless powder. Such was the demoralizing effect of the powder that the opposing party, unable to see the enemy, or where their fire came from, were thrown into almost complete panic, although the maneuvers were merely mimic warfare.

COWARD AND IMBECILE.

The Liberal organ is anxious to know when Utah politics assumed the phase that with the Liberal party continuing the question was narrowed down to this: Shall the Mormons be disfranchised, denied the privilege of naturalization, prevented from acquiring title to land and subjected to the danger of losing much of the land they already have?

The Liberal party, through its candidate for Delegate to Congress, answered this question in the affirmative. The Democratic party, through its declaration of principles, has answered it in the negative.

But the Liberal organ pretends that it did not force this issue to the exclusion of every other. If the editor of that paper will consult his files he will come across frequent utterances of which the following is a sample:

"The first thing that will be taken from them (the Mormons) will be the franchise. Then they will find themselves at the mercy of such laws as may be prescribed for them. * * * The next attack will be on their property. * * * This will mean final bankruptcy, not only for the masses, but for the rich in the organization."

Three days before the November election the Liberal candidate said through the Liberal organ:

"Mormons have no right to participate in public political affairs and no real claim to the benefit of the land laws."

Immediately after the election, the defeated candidate boasted that he had declaimed in favor of the disfranchisement of the "oath-bound serfs" of Utah, and for months he endeavored to show that he had not tried to dodge the disfranchisement issue, but had openly advocated disfranchisement in his tour through Utah.

For the same paper now to pretend that it knows nothing of a disfranchisement issue, is clearly the depth of cowardice and the last totter of imbecility. The Republican paper is sick.

IT IS said that during the present tour of the President he stopped at one of the rural villages in Southern California. It was a small place, and there were few to do him honor. However, he was President and was entitled to the best that could be had. The two musicians of the town, one a harmonica player and the other a twanger of the banjo, went down to the car and rolled out a few doleful melodies. "Play something more lively, boys, whoop 'er up!" urged the chairman of the local committee. Judge of his holy horror when a few seconds later there rolled out upon the evening air the strains of "Where Did You Get That Hat?"

FOLLY is on the increase at Frankfort, for we learn that a remarkable anti-matrimonial ladies' club exists there. Ladies of between twenty and forty years of age are admissible, and upon election, with an annual subscription of $50, they take a vow never to marry. A fine of $500 is demanded from a member who may find love and marriage a more tempting prospect than a club and companions. Every member must attire herself in funeral black and forswear novels.

THE PRICE OF TIN.

The Burlington *Gazette* is a bright Democratic paper that teaches straight Democratic doctrine. It is especially happy on the tariff issue. A recent issue contains the following instructive correspondence:

MUSCATINE, Iowa, March 2, 1891.

Messrs. Norton Brothers, Chicago, Ill.:

GENTLEMEN—We note that you charged us $1.15 for No. 99 coffee cans February 24. Your price heretofore has been $1. We expected them at this price. Have you made an error? Yours truly, J. M. GOBLE & Co.

In reply he received the following:

CHICAGO, March 3, 1891.

J. M. Goble & Co., Muscatine, Iowa:

DEAR SIRS—Your favor of the 2d inst. is duly at hand and noted. We have been obliged to advance our price on our entire line within the last few months, owing to the heavy advance in the tin plate market, and the best price we are making to anybody on our No. 99 cans is $1.15 case net. We should have called your attention to this before shipping had we not supposed you had had some of these cans at the new price, which was made quite a while ago. Yours truly, NORTON BROTHERS,

Per W. L. Clifford.

The high tax press in asserting that there has been no advance in tin plate simply lies. But that is nothing new for the high tax press.

There is a lesson for protectionists in the advanced price, not only of tin but of canned goods, caused by the passage of the MCKINLEY bill. At the same time the tin mines of Dakota refuse to be developed, and the ever fleeting tin industry, pursued from city to city by anxious seekers, knows not where to lay its head.

THE ROYAL Agricultural society of England has received from that society's consulting entomologist, Miss ORMEROD, a report in which special attention is drawn to the fact that the hard frost and severe winter have not the smallest effect upon insect life. It is generally supposed that frost has the power of killing insects, and that therefore the country will be free from insect pests during the forthcoming season. Miss ORMEROD is afraid that these hopes will be disappointed, and advises all those who were troubled with insects during the past year to take precautions for the coming season.

IN ENGLAND and Wales during 1889, the whole small-pox mortality was only twenty-eight in a population of twenty-nine millions. Among the nine and a half millions inhabiting the principal cities and towns only seven small-pox deaths occurred, and among the four millions of London only one death.

STATE RIGHTS.

"2—We believe that the several states of the union are sovereign within their sphere, and that upon the preservation of their autonomy depend the benefits of local self-government, the liberty of the citizens, and the perpetuity of the union.—*Democratic Platform.*

The constitution states that "the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people." From this it appears that the state power extends to all cases not covered in the grant made by the people to the United States.

This power, which rests with the people or with the states, includes, therefore, among other things, the right of the state to punish for crimes committed within its borders, to adjudicate civil cases, to make rules and regulations for the protection and safety of persons or property within its jurisdiction, in short to pass and put into execution all laws that may be necessary for the ordinary conduct of business, the daily life of the people, the safety of their property, and the maintenance of personal freedom. It may be observed that the punitive power of the state is vastly greater than that of the nation, and deals with affairs of more vital importance. For the power of Congress covers chiefly the matters of revenue and taxation for national purposes, the regulation of commerce, the coining of money, the postal service, the army and navy, the punishment of piracies and felonies committed on the high seas, and the establishment of a supreme court and inferior ones for the adjudication of these cases. The power of the states covers such vital matters as murder, felony, arson, theft, robbery, contracts, marriage and divorce, police regulations of all sorts, quarantine regulations and numerous others that need not be mentioned. Within this sphere, and it is a very great one, the states are sovereign, and the sentence quoted above declares with truth that the liberty of the people depends upon their autonomy, upon their right to legislate for themselves within the vast field of action that concerns only their own citizens.

We have said that whatever else may be disputed there is one proposition that admits of no difference of opinion among Democrats—the right of a free community to govern itself. By a strange fatuity, however, many have held and some Democrats have provisionally admitted, that this doctrine of "state rights" has no application to the territories. But all agree that people of the territories may claim the benefit of the guarantees of personal liberty found in the constitution, and that the territorial condition is merely preparatory to full participation in national affairs and in local self-government.

But though the states are sovereign within the sphere of the vast powers above indicated, yet they are limited in their action. The supreme law of the land declares that "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Liberty, as here used, is a very comprehensive term, and "due process of law" signifies a regular proceeding before a constituted judicial tribunal.

It was once believed by many, not only that the states were sovereign within their sphere, but that they could also judge of the validity of the acts of Congress. Nearly a century ago the Virginia Resolutions declared the power of the federal government is limited by the plain sense and intention of the constitution, and that" in case of a deliberate palpable and dangerous exercise of other powers not granted by the said compact, the states, who are the parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights and liberties appertaining to them." The Kentucky Resolutions passed at about the same time, declared that a nullification by the states of all unauthorized acts done under color of the constitution is the rightful remedy.

These extreme views are no longer advocated. The federal government decides upon the extent and scope of its own powers and the remedy is not nullification by the states, but reversal of that policy through elections, if the federal government has exceeded its powers, just the same as the remedy for other evils in the government.

Thus, the much-abused but little known doctrine of state rights turns out to mean nothing more than that the states should exercise those powers which belonged to the states when the constitution was formed, and have not by that instrument been granted to the federal government or prohibited to the states. We have seen that these powers are of great extent and of the utmost importance. If the people themselves cannot be trusted to exercise these powers, no one can.

Democracy pins its faith to the people in this as in other respects. It leaves the power in their hands and they are then responsible for its exercise. The government will thus be as good as the people choose to make it, and no government can be better than the people composing it. Unless the people are honest and make the government correspond, it will necessarily be bad, and there will never be found an unselfish few that will labor very long in their interest if they themselves are neglectful of it.

THE KING of Siam has given to the Baptist mission at Bangkok $20,000 for a hospital and school.

IT IS a notable fact that of all the nations round Judea the Persians alone, who restored the Jews from their captivity, remain a kingdom.

COUNT CAMPORELLO, a Protestant convert in Italy, is preaching protestantism up and down the country. He was once a high official in the Church of Italy.

THE CENSUS reports of religious bodies in the United States show that there are 134 sects with 25,000,000 members.

THE PLACING of the last stone in the spire of the cathedral at Ulm raises it to a height of 530 feet, and makes it the highest cathedral in the world.

A MINISTER had been deposed by his congregation, and in due time he delivered his farewell discourse to the people of his church. It is a remarkable production, both in brevity and quaint pointedness: "Dearly beloved, our parting does not seem hard to me, for three reasons: First, you do not love me; second, you do not love each other; third, and the Lord does not love you. (1) If you loved me, you would have paid me for my services during the past two years; (2) you do not love each other, or I would have had more marriages to celebrate, and (3) in conclusion, the Lord does not love you, for otherwise He would call more of you to Him."

A FRESHMAN indeed needs college breeding. Scene: Library. Freshman—"Where shall I find DARWIN'S works?" Librarian—"What do you want with DARWIN?" Freshman—"I want his 'Origin of Species' so as I can find out something about this financial question."

THE UNITED STATES originates a dozen or more new sects every year, and many of them of great good to poor suffering humanity, which go to show that Christianity is a progressive religion, having in itself the spirit to do good without specific commandments to that end. One of our exchanges says, among the grandest and last organizations of the day is that of the "King's Daughters." They gather inspiration from the name of CHRIST, and from the spirit of his example. The members do not need to be professedly Christian, we think, but the good work they yield their hands and hearts to "In His Name," would, certainly, soon lead them to become most earnest Christians in fact. The pledge is to do for the heart of want and sorrow the work nearest at hand, though simplest in form. Their attention is chiefly bestowed upon the sick poor of the humbler homes, and they are the right hand messengers of mercy to the physicians. The past year in New York city alone they made 120,000 visits to 16,000 families, bearing comforts, delicacies, flowers, and, best of all, sweet spirits and kindly words.

THE PURPOSE OF RECIPROCITY.

The junior Republican organ makes one more stagger at the reciprocity question:

We all agree that the balance of trade in our favor growing out of our trade with Europe is absorbed by the balance against us in the South American trade. The principle of reciprocity is designed to overcome this, and nearly everybody in the world excepting the HERALD recognizes the fact that it will absorb it.

The junior organ is not keen enough to observe that this admission overwhelms all its talk about the benefits of reciprocity to American farms.

The farms of this country send to Europe $200,000,000 more in products than Europe sends back, but we accept South American products for this balance. That is, the American farmers now supply South America with $200,000,000 worth of European manufactures bought with the farm surplus we send to Europe.

"Reciprocity is designed to overcome this," says the junior organ. Most decidedly it is, and that is precisely the objection to reciprocity.

Reciprocity will give this market to the manufacturers, and it can only do that by taking it from the farmers.

Let there be no mistake about this. The South Americans buy one billion dollars' worth of goods, mostly manufactures, each year, paying for them with the same amount of agricultural products. Of this amount our farmers furnish them a considerable proportion by sending our farm surplus to Europe and purchasing these goods. South Americans will not use more manufactures simply because they are to be furnished by American mill-owners instead of by American farmers. Nor will they pay more for them. The difference will consist solely in the fact that the mills will drive the farms from this profitable indirect trade with South America.

The junior organ might think the farm surplus will be paid for in the products of other countries, after the manufacturers have taken their South American trade away from the farms. But that remains to be seen. The fact now before us is that American farms supply South America with goods from Europe.

Reciprocity is intended to keep these European goods bought by our farm surplus out of South America, so that our mill-owners instead of our farmers can supply them. If that scheme should succeed, our manufacturers could supply South America with all such goods, receiving in payment all the agricultural products now sent from South America to Europe, viz: cotton, wheat, hides, beef, etc. Our farmers would then lose their home market as they are now losing their foreign market. And this is the ultimate aim of reciprocity with agricultural countries like those south of us.

THE TOTAL amount of life insurance and annuity funds in Great Britain is nearly nine hundred million pounds ($4,500,000,000).

MR. E. C. RAVENSTEIN, the well-known cartographer, estimates the number of the world's inhabitants last year to have been 1,467,900,000, and the area of land on the earth's surface 46,350,000 square miles, of which 28,209,000 square miles are fertile. According to Mr. RAVENSTEIN'S estimate, France in the present year exercises influence over a greater area of the African continent than any other European power, Great Britain not excepted. French Africa covers an area of 2,988,950 square miles, while Britain has only 2,462,436 square miles, and Germany is far behind with 831,000 miles. Turkey (Egypt and Tripoli) and the Congo Free State take almost precisely the same area, while Portugal has a somewhat larger share—809,824 square miles. In matter of population, however, Great Britain more than holds her own, for while French Africa has 22,013,000 inhabitants, or eight to the square mile, Britain's possessions contain 39,836,000 people, or sixteen to the square mile. Unappropriated Africa still covers 2,021,583 square miles, with a population of 23,868,400.

LITERATURE.

HORTENSE—By W. Heimburg. Translated from the German by Mary E. Almy. Chicago and New York: Rand, McNally & Co.

Mrs. Almy is doing the novel-reading public a real service in making them familiar with the writings of that charming German novelist, W. Heimburg. When the lady's translation of "Cloister Wendhusen" appeared a few months ago it gave American readers their first intimation of the delightful German, and made them keen for more of his works. Now Mrs. Almy gives us "Hortense," a story not so vigorous as the other, and with fewer intense situations, yet with all the charm and evenness of construction and the beauty of imagination which characterized "Cloister Wendhusen." In view of the fact that such authors as Heimburg exist, it seems strange that our American publishers will persist in issuing so much of the cheap and senseless trash which is sent out as entertaining and instructive literature. As in her previous effort, the pains which the translator has taken and her literal adherence to the text are manifest in every line. Her fidelity is such that one can not discover that the story was originally written in a foreign tongue. It is to be hoped that the lady will continue these translations, giving us more examples of the splendid creations of the comparatively unknown novelist.

THE AURORAPHONE. A Romance. By Cyrus Cole. Second edition. Chicago: Charles H. Kerr & Co. Price, 50 cents.

In this little volume, which comes as No. 1 of the Unity library, the author has given the widest possible range to his very vivid imagination, the result being a jumble of improbabilities, of sentimentalities, of striking situations and of weirdness. The story would have been more interesting if it had been confined to half the space which it occupies.

CHARLES DARWIN. His life and work. By Charles Frederick Holder. New York: G. P. Putnam's Sons.

The purpose of the author has been to adapt the study of the life of the great thinker and reasoner to young readers, and most admirably has he succeeded, the matter being not merely plainly presented, but told in a decidedly interesting manner. Holder does not discuss the theories of Darwin; simply presenting them in attractive form, leaving the reader to form his own conclusions as to the correctness of the positions assumed by the great naturalist. The subject is treated under the following heads in the order here set forth: "The Boy Darwin," "College Days," "The Young Naturalist," "In Southern Seas," "In the Land of the Sacred Tree," "Among the Fossils," "The Land of Giants," "The Foot of the Andes," "In the Earthquake Country," "In the Red Snow Country," "Among the Ocean Volcanoes," "In the Gardens of the Sea," "Darwin the Naturalist," "Home Life," "The Work of a Life," "Honors of a Lifetime," "The Darwin Family," "Darwinism," "The Darwin Memorial." Mr. Holder asserts and demonstrates that Darwin was not the originator of the evolution theory, as before him many naturalists had advocated it; but he elaborated the theory and undertook to establish its soundness by the multiplication of facts asserted to be incontrovertible. Whatever one may think of the peculiar doctrine which will cause Darwin's name to live through all time, the reading of the story of his researches in the special field where he dwelt will ever be entertaining and instructive.

THE SINGLE TAX IDEA.

Mr. Monroe Continues His Arguments in Favor of Its Adoption.

It is urged against the taxation of personal property that it cannot be collected except from the honest, the ignorant, the timid, and that a vast majority of people being dishonest, intelligent and brave, especially when dealing with the assessor, the personal property tax is, therefore, impracticable and inexpedient. There are too many avenues by which the assessor can be deceived. Frequently the value of goods can be ridiculously underestimated, and the general ignorance of assessors, which they must necessarily have on many lines of goods, makes them unable to protect themselves against such imposition. How, for example, can the average assessor ascertain the value of a $300,000 residence finished by woods from European forests, or the value of a painting recently bought from a famous gallery? Even on the furniture, statuary, etc., the value given depends entirely on the truthfulness of the owner, and will be regulated by

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THE MOST MAGNIFICENT HOMES

in that city of magnificent homes was assessed only $700 for personal property in one year.

Two widows residing in Batavia, New York, were assessed for more personal property than all the individuals in the city of Rochester with 70,000 inhabitants.

In regard to minors, lunatics, etc., whose property is controlled by guardians and in the hands of the courts, the valuation is easily ascertained, and they are, consequently, taxed to the last dollars' worth, while the crafty and conscienceless escape and no law can be devised to get at a true valuation that can be enforced.

Let the farmer, the small merchant and the tradesmen consider the fact carefully, that the rich are only taxed on an exceedingly small valuation, partly because the value cannot be ascertained and partly because they have so much at stake that they can resort to methods that the poor cannot afford to. On the other hand, the horses and cattle, fences, houses, barns, implements, grain, etc., of the farmer, the simple stock of the small merchant, and the home of the mechanic can easily be valued to their full worth by a man of ordinary intelligence.

ASK YOURSELF THE QUESTION.

"Doesn't this show a fundamental wrong somewhere?"

Let no poor man console himself that he at present pays no taxes simply because he owns no home, no lands, no houses.

Every man, rich and poor alike, pays taxes every time he buys a tiny pair of stockings for his baby, a new hat for his wife or a suit of clothes for himself. He not only pays a tax, but a profit on the tax. All taxes on goods increase the cost, as the per cent. of profit must be figured on the aggregate cost of the article. The tax is part of the cost of every article. Every man pays a tax, though he may live in the darkest room of a ten-story tenement house. The tariff and other taxes added to the cost of the lumber and nails and other material in the house, and even the tax on the mechanic's tools that constructed the place increased the cost. It would be an interesting mathematical problem for the poor fellow occupying the darkest room of the ten-story tenement when he pays his rent, to quietly figure just how much his rent is increased by tariffs and personal property taxes.

THE HEAVIEST TAX

comes in this indirect way and is merely a method of extorting the greatest amount of wealth from the people without making them rebel; as Turgot put it, "Taxation is the art of plucking the goose without making it cry."

The time has arrived when the American people must be conversant with the exact amount of taxes each one pays and the exact purpose for which this is used.

The day of paternalism is passed. Monarchial governments where the people have little to say in regard to the control of affairs and where money is constantly used for improper and unpatriotic purposes, must needs deceive the people by indirect taxation. But in this country where the people are the supreme power, it seems ridiculous for them to try to deceive themselves. It is like the ostrich in the desert sticking his head in the sand and imagining he is not seen because he sees not.

Among the many reasonable objections to the present form of taxation, is the one that to even attempt to enforce the system requires

AN INQUISITORIAL SEARCH

into one's private affairs that is tyrannous and embarrassing. That "every man's home is his castle" is accepted as a truism in this country, and yet like many other high-sounding statements, it means little. No home should be subject to invasion by public officers except in extreme cases, and every man's business should be as private to him as his own home circle.

A system of taxation that puts the larger share on the honest, the ignorant and timid is unjust—men are not to blame for being honest or ignorant or timid. It is very largely a matter due to heredity and environment. While it may be perfectly right to make the criminal classes work for the state it does not seem just to the honest nor merciful to the ignorant and timid to make them bear the main burden of taxation.

The single tax on land values is a remedy for this evil.

Land cannot be hid away; its value can be easily ascertained.

The single tax on land values would do away with an immense amount of lying. Nothing could be hid away, nothing sent out of the state, nothing could be undervalued, consequently there would be nothing to lie about.

Under such a system the honest and dishonest, the brave and timid, the intelligent and ignorant pay but one just and equal tax, proportioned to the advantages enjoyed from society.

F. H. MONROE.

rules and regulations for the protection and safety of persons or property within its jurisdiction, in short to pass and put into execution all laws that may be necessary for the ordinary conduct of business, the daily life of the people, the safety of their property, and the maintenance of personal freedom. It may be observed that the punitive power of the state is vastly greater than that of the nation, and deals with affairs of more vital importance. For the power of Congress covers chiefly the matters of revenue and taxation for national purposes, the regulation of commerce, the coining of money, the postal service, the army and navy, the punishment of piracies and felonies committed on the high seas, and the establishment of a supreme court and inferior ones for the adjudication of these cases. The power of the states covers such vital matters as murder, felony, arson, theft, robbery, contracts, marriage and divorce, police regulations of all sorts, quarantine regulations and numerous others that need not be mentioned. Within this sphere, and it is a very great one, the states are sovereign, and the sentence quoted above declares with truth that the liberty of the people depends upon their autonomy, upon their right to legislate for themselves within the vast field of action that concerns only their own citizens.

We have said that whatever else may be disputed there is one proposition that admits of no difference of opinion among Democrats—the right of a free community to govern itself. By a strange fatuity, however, many have held and some Democrats have provisionally admitted, that this doctrine of "state rights" has no application to the territories. But all agree that people of the territories may claim the benefit of the guarantees of personal liberty found in the constitution, and that the territorial condition is merely preparatory to full participation in national affairs and in local self-government.

But though the states are sovereign within the sphere of the vast powers above indicated, yet they are limited in their action. The supreme law of the land declares that "No state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Liberty, as here used, is a very comprehensive term, and "due process of law" signifies a regular proceeding before a constituted judicial tribunal.

It was once believed by many, not only that the states were sovereign within their sphere, but that they could also judge of the validity of the acts of Congress. Nearly a century ago the Virginia Resolutions declared the power of the federal government is limited by the plain sense and intention of the constitution, and that" in case of a deliberate palpable and dangerous exercise of other powers not granted by the said compact, the states, who are the parties thereto, work nearest at hand, though simplest in form. Their attention is chiefly bestowed upon the sick poor of the humbler homes, and they are the right hand messengers of mercy to the physicians. The past year in New York city alone they made 120,000 visits to 16,000 families, bearing comforts, delicacies, flowers, and, best of all, sweet spirits and kindly words.

THE PURPOSE OF RECIPROCITY.

The junior Republican organ makes one more stagger at the reciprocity question:

We all agree that the balance of trade in our favor growing out of our trade with Europe is absorbed by the balance against us in the South American trade. The principle of reciprocity is designed to overcome this, and nearly everybody in the world excepting the HERALD recognizes the fact that it will absorb it.

The junior organ is not keen enough to observe that this admission overwhelms all its talk about the benefits of reciprocity to American farms.

The farms of this country send to Europe $200,000,000 more in products than Europe sends back, but we accept South American products for this balance. That is, the American farmers now supply South America with $200,000,000 worth of European manufactures bought with the farm surplus we send to Europe.

"Reciprocity is designed to overcome this," says the junior organ. Most decidedly it is, and that is precisely the objection to reciprocity.

Reciprocity will give this market to the manufacturers, and it can only do that by taking it from the farmers.

Let there be no mistake about this. The South Americans buy one billion dollars' worth of goods, mostly manufactures, each year, paying for them with the same amount of agricultural products. Of this amount our farmers furnish them a considerable proportion by sending our farm surplus to Europe and purchasing these goods. South Americans will not use more manufactures simply because they are to be furnished by American mill-owners instead of by American farmers. Nor will they pay more for them. The difference will consist solely in the fact that the mills will drive the farms from this profitable indirect trade with South America.

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ing account of the number of Liberal votes polled, and frequently conferring with the Liberal judges of election.

Members of the Liberal committee were at each polling place, giving instructions to police officers, judges of election and registrars.

Liberal heelers in order to consult with judges of election or registrars, approached the polls without restraint to receive from their colleagues on the inside little slips of paper containing the names of men who had not yet voted.

In short, every advantage was given to the Liberal party to carry the election, and almost the entire expense of manning the polls in the interests of that party was borne by the government.

But these are minor evils. There is one gigantic fraud that overtops all the others, and that one we especially denounce. That is the appointment of radical Liberals, often Liberal candidates on the ticket, as registrars, and then maintaining that the registrars are absolute in authority. This is done in Utah, with the perfectly obvious result that the Liberal party is gaining many successes.

Only the intolerable arrogance of the

property or they should be stripped of it.

THE QUAINTEST bit of recent political irony occurs in the Liberal organ of yesterday, in speaking of the methods of that party. Here it is:

A fairer convention was never held. * * * Every preliminary that led up to the nominations was fair and honest. * * * Every man who pleased in the primaries had a voice and full power to exert all the influence he possessed.

To write the foregoing with a straight face was of course impossible. Readers of the sheet will remember also what it said of the Eighth ward primary at the time it was held. Comment is unnecessary.

EQUALITY BEFORE THE LAW.

We commend to our fanatical Liberal friends a study of the following truths as expressed by the Philadelphia *Times:*

The equality of all men before the law is one of the fundamental principles of republican government. It is imbeded in the constitution. No favoritism, no monopolistic privileges are allowed. All men are equal before the law: all have the same rights and privileges, and none of these rights and privileges can be taken away except by due process of law. The discretion,

per day. H. L. HALL, Prop.

RAILWAY NOTES.

It is said that the Mexican Central purchases all its coal and the greater part of its supplies in the United States, and the advance in silver increases just so much its purchasing ability.

The car works all over the country have advanced the price of building passenger coaches. A coach which was built a year ago for $5,200 the works will not build now for less than $5,500, and the car works are steadily advancing the price of box and coal cars.

The earnings and expenses of the Chicago, Burlington & Quincy and its lines for the month of June shows gross earnings of $2,740,538.05, an increase of $56,523.02. The operating expenses and other charges for the month were $2,759,253.31, an increase of $320,775.10. The net earnings for the month show a deficit of $19,000.29, and a consequent decrease of $264,252. From January 1st to June 30th there was an increase in gross earnings over the same period last year of $1,590,498.16, and an increase in net earnings of $723,458.31.

An express train is to be run over the New Jersey Central & Reading tracks that will, it is expected, beat all previous records made between New York and Philadelphia. By using a single locomotive and thus avoiding a change of engines at Bound

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HENRY W. LAW
SALT LAKE CITY, UTAH

THE HERALD.

SALT LAKE CITY, UTAH.

WEDNESDAY, - - - August 6, 1890

THE DAILY HERALD is published every morning, Mondays excepted, at THE HERALD Block, corner West Temple and First South streets, Salt Lake City, by THE HERALD COMPANY. Subscription price, in advance, $10.00 per annum, post paid.

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SUBSCRIBERS will confer a favor by forwarding information to this office when their papers are no promptly received. This will aid us to determine where the fault lies.

ALL communications should be addressed to

THE HERALD,
Salt Lake City, Utah.

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By the year (invariably in advance).....$10.00

Liberal leaders, inspired by a knowledge of their absolute power, prevented the county from falling into the hands of that party yesterday. The registration officers had so conducted the house to house visitation, that large numbers of men, mostly of the People's party, of course, had failed to get registered; and the registrars simply laughed at the efforts of these men to get their names on the list afterwards. Though in a minority in the county, the Liberals would have carried the county by the arbitrary counting in or counting out of men by the registrars, had not this high-handed proceeding disgusted a class of workingmen, who left the party of oppression and voted with the People to defeat the tyrants.

An election in this city is very much a farce.

IT IS a glorious victory which the Workingmen and People have achieved—glorious enough to be celebrated in a grand jollification. When shall the eagle be turned loose to scream?

REBUKING THE BOSSES.

opinion, whim or caprice of executive or ministerial officers, or even a state statute, is not due process of law. This is shown in the decisions of the supreme court that state laws excluding colored persons from the jury box are unconstitutional.

The federal constitution provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection or of the laws." This phrase "due process of law" means a course of legal proceedings in which there is a judicial tribunal, parties, accusers and accused, an offense charged on fixed and certain law, and last a judgment, rather than a mere record of popular clamor or official favoritism.

Life, liberty and property are alike secured, for life without liberty, under the law, and life and liberty together without property are worthless. Property includes trade or business, and the right to engage in it, on the same terms as all other men, without any discrimination in favor of or against any person. No state can deny to any person within its jurisdiction [illegible] of the laws. Protection [illegible] which all persons are equal, so long as they do not violate

4 of 8

Brook, by scooping water from track tanks at Green Brook instead of stopping for water, and by increasing the speed for the whole trip, the scheduled time is brought down to 102 minutes for a distance of eighty-nine miles. Between Plainfield and Elizabeth a speed of over seventy miles an hour is to be attained. The Newark bay bridge and the city grade crossings are the retarding features of the trip.

The contract for the great Busk-Ivanhoe tunnel through the Saguache range has been let by the Colorado Midland to Michael H. Keefe, of Butte, Mont., who has just completed a tunnel 7,000 feet long for the Montana Central railroad. The Busk will be 9,350 feet long, and will cost about $1,000,000. It will have only a single track through it, but will be as complete a piece of work of its kind as there is in the country. The contract calls for the completion of the work in twenty months, and allows a good bonus for each day before the time expires. The work on the approaches to the tunnel has been commenced.

Good Fortune of a Land Broker.

In February, 1889, I commenced to use Hibbard's Rheumatic Syrup and Plasters for inflammatory rheumatism from which I had suffered for three years. My joints were swollen so that I could hardly walk, but three bottles of the Syrup, and the

Addendum N

THE EVENING DISPATCH.

No 78--Vol 4 PROVO CITY, UTAH, MONDAY, FEBRUARY 4, 1895. PRICE FIVE CENTS A COPY

BAR ASSOCIATION

Hon. W. N. Dusenberry Reads an Able Paper On

THE GRAND JURY SYSTEM

Favors its Abrogation and Gives Lucid Reasons for His Conclusions—A Lively Discussion Ensues Upon the Matter of Selecting Supreme Judges.

The meeting of the bar association held last Saturday evening was better attended than have been the meetings held previously. More delegates-elect to the constitutional convention were present, and visitors were also more numerous. The subjects discussed at these meetings are of deep interest to each and every citizen of the new state. One's time of a Saturday evening cannot be better spent than by attending these meetings and hearing the arguments made, and studying pro and con the subjects that are there brought up.

At last Saturday night's session President Milliner occupied the chair. The first business taken up was the reading of a very able paper by Hon. W. N. Dusenberry on "The Grand Jury System."

The judge designated this system as "the ancient fraud and venerable humbug," also as "the fifth wheel to the car of justice," which is entirely useless, costs very much money, and often facilitates the escape of the guilty. "It is a maxim of law" said the judge, "that whatever is required to be done must be well done, and hence each indictment must conform in detail to all the forms of law, and any defect in the drawing or organization of the grand jury, or in the form of the indictment, is fatal to the whole proceedings and in practice we frequently see the worst criminals released from the consequences of their crimes and turned loose to again prey upon society by reason of defects and informalities in the indictment, in the organization of the jury, or that one man too many took notes of evidence in the jury room."

The judge cited many other objections to the system which lack of space compels THE DISPATCH to omit mention of, and said the cost of the grand juries to the territory each year in the past had been at least $45,000.00. This sum had been worse than wasted. No substitute for the grand jury system is needed; let the criminal go direct from the magistrate before whom he is accused and answer to the accusation. The wisdom of several states who years ago adopted this reform and abolished the grand jury system has proven that a commonwealth gets along better without than with a grand jury.

The argument urged by some that the Constitution of the United States forbids the exclusion of the grand jury, in that in the fifth amendment that instrument provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and in the fourteenth amendment it provides that "no state shall deprive any person of life, liberty or property without due process of law," was ably answered. The Constitution of the United States gives the states the right to designate in their constitutions just what the states shall desire to be "due process of law."

On motion of Hon. S. R. Thurman a vote of thanks was tendered Judge Dusenberry for his very able paper and he was asked to prepare a paper on the petit jury system for next meeting.

The resolution published in last Monday's issue of THE DISPATCH relative to the matter of selection, tenure of office and jurisdiction of judges under the constitution of the new state was then taken up. Much discussion upon it for and against was had. Only that portion of the resolution pertaining to the supreme judges was considered. The balance of the resolution will be taken up at next meeting.

Hon. D. D. Houtz, who presented the resolution at last meeting, was the first speaker. He favored it entirely, holding that the office of judge of the supreme court is a representative office and that therefore the people should have the privilege of electing men to fill that office. He pointed out that if the offices of the three judges were to be filled by appointment by the governor and senate it would be placing too much power in the hands of one or of a few men, that favorities might be placed in offices, while men more capable would be elected by the people. A term of office of six years was deemed by Mr. Houtz to be sufficiently long. Other arguments were advanced by Mr. Houtz.

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UTAH CO. RELIEF SOCIETIES.

Some Pleasing Information Concerning Them and the Grand Good Work They are Doing.

To the Editor of THE EVENING DISPATCH:

Knowing that THE DISPATCH and its many readers are especially interested in all good works, I take pleasure in giving a few statistics in regard to the relief societies of Utah county, which are organized for the express purpose of caring for the needy, the sick and the afflicted. There are thirty-three of these organizations in this county with a membership of 2500. They have held during the year 1894 seven hundred meetings and have disbursed to those needing assistance nearly $2,500. These societies, besides having presidents and secretaries, have an efficient corps of ladies whose duty it is to visit each family in the district assigned them to labor in, and learn if there are any sick or needy and at once render the assistance necessary. And whether it be in the pleasant summer days or amid the cold and snows of winter, these faithful women never fail to perform their monthly round, a part of their duties being to receive donations for the furtherance of this good work from those who are charitably disposed. The labor of these societies is continuous. The writer of this can testify from personal experience in the labors of these societies that the unfortunate sick and afflicted are tenderly cared for, and when called hence, are neatly and cleanly laid in their last resting places.

Another laudable enterprise under the auspices of these societies is the storing up of wheat, the same to be used should a time of scarcity of bread ever over take us, as it recently has our sister state, Nebraska. Twenty of these societies report having at the present time five thousand one hundred and ninety-six bushels of wheat.

CAROL B. PRATT.

PROVO, February 4, 1895.

Beet Contracts.

Nels Johnson of Provo, and John Johnson of Lake View have received contracts from the Sugar company, and are now prepared to make contracts for beets for the coming season. Those farmers who anticipate raising sugar beets this year should call on the agent in their district at once.

Notice.

To whom it may concern.

All persons knowing themselves indebted to, or having any claims against the late Wm. Harrison, tinner, are requested to present the same within thirty days to the undersigned at Spanish Fork or Provo City, Box 5.

W. C. HARRISON.

Welsh Reunion at Spanish Fork March 1st.

For the above occasion the Union Pacific will sell tickets from all points in Utah to Spanish Fork at half fare. Selling dates February 28th and March 1st. Good for return until March 4th.

Train leaves Lehi at 8:44 a. m., American Fork 8:50 a. m., Pleasant Grove 8:55 a. m., Lake View 9:04 a. m., Provo 9:15 a. m., Springville, 9:25 a. m., arriving at Spanish Fork at 9:34 a. m.

Leave Nephi at 2 p. m., Mona 2:19 p. m., Santaquin 2:50 p. m., Payson 3:01 p. m., arriving at Spanish Fork at 3:18 p. m.

G. W. CRAIG.

Athletics For Women.

In the memorial building of the Young Women's Christian association in Brooklyn is a gymnasium which was opened last season. It has been constructed to meet the needs of young women who can give only the evening hours to athletic exercise and pay only a nominal sum. In addition to the gymnasium hall, with its visitors' gallery and elevated running track, are dressing rooms, bathrooms and needle baths. For the modest sum of 5 cents any woman, whether a member or not of the gymnasium, can have a bath. The work in the gym comprises three grades—calisthenic, gymnastic and corrective. Corsets and close fitting waists are prohibited in all grades of work. Among the women well known in Brooklyn society who are generous supporters of the association are Mrs. Samuel B. Duryea, Mrs. Clark Burnham, Mrs. G. H. Prentiss and Mrs. C. W. Ide.

One of the prettiest of gymnastic exercises—a new one—is that in which the line of girls moves in an elaborate arabesque or scroll, winding around in concentric circles and then unwinding to form a long line moving down the length of the room in skillfully planned curves. The music grows slower and slower until the line finally comes to a standstill, when the girls take their places for other exercises.—Brooklyn Eagle.

Training Women For Business.

A business woman's college has been just opened in London, or, to describe the excellent institution's aims more exactly, a school for the business training of women has been established. The school is mainly designed to train women for clerkships and secretaryships. They are taught shorthand, typewriting, accounts and banking in a course extending over six months. The opportunities are offered gentlewomen who, suddenly thrown by financial mishap on their own resources, can catch up a profession by which to support themselves. Besides this the school accepts as pupils women who wish to learn how to keep their own books and personally manage their own independent fortunes. Then, too, women apply who have a chance for a government position and must be well up in mathematics and get through special examinations. From its graduating classes the school supplies secretaries to busy philanthropical ladies who need help in their work in the form of a capable head for figures and a neat hand at penmanship.—London Letter.

Women In the Colleges.

Colleges for women were never so full as now. Smith leads with a round 800, and Wellesley follows with a score or so less. Mount Holyoke has the largest class ever gathered in her walls and overflows into the village for lack of dormitory space, while every facility of Vassar is taxed to the utmost. At Smith a new course in English is offered to the juniors by Professor Mary A. Jordan. "Mountain day" was celebrated by long drives and mountain climbs, and the roads in the vicinity were filled with student pedestrians. Bryn Mawr notes a gain of 40 in its list of students. Miss Thomas, formerly dean of the faculty, has assumed her position as president in place of Dr. Rhoades, whose resignation on account of ill health has been accepted reluctantly. The Mount Holyoke College Botanical garden has been an unusual success this season, and classes under Professor Hooker have made constant use of its treasures.—Home Journal.

Sex Disqualified Her.

The Cook county (Ills.) board of review decided that the name of Miss Kate Kane could not be printed as a candidate for probate judge. The petition on which Miss Kane made her application was signed by 3,175 voters of the Republican, Democratic, People's and Socialistic parties, and she has been a practicing attorney for years. The decision was broadly that the sex of the nominee disqualified her. Judge Scales said, in reference to the action of the board, that women were not yet entitled to vote for county officers, and that a woman was not qualified to hold the position of probate judge.

Do Not Sleep on the Left Side.

There is little doubt that an immense number of persons habitually sleep on the left side, and those who do so can never, it is said, be strictly healthy. It is the most prolific cause of nightmare, and also of the unpleasant taste in the mouth on arising in the morning. All food enters and leaves the stomach on the right side, and hence sleeping on the left side soon after eating involves a sort of pumping operation which is anything but conducive to sound repose. The action of the heart is also seriously interfered with and the lungs unduly compressed. Hence it is best to cultivate the habit of always sleeping on the right side, although Sandow and other strong men are said to invariably sleep on their backs.—Philadelphia Times.

Charlotte M. Yonge.

Miss Charlotte M. Yonge received, on her recent seventieth birthday, an album containing 5,000 autographs of admirers of her writings. Among them are those of the archbishop of York, the marquis of Salisbury, 15 bishops and many others of eminence. The queen of Italy sent an autograph note and a photograph of herself.

BAR ASSOCIATION

Hon. W. N. Dusenberry Reads an Able Paper On

THE GRAND JURY SYSTEM

Favors its Abrogation and Gives Lucid Reasons for His Conclusions—A Lively Discussion Ensues Upon the Matter of Selecting Supreme Judges.

The meeting of the bar association held last Saturday evening was better attended than have been the meetings held previously. More delegates-elect to the constitutional convention were present, and visitors were also more numerous. The subjects discussed at these meetings are of deep interest to each and every citizen of the new state. One's time of a Saturday evening cannot be better spent than by attending these meetings and hearing the arguments made, and studying pro and con the subjects that are there brought up.

At last Saturday night's session President Milliner occupied the chair. The first business taken up was the reading of a very able paper by Hon. W. N. Dusenberry on "The Grand Jury System."

The judge designated this system as "the ancient fraud and venerable humbug," also as "the fifth wheel to the car of justice," which is entirely useless, costs very much money, and often facilitates the escape of the guilty. "It is a maxim of law" said the judge, "that whatever is required to be done must be well done, and hence each indictment must conform in detail to all the forms of law, and any defect in the drawing or organization of the grand jury, or in the form of the indictment, is fatal to the whole proceedings and in practice we frequently see the worst criminals released from the consequences of their crimes and turned loose to again prey upon society by reason of defects and informalities in the indictment, in the organization of the jury, or that one man too many took notes of evidence in the jury room."

The judge cited many other objections to the system which lack of space compels THE DISPATCH to omit mention of, and said the cost of the grand juries to the territory each year in the past had been at least $45,000.00. This sum had been worse than wasted. No substitute for the grand jury system is needed; let the criminal go direct from the magistrate before whom he is accused and answer to the accusation. The wisdom of several states who years ago adopted this reform and abolished the grand jury system has proven that a commonwealth gets along better without than with a grand jury.

The argument urged by some that the Constitution of the United States forbids the exclusion of the grand jury, in that in the fifth amendment that instrument provides that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and in the fourteenth amendment it provides that "no state shall deprive any person of life, liberty or property without due process of law," was ably answered. The Constitution of the United States gives the states the right to designate in their constitutions just what the states shall desire to be "due process of law."

On motion of Hon. S. R. Thurman a vote of thanks was tendered Judge Dusenberry for his very able paper and he was asked to prepare a paper on the petit jury system for next meeting.

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Addendum O

NEW YORK UNIVERSITY
LAW REVIEW

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THE BILL OF RIGHTS AND THE STATES: THE REVIVAL OF STATE CONSTITUTIONS AS GUARDIANS OF INDIVIDUAL RIGHTS

WILLIAM J. BRENNAN, JR.*

Focusing on the series of decisions he calls the most important of the Warren era, Justice Brennan traces the development of the Fourteenth Amendment as a vehicle to bind the states to the restraints of the Federal Bill of Rights. But Justice Brennan observes that the years since 1969 have seen a contraction of the scope of federal rights, often in the name of federalism. While he laments this trend, he notes with approval that state courts have stepped into the breach, often interpreting provisions in their constitutions as more protective than the analogous federal provisions. However, Justice Brennan admonishes that the strength of the federal system is its double source of protection and that federal courts must not abdicate their special responsibility to interpret and enforce the Bill of Rights and the Fourteenth Amendment.

Twenty-five years ago I had the honor to stand at this lectern and deliver one of the first James Madison lectures.[1] It is uniquely appropriate that a lecture series born out of a concern for the enhancement and appreciation of our civil liberties should bear the name of James Madison. Our constitutional structure of separated powers and limited government is known as the Madisonian system, for it was Madison who laid down its basic design in the Virginia Plan and Madison who led the congressional battle for the adoption of our national Bill of Rights.

When I spoke here in 1961, our nation stood on the threshold of great changes, in which the Supreme Court would play a major role. The Court was preparing to hand down the first in a series of decisions that were the most important of the Warren era. I reserve this characterization not for *Brown v. Board of Education*[2] or for *Baker v. Carr*,[3] although

* Associate Justice, Supreme Court of the United States. This Article was delivered as the nineteenth James Madison Lecture on Constitutional Law at New York University School of Law on November 18, 1986.

[1] Brennan, The Bill of Rights and the States, 36 N.Y.U. L. Rev. 761 (1961).

[2] 347 U.S. 483 (1954).

surely the banning of racial segregation and the recognition of the principle of one person-one vote were great triumphs for our nation and our Constitution. Instead, I believe that even more significant for the preservation and furtherance of the ideals we have fashioned for our society were the decisions binding the states to almost all of the restraints in the Bill of Rights.

The vehicle for this dramatic development was the Fourteenth Amendment. "[I]t is the amendment that has served as the legal instrument of the equalitarian revolution which has so transformed the contemporary American society,"[4] protecting each of us from the employment of governmental authority in a manner contravening our national conceptions of human dignity and liberty. This country has been transformed by the standards, promises, and power of the Fourteenth Amendment—"that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and equal protection of the laws from our state governments no less than from our national one."[5]

The passage of the Fourteenth Amendment fulfilled James Madison's vision of the structure of American federalism. During the debates over the Bill of Rights, Madison expressed serious reservations over the bills of rights then present in various state constitutions. He stated, "[S]ome states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing [rights] in the full extent which republican principles would require, they limit them too much to agree with common ideas of liberty."[6]

Madison crafted a solution to this problem and proposed it as one of the seventeen amendments to the Constitution that he originally submitted to the House. Coincidentally numbered 14, the amendment read: "No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."[7] Because Madison thought that there was "more danger of . . . powers being abused by the State Governments than by the Government of the

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[3] 369 U.S. 186 (1962).

[4] Schwartz, The Amendment in Operation: A Historical Overview, in The Fourteenth Amendment 29, 30 (B. Schwartz ed. 1970).

[5] Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 490 (1977).

[6] 1 Annals of Cong. 439 (J. Gales ed. 1789).

[7] Id. at 435.

United States,"[8] he labeled this "the most valuable amendment in the whole list."[9] After passage in the House, however, his amendment was defeated in the Senate by the forces Madison feared most, those who wanted the states to retain their systems of established churches.[10]

Madison's fears of excessive and arbitrary state power were not widely shared at the time the Bill of Rights was adopted. Instead it was believed that personal freedom could be secured more accurately by decentralization than by express command. In other words, the states were perceived as protectors of, rather than threats to, the civil and political rights of individuals. The enactment of the Fourteenth Amendment seventy-nine years later signaled the adoption of Madison's view and banished the spectre of arbitrary state power, his lone fear for our constitutional system.

Prior to the passage of this Civil War Amendment, the Supreme Court had made it plain that the Bill of Rights was applicable only to the federal government. In 1833, in *Barron v. Baltimore*,[11] Chief Justice Marshall held that the Bill of Rights operated only against the power of the federal government and not against that of the States. The federal Constitution, he stated, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states."[12]

Only after the Civil War did the demand arise for the national protection of individual rights against abuses of state power. The war exposed a serious flaw in the notion that states could be trusted to nurture individual rights: the assumption of "an identity of interests between the states, as the level of government closest to the people, and the primary corpus of civil rights and liberties of the people themselves—an identity incomplete from the start and . . . impossible to maintain after the great battle over slavery had been fought."[13] In fact, the primary impetus to the adoption of the Fourteenth Amendment was the fear that the former Confederate states would deny newly freed persons the protection of life, liberty, and property formally provided by the state constitutions. But the majestic goals of the Fourteenth Amendment were framed in terms of more general application: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction

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[8] Id. at 440.

[9] Id. at 755.

[10] See generally I. Brant, James Madison, Father of The Constitution 271 (1950).

[11] 32 U.S. (7 Pet.) 243 (1833).

[12] Id. at 247.

[13] L. Tribe, American Constitutional Law § 1-3, at 5 (1978).

the equal protection of the laws."[14]

Section 5 of the new amendment further authorized Congress to enforce its requirements through appropriate legislation. Thereafter, in March 1875, Congress granted the federal courts jurisdiction "of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States . . . ."[15] This legislation, in my view, revealed Congress's intention to leave the definition and enforcement of the protections and prohibitions of the Fourteenth Amendment to the federal judiciary. The authors of the Fourteenth Amendment, like the authors of the original Bill of Rights and the Constitution, realized that the written guarantees of liberty are "mere paper protections without an [independent] judiciary to define and enforce them."[16]

In my 1961 lecture, I detailed the historical development of the relationship between this modern Magna Carta and the protection of civil rights in the states. Initially, the Fourteenth Amendment served to protect the excesses of expanding capital and industry from even limited control by the government. The Court firmly rejected the suggestion that any of the guarantees of the Federal Bill of Rights were among the "privileges or immunities of citizens of the United States."[17] But I also observed that the Court had not "closed every door in the Fourteenth Amendment against the application of the Federal Bill of Rights to the states."[18] The Court utilized the Due Process Clause to apply certain safeguards in the first eight amendments to the states. Unfortunately, the Court expressly rejected any notion that the Fourteenth Amendment mandated the wholesale application of any of the first eight amendments to the states; instead the Court held that certain of the protections in the Bill were "of such a nature that they are included in the conception of due process of law."[19] The Court felt that it could give the Due Process Clause of the Fourteenth Amendment a meaning or content independent of the liberties secured by the Bill of Rights by picking and choosing those rights it considered "of the very essence of a scheme of ordered liberty."[20]

Pursuant to this analysis, the Court, at the time of my lecture, had held that all the protections of the First Amendment extended to restrain the unlawful exercise of state power.[21] Aside from the First Amend-

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[14] U.S. Const. amend. XIV.

[15] 18 Stat. 335 (1875).

[16] Brennan, Landmarks of Legal Liberty, in The Fourteenth Amendment 1, 4 (B. Schwartz ed. 1970).

[17] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-81 (1873).

[18] Brennan, supra note 1, at 769.

[19] Twining v. New Jersey, 211 U.S. 78, 99 (1908).

[20] Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[21] See Gitlow v. New York, 268 U.S. 652, 666 (1925).

ment, however, only three specific rights from the Federal Bill had been deemed to apply to the states when I stood before you in 1961: the Fifth Amendment's requirement that just compensation should be paid for private property taken for public use,[22] the Sixth Amendment's requirement that counsel be appointed for an accused in a capital case,[23] and the Fourth Amendment's prohibition of unreasonable searches and seizures, absent its corollary, the exclusionary rule.[24]

I left the audience with a prediction and a question. My prediction was that, having applied the guarantee against unreasonable searches and seizures to the states, the Court would soon determine that states must also exclude from their proceedings any evidence obtained by such illegal means.[25] In other words, the Court would have to impose adherence to the exclusionary rule on the states. This prediction came to pass four months after the delivery of the lecture.[26] Needless to say, I decline to spoil my perfect record by making any further predictions at this time.

The question I asked in 1961 has now been answered by the actions of the Court. I asked what James Madison would have thought of the Court's refusal to apply many of the protections and prohibitions of the Federal Bill to the states, protections such as

> the right of a person not to be twice put in jeopardy of life or limb for the same offense; not to be compelled in any criminal case to be a witness against one's self; as an accused, to enjoy the right in criminal prosecutions to a speedy and public trial by an impartial jury of twelve, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[27]

I asked whether Madison would have conceded that any of these rights were unnecessary to " 'the very essence of a scheme of ordered liberty,' " or that any were not among " 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' " or not among those personal immunities that are " 'so rooted in the traditions and conscience of our people as to be ranked fundamental?' "[28]

It is with deep satisfaction that I come before you tonight to answer the rhetorical question I posed twenty-five years ago. Of course, the his-

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[22] See Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[23] See Betts v. Brady, 316 U.S. 455 (1942).

[24] See Wolf v. Colorado, 338 U.S. 25 (1949).

[25] Brennan, supra note 1, at 776.

[26] See Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[27] Brennan, supra note 1, at 777.

[28] Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937); Hurtado v. California, 110 U.S. 516, 535 (1884); Snyder v. Massachusetts, 291 U.S. 97, 105 (1922)).

torical record demonstrates clearly what Madison's answer would be: he felt that it was vital to secure certain fundamental rights against state and federal governments alike. Recent history reveals that the Supreme Court finally agreed with him. In the years between 1961 and 1969, the Supreme Court interpreted the Fourteenth Amendment to nationalize civil rights, making the great guarantees of life, liberty, and property binding on all governments throughout the nation. In so doing, the Court fundamentally reshaped the law of this land.

Two questions recurred throughout this period of change. The first was whether the Bill of Rights should be selectively or fully incorporated. Although the full incorporation of the Bill of Rights into the Fourteenth Amendment has never commanded a majority of the Court, we have "looked increasingly to the Bill of Rights for guidance [so that] many of the rights guaranteed by the first eight Amendments"[29] have been deemed selectively absorbed into the Fourteenth. Second, assuming that a particular guarantee in the Federal Bill should be applied to the states, there remained the question of the scope or extent of its application. For example, for a great many years after the Fourth Amendment had been applied to the states, the Court refused to extend application of the exclusionary rule, labeling it a mere rule of evidence and not a constitutional requirement. The reversal of this decision was the forerunner of the trend toward the broad and complete nationalization of the Bill which occurred in the 1960s.

The first signal that change was in the air came in 1961 with the Court's decision in *Mapp v. Ohio*,[30] reversing *Wolf v. Colorado*[31] and applying the Fourth Amendment *and* the exclusionary rule to the states. Evidence obtained through an unconstitutional search was excluded from consideration in state court cases, as it had been for some years in federal cases. This decision was, in its time, "the Supreme Court's most ambitious effort to affect and determine the quality of state criminal justice . . . subject[ing] the state officer to a constitutional standard of performance no lower or different from that governing federal law enforcement."[32] Anthony Lewis, who covered the Court for the *New York Times*, perceptively noted that a significant corner had been turned in the relationship between the Bill of Rights and the states and speculated that other rights in the Bill, too, might be fully applied to the

[29] Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

[30] 367 U.S. 643 (1961).

[31] 338 U.S. 25 (1949).

[32] Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 Sup. Ct. Rev. 1, 47.

states.[33]

Although, in retrospect, it is plain that *Mapp* was a turning point, at the time the future of the incorporation doctrine did not appear settled. The case was decided by the narrowest of margins—five to four. Opponents of the decision violently denounced it, arguing that it offended principles of federalism and symbolized the Court's determination to impose a national system of individual rights at the expense of traditional state controls.

The opinion of the court itself firmly and properly rejected this argument. A *healthy* federalism is not promoted by allowing state officers to seize evidence illegally or by permitting state courts to utilize such evidence. The Court has long recognized the paramount importance of procedural safeguards in the administration of a system of criminal laws. In our modern world, "the criminal procedure sanctioned by any of our states is a procedure sanctioned by the United States."[34] The mere invocation of the slogan "state's rights" does not authorize the judiciary to "administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before [the Court]."[35]

Between 1962 and 1969, in a flurry of activity, the Court extended nine of the specific provisions of the Federal Bill to the states; these decisions have had a profound impact on American life, deeply involving state courts in the application of rights and protections formerly perceived as creatures solely of federal courts. The Eighth Amendment's prohibition against cruel and unusual punishment was applied against the states in 1962 in the case of *Robinson v. California*.[36] Walter Robinson was arrested in Los Angeles for the "crime" of addiction to narcotics. Almost as an afterthought, Robinson's attorney argued that the narcotics addiction statute inflicted cruel and unusual punishment, first because it punished an involuntary status, and second because it required an offender to undergo a "cold turkey" withdrawal from his or her addiction. In June 1962, the Court accepted these arguments and determined that the Cruel and Unusual Punishment Clause of the Eighth Amendment applied to the states. We held that drug addiction was akin to mental illness, leprosy, or affliction with venereal disease and that, "in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth

[33] Lewis, An Old Court Dispute: Search-Seizure Edict Revives Issue of Applying Bill of Rights to States, N.Y. Times, June 21, 1961, at 21, col. 1.

[34] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

[35] Ohio ex. rel. Eaton v. Price, 364 U.S 263, 275 (1956) (Brennan, J., dissenting from the judgment of an equally divided court).

[36] 370 U.S. 660 (1962).

and Fourteenth Amendments."[37]

The opinion of the Court did not make plain whether the Court was holding that the Cruel and Unusual Punishment Clause applied to the state in exactly the same way it applied to the federal government or whether it was holding only that the Due Process Clause, as the embodiment of a more generalized notion of fairness, prohibited the punishment inflicted upon Robinson. In other words, the Court did not state clearly that the Fourteenth Amendment applied the full scope of protections embodied in the Cruel and Unusual Punishment Clause of the Eighth Amendment to the states. Subsequently, it was made clear that the clause was indeed incorporated to its full extent. The importance of this decision cannot be overestimated, for it was pursuant to this clause that the death penalty as then administered was struck down in 1972.[38]

In *Gideon v. Wainwright*,[39] the Court once again avoided a direct holding on the question of incorporation, but did deal a devastating blow to an ad hoc, fundamental fairness approach to the application of the Federal Bill. The case came to the Court by way of a hand-written petition for certiorari in which Clarence Gideon stated the question quite plainly: "It makes no difference how old I am or what color I am or what church I belong to if any . . . . The question is very simple. I requested the court to appoint me [an] attorney and the court refused."[40] Abe Fortas, who was appointed to represent Gideon before the Court, did not primarily argue that the Assistance of Counsel Clause of the Sixth Amendment applied in state criminal trials through incorporation in the Fourteenth Amendment; instead, he forcefully maintained that indigent defendants simply could not possibly receive a fair trial in serious state criminal cases unless represented by counsel. It was evident at oral argument that Fortas was willing to accept the application of the right of counsel to the states whether or not the Court accomplished this through specific incorporation of the Sixth Amendment.[41]

When the decision was handed down, the Court held that the Due Process Clause required the appointment of counsel for indigent defendants charged with serious state criminal offenses. We stated that any provision of the Federal Bill which is " 'fundamental and essential to a fair trial' "[42] is made obligatory on the states by the Fourteenth Amend-

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[37] Id. at 666 (citation omitted).

[38] Furman v. Georgia, 408 U.S. 238, 240 (1972).

[39] 372 U.S. 335 (1963).

[40] Answer to Respondent's Response to Petition for Writ of Certiorari at 2-3, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155), quoted in R. Cortner, The Supreme Court and the Second Bill of Rights 195 (1981).

[41] R. Cortner, supra note 40, at 199-200.

[42] *Gideon*, 372 U.S. at 340 (quoting Betts v. Brady, 316 U.S. 455, 465 (1942)).

ment, and that representation by counsel is one such fundamental right. Justice Harlan, however, insisted in his concurrence that *Gideon* did not mean that the right to counsel that applied to the states was identical to that guaranteed in the Sixth Amendment.[43] He rejected the idea that the Fourteenth Amendment incorporated the Sixth and found instead that the right to counsel was embraced within the Due Process Clause's conception of "fundamental fairness."[44]

Ironically, it was in *Gideon* that the opponents of incorporation were hoist on the petard of their own traditional argument that a proper consideration of the principles of federalism would block the full application of the guarantees of the Federal Bill to the states. When asked by the Attorney General of Florida to submit briefs in support of his state's position in *Gideon*, the Attorneys General of twenty-three states instead urged the Court to require appointed counsel in all cases involving indigent defendants. The states argued that the existing rule—that counsel would only be appointed when necessary due to "special circumstances"—led to friction between state and federal courts because it required a post-trial assessment of the fairness of the adversary proceeding conducted absent counsel, necessitating a "most obnoxious" federal supervision[45] of the state court's actions. Essentially, twenty-three states had requested incorporation of the right to counsel, hoping to avoid unpredictable and arbitrary intrusions of federal judicial power in state proceedings and expressing a desire for clear standards of conduct. The position of the states in *Gideon* illustrated that federalism is better served by incorporation of the guarantees of the Federal Bill than by a case-by-case assessment of the degree of protection afforded to particular rights.

The momentous consequence of this decision is that "counsel must now be provided in every courtroom of every state of this land to secure the rights of those accused of crime."[46] By this decision, the Court removed one of the most egregious examples of differential treatment for poor and rich; effective advocacy is no longer exclusively enjoyed by the wealthy criminal defendant.

In *Malloy v. Hogan*,[47] the Court finally decided a case by speaking in explicitly incorporationist terms. *Twining v. New Jersey*[48] was reversed, and the Self-Incrimination Clause of the Fifth Amendment was applied to the states. The state had insisted that only the core of the Self-Incrimination Clause, that is, the prohibition against use of physically coerced

[43] Id. at 352 (Harlan, J., concurring).
[44] Id.
[45] R. Cortner, supra note 40, at 196.
[46] Brennan, supra note 5, at 494.
[47] 378 U.S. 1 (1964).
[48] 211 U.S. 78 (1908).

confessions, applied to the states, not the full clause or all of the procedural refinements applicable in federal proceedings.

Writing for the majority, however, I stated that the Court must refuse to accord "the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by the Framers when they added the Amendment to our constitutional scheme"[49] and rejected the suggestion that a "watered-down" version of the Fifth Amendment applied in state court. In *Mapp*, *Robinson*, and *Gideon*, the Court had not proceeded explicitly on the basis of incorporation, but the Court's opinion in *Malloy* made clear that the rights and prohibitions nationalized in the past were now considered to apply to the states with full federal regalia intact.

It has been said that "the nationalization process took on an inexorable quality after the decision in *Malloy v. Hogan*."[50] The explicit articulation of the incorporation theory clarified the reasoning of the Court's earlier decisions and advanced significantly the progress toward full nationalization. Moreover, the decision to extend this particular guarantee held profound significance for the future. Eventually, "after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona*, requiring police in every state to give warnings to a suspect before custodial interrogation."[51]

Between 1965 and 1967, in rapid-fire succession, the Court extended to the states four of the Sixth Amendment's guarantees—the right of an accused to be confronted by the witnesses against him,[52] the right to a speedy trial,[53] the right to a trial by an impartial jury,[54] and the right to have compulsory process in order to obtain witnesses.[55] In the course of these decisions, however, it became clear that a majority of the Court was unwilling to embrace incorporation of all the amendments in the Bill of Rights. In 1968, in *Duncan v. Louisiana*,[56] the Court attempted to explain the theoretical basis for its decisions requiring the states to adhere to certain provisions of the Bill while excluding others. Applying the right to trial by jury for all serious offenses to the states, the Court reasoned that "state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the

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[49] *Malloy*, 378 U.S. at 5.

[50] R. Cortner, supra note 40, at 217.

[51] Brennan, supra note 5, at 494.

[52] See Pointer v. Texas, 380 U.S. 400 (1965).

[53] See Klopfer v. North Carolina, 386 U.S. 213 (1967).

[54] See Parker v. Gladden, 385 U.S. 363 (1966).

[55] See Washington v. Texas, 388 U.S. 14 (1967).

[56] 391 U.S. 145 (1968).

common-law system that has been developing contemporaneously in England and this country."[57] As a consequence, the Court explained that each decision to incorporate was founded on a determination of whether "a procedure is necessary to an Anglo-American regime of ordered liberty."[58]

Justice Black concurred in this decision, stating that he was willing to accept the majority's selective incorporation of rights because it limited the discretion of the Court to application of specific protections, and because it had "already worked to make most of the Bill of Rights' protections applicable to the States."[59]

Finally, on June 23, 1969, in *Benton v. Maryland*,[60] the Double Jeopardy Clause of the Fifth Amendment was applied to the states and the modern revolution was virtually complete. Only the Second and Third Amendments, the Grand Jury Clause of the Fifth Amendment, the Seventh Amendment, and the Excessive Fines and Bail Clause of the Eighth Amendment remained unincorporated, and the latter was subsequently absorbed. Although the Court had rejected Hugo Black's theory of total incorporation, it had accepted one vital element of his analysis—that once a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court.

The nationalization process stretched over a hundred years after the passage of the Fourteenth Amendment. Most fittingly, the date upon which *Benton*, the capstone of the revolution, was handed down was also the final day of Earl Warren's service on the Court. The tenure of this great Chief Justice saw the conversion of the Fourteenth Amendment into a guarantee of individual liberties equal to or more important than the original Bill of Rights.

This series of decisions transformed the basic structure of constitutional safeguards for individual political and civil liberties in the nation and profoundly altered the character of our federal system. The agenda of the national Court was radically altered by the nationalization of the first eight amendments. Only rarely in the nineteenth century did individuals challenge the exercise of federal authority. Now modern constitutional law revolves around questions of civil and political liberty. The Court's reinvigorated construction of the Fourteenth Amendment, and particularly the nationalization of the Bill of Rights through the Due Process Clause, are the primary reasons for that development.

I do not believe, however, that these revolutionary changes are due

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[57] Id. at 149 n.14.
[58] Id. at 150 n.14.
[59] Id. at 171 (Black, J., concurring).
[60] 395 U.S. 704 (1969).

solely to the triumph of the doctrine of selective incorporation. Even those Justices who resisted the sway of this theory interpreted the Due Process Clause of the Fourteenth Amendment to require progressively more stringent standards in a state criminal trial. This truth is revealed most clearly in the Court's judgment in *Gideon* which, despite the lack of consensus as to rationale, was a unanimous decision. Every member of the *Gideon* Court concurred in the holding that the Constitution required that indigent defendants receive the benefit of counsel when charged with a serious criminal offense. Some felt that the Fourteenth Amendment incorporated the Sixth Amendment's requirements and applied them to state criminal proceedings, but others simply concluded that principles of fundamental fairness mandated equal representation for rich and poor alike. By different paths, each member of the Court arrived at the same constitutional endpoint. Modern critics of incorporation who insist that the doctrine has dealt the principle of federalism a "politically violent and constitutionally suspect blow"[61] ignore this significant fact.

Most Americans have come to think of the Bill of Rights as the source of their liberties. Even in casual parlance, people speak of "taking the Fifth" or of their "First Amendment rights." In most relevant instances, Americans receive the protections they take for granted only due to their application to the states through the Due Process Clause of the Fourteenth Amendment, which has most appropriately been called "our second Bill of Rights."[62]

I would prefer to end my tale here with the legal fulfillment of the original promise of the Fourteenth Amendment. Although we have not yet achieved equal justice for all members of our society, Congress and the judiciary did much in the decade of the 1960s to close the gap between the promise and the social and political reality envisioned by the framers of the Fourteenth Amendment. But today, although unmistakable inequities should disrupt any observer's complacency, the Court is involved in a new curtailment of the Fourteenth Amendment's scope. Although this nation so reveres the civil and political rights of the individual that they are sheltered from the power of the majority, these rights are treated as inferior to the ever-increasing demands of governmental authority. Although both economic and political power are more intensely concentrated in today's urban industrialized society than ever before, threatening individual privacy and autonomy, we see an increasing tendency to insure control rather than to nurture individuality.

The issue of application of the Bill of Rights to the states involves two separate questions: whether the guarantee in question should apply

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[61] Address by Attorney General Edwin Meese, American Bar Association (July 9, 1985).

[62] R. Cortner, supra note 40, at 301.

to the states, and what its content should be when applied. For several years now, there has been an unmistakable trend in the Court to read the guarantees of individual liberty restrictively, which means that the content of the rights applied to the states is likewise diminished.

The Fourth Amendment has been most clearly targeted for attack. For many years, the rule was that a valid search warrant had to be supported by probable cause; if it was not, the fruits of the search could not be used in evidence. In 1984, in *United States v. Leon*,[63] the Court revoked this rule and determined that the products of a search based on a police officer's "reasonable" reliance on a warrant not supported by probable cause would not necessarily be suppressed.[64] I joined the dissent, in which three Justices stated that this holding—"that it is presumptively reasonable to rely on a defective warrant"[65]—is the product of "constitutional amnesia"[66] and suggested that the Court was converting the Bill of Rights "into an unenforced honor code that the police may follow at their discretion."[67]

The Court has further determined that we do not have a legitimate expectation of privacy in our bank records,[68] permitting their seizure without our consent or knowledge; that private diaries may be seized and utilized to convict a person of a crime;[69] that police searches are lawful when grounded on consent even if that consent is not a knowing or intelligent one;[70] that states may convict persons of crimes by nonunanimous juries;[71] that private shopping centers may prohibit free speech on their premises;[72] and that it is neither cruel nor unusual punishment to sentence a repeated writer of bad checks to a lifetime in prison.[73] These decisions reveal most plainly that retrenchment is following the Warren era, a time in which the Court played "the role of keeper of the nation's conscience."[74]

This trend is not visible solely in the enfeebled protection of individual rights under the Federal Bill and the Fourteenth Amendment. The venerable remedy of habeas corpus has been sharply limited in the name of federalism, the Equal Protection Clause has been denied its full reach,

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63 468 U.S. 897 (1984).

64 Id. at 922-25.

65 Id. at 972 (Stevens, J., dissenting).

66 Id.

67 Id. at 978.

68 United States v. Miller, 425 U.S. 435, 443 (1976).

69 Fisher v. United States, 425 U.S. 391, 408 (1976).

70 United States v. Watson, 423 U.S. 411, 423-24 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 247-48 (1973).

71 Apodaca v. Oregon, 406 U.S. 404, 410-14 (1972) (plurality opinion).

72 Hudgens v. NLRB, 424 U.S. 507, 521 (1976).

73 Rummel v. Estelle, 445 U.S. 263, 285 (1980).

74 Wilkes, The New Federalism in Criminal Procedure, 62 Ky. L.J. 421, 421 (1974).

and a series of decisions shaping the doctrines of justiciability, jurisdiction, and remedy "increasingly bar the federal courthouse door in the absence of showings probably impossible to make."[75]

For a decade now, I have felt certain that the Court's contraction of federal rights and remedies on grounds of federalism should be interpreted as a plain invitation to state courts to step into the breach. In the 1960s, the "understandable enthusiasm that championed the application of the Bill of Rights to the states . . . contribute[d] to the disparagement of other rights retained by the people, namely state constitutional rights."[76] Busy interpreting the onslaught of federal constitutional rulings in state criminal cases, the state courts fell silent on the subject of their own constitutions. Now, the diminution of federal scrutiny and protection out of purported deference to the states mandates the assumption of a more responsible state court role. And state courts have taken seriously their obligation as coequal guardians of civil rights and liberties.

As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law. Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.[77] When the United States Supreme Court cut back the reach of First Amendment protections, the California Supreme Court responded by interpreting its state constitution to protect freedom of speech in shopping centers and malls.[78] The Massachusetts, Pennsylvania, and Washington courts responded in kind when confronted with similar questions involving freedom of expression.[79] Under the federal Constitution, a motorist stopped by a police officer for a simple traffic violation may be subject to a full body search and a search of his vehicle.[80] Such police conduct offends state constitutional provisions

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[75] Brennan, supra note 5, at 498 (citing Rizzo v. Goode, 423 U.S. 362, 380 (1976); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-46 (1976); Warth v. Seldin, 422 U.S. 490, 508-10 (1975); O'Shea v. Littleton, 414 U.S. 448, 502-04 (1974)).

[76] Collins, Reliance on State Constitutions, in Developments in State Constitutional Law 1, 4 (B. McGraw ed. 1985).

[77] Id. at 2.

[78] Robins v. Pruneyard, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860 (1979), aff'd, 447 U.S. 74 (1980).

[79] Batchelder v. Allied Stores Int'l, Inc., 388 Mass. 83, 87-93, 445 N.E.2d 590, 593-95 (1983); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1333-39 (Pa. 1986); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 237-46, 635 P.2d 108, 112-17 (1981).

[80] Gustafson v. Florida, 414 U.S. 260, 266 (1973); United States v. Robinson, 414 U.S. 218, 235 (1973).

in California and Hawaii, unless the officer has articulable reasons to suspect other illegal conduct.[81] South Dakota has rejected the inventory search rule announced in *South Dakota v. Opperman*.[82] Other examples abound.[83] Truly, the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by the decisions of the Supreme Court majority.[84]

As Professor Sager has so convincingly argued,[85] the institutional position of the national Supreme Court may cause it to "underenforce" constitutional rules.[86] The national Court must remain highly sensitive to concerns of state and local autonomy, obviously less of a problem for state courts, which *are* local, accountable decisionmakers. It must further be remembered that the Federal Bill was enacted to place limits on the federal government while state bills are widely perceived as granting affirmative rights to citizens.

In addition, the Supreme Court formulates a national standard which, some suggest, must represent the common denominator to allow for diversity and local experimentation. In the Warren era, federalism was unsuccessfully invoked to support the view of the anti-incorporationists—that the rights granted in federal courts need not apply with the same breadth or scope in state courts. Dissenting Justices "extolled the virtues of allowing the States to serve as 'laboratories' " and objected to incorporation as "press[ing] the States into a procrustean federal mold."[87] Justice Harlan and others felt that the phenomenon of incorporation complicated the federal situation, creating a kind of "constitutional schizophrenia" as the Court attempted both to recognize diversity and faithfully to enforce the Bill of Rights.[88] In order to make room for

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[81] People v. Brisendine, 13 Cal. 3d 528, 551-52, 531 P.2d 1099, 1114-15, 119 Cal. Rptr. 315, 330-31 (1975); State v. Kaluna, 55 Haw. 361, 368-70, 52 P.2d 51, 58-60 (1974).

[82] Compare South Dakota v. Opperman, 428 U.S. 364 (1976) (search of car impounded for parking violation not unreasonable and therefore permissible under Fourth Amendment) with State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (on remand, same search held not permissible under state constitution).

[83] See Mosk, State Constitutions After Warren: Avoiding the Potomac's Ebb and Flow, in Developments in State Constitutional Law 201, 222-35.

[84] See Brennan, supra note 5, at 503; see also cases cited in Collins, supra note 76, at 24 n.13.

[85] Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978).

[86] See id. at 1212-13; see also Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1042-45 (1985).

[87] Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Tex. L. Rev. 1141, 1141 n.2 (1985) (quoting Crist v. Bretz, 437 U.S. 28, 39-40 (1978) (Burger, C.J., dissenting)).

[88] Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., concurring in result).

such diversity, Justice Harlan felt that the Bill should not apply to the states exactly as it applied to the federal government.

As is well known, however, I believe that the Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor. Experimentation which endangers the continued existence of our national rights and liberties cannot be permitted; a call for that brand of diversity is, in my view, antithetical to the requirements of the Fourteenth Amendment. While state experimentation may flourish in the space above this floor, we have made a national commitment to this minimum level of protection through enactment of the Fourteenth Amendment. This reconciliation of local autonomy and guaranteed individual rights is the only one consistent with our constitutional structure. And the growing dialogue between the Supreme Court and the state courts on the topic of fundamental rights enables all courts to discern more rapidly the "evolving standards of decency that mark the progress of a maturing society."[89]

This rebirth of interest in state constitutional law should be greeted with equal enthusiasm by all those who support our federal system, liberals and conservatives alike. The development and protection of individual rights pursuant to state constitutions presents no threat to enforcement of national standards; state courts may not provide a level of protection less than that offered by the federal Constitution. Nor should these developments be greeted with dismay by conservatives; the state laboratories are once again open for business.

As state courts assume a leadership role in the protection of individual rights and liberties, the true colors of purported federalists will be revealed. Recently, commentators have highlighted a substantial irony; it is observed that "the same Court that has made federalism the centerpiece of its constitutional philosophy now regularly upsets state court decisions protecting individual rights."[90] When state courts have acted to expand individual rights, the Court has shown little propensity to leap to the defense of diversity. In fact, in several cases, the Court has demonstrated a new solicitude for uniformity. The Court has reminded the residents of Florida that when their state court's decisions rest only on state constitutional grounds, citizens have the power "to amend state law to insure rational law enforcement."[91] Some state courts and commentators have taken umbrage at the suggestion that proceeding in lockstep

[89] Trop v. Dulles, 356 U.S. 86, 101 (1970).

[90] Collins, Plain Statements: The Supreme Court's New Requirement, A.B.A. J., Mar. 1984, at 92.

[91] Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

with the Supreme Court is the only way to avoid irrational law enforcement. As one state court judge reminded us recently, the United States Supreme Court is not "the sole repository of judicial wisdom and rationality."[92] One wonders if ringing endorsement of state independence will be transformed into assertions of the importance of federal uniformity in law enforcement.

State experimentation cannot be excoriated simply because the experiments provide more rather than less protection for civil liberties and individual rights. While the Fourteenth Amendment does not permit a state to fall below a common national standard, above this level, our federalism permits diversity. As tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so. The Supreme Court has no conceivable justification for interfering in a case plainly decided on independent and adequate state grounds.

Finally, those who regard judicial review as inconsistent with our democratic system—a view I do not share—should find constitutional interpretation by the state judiciary far less objectionable than activist intervention by their federal counterparts. It cannot be denied that state court judges are often more immediately "subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts."[93] Federal judges are guaranteed a salary and lifetime tenure; in contrast, state judges often are elected, or, at the least, must succeed in retention elections. The relatively greater degree of political accountability of state courts militates in favor of continued absolute deference to their interpretations of their own constitutions. Moreover, state constitutions are often relatively easy to amend; in many states the process is open to citizen initiative. Prudential considerations requiring a cautious use of the power of judicial review, though not insignificant, should "weigh less heavily upon elected state judges than on tenured federal judges."[94]

Some critics fear that the Supreme Court will become increasingly hostile to state courts' protection of individual rights and will meddle in those cases, refusing to find that a decision is based on independent and adequate state grounds.[95] I am not so pessimistic. Despite the recent

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[92] State v. Jackson, 672 P.2d 255, 264 (Mont. 1983) (Shea, J., dissenting).

[93] Note, *Michigan v. Long*: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision, 69 Iowa L. Rev. 1081, 1096-97 (1984)(footnote omitted).

[94] Keyser, State Constitutions and Theories of Judicial Review: Some Variations on a Theme, 63 Tex. L. Rev. 1051, 1077 (1985).

[95] See, e.g., Collins, supra note 90.

tendency of the Court to give gratuitous advice to state citizens to amend their constitutions,[96] I believe that the Court has set appropriate "ground rules"[97] for federalism with its recent decision in *Michigan v. Long*.[98] If a state court plainly states that its judgment rests on its analysis of state law, the United States Supreme Court will honor that statement and will not review the state court decision. So long as the Court adheres strictly to this rule, state courts may shield state constitutional law from federal interference and insure that its growth is not stunted by national decisionmakers. I join Justice Mosk of the California Supreme Court in his most apt observation: "I detect a phoenix-like resurrection of federalism, or, if you prefer, states' rights, evidenced by state courts' reliance upon provisions of state constitutions."[99]

This said, I must conclude on a warning note. Federal courts remain an indispensable safeguard of individual rights against governmental abuse. The revitalization of state constitutional law is no excuse for the weakening of federal protections and prohibitions. Slashing away at federal rights and remedies undermines our federal system. The strength of our system is that it "provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[100]

Federalism does not require that one level of government take a back seat to the other when the question involved is one of individual civil and political rights; federalism is not an excuse for one court system to abdicate responsibility to another. Indeed, federal courts have been delegated a special responsibility for the definition and enforcement of the guarantees of the Bill of Rights and the Fourteenth Amendment. Our founders and framers, and here I include the framers of the Fourteenth Amendment, took it as an article of faith that this nation prized the independence of its judiciary and that an independent judiciary could be counted upon to enforce the individual rights and liberties of our citizens against infringement by governmental power. As James Madison said, "[T]he independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights."[101]

Twenty-five years ago, when the Supreme Court finally began to seek achievement of the noble purpose of the Fourteenth Amendment, it

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[96] See Colorado v. Nunez, 465 U.S. 324, 327 (1984) (White, J., concurring); Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring).

[97] See Pollock, Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts, 63 Tex. L. Rev. 977, 993 (1985).

[98] 463 U.S. 1032 (1983).

[99] Mosk, The State Courts, in American Law: The Third Century 213, 216 (B. Schwartz ed. 1976).

[100] Brennan, supra note 5, at 503.

[101] 1 Annals of Cong. 439 (J. Gales ed. 1789).

took giant steps in the direction of equality under the law for all races and all citizens. While the full breadth and depth of the promise of the Fourteenth Amendment have not been fulfilled, the promise itself remains—a vibrant symbol of the hopes and possibilities of this nation and a forceful challenge to those who have become complacent. As a nation, we must renew our commitment to its ideal: "[J]ustice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, . . . for all, in short, who do not partake of the abundance of American life."[102]

[102] Brennan, supra note 16, at 10.

Addendum P

"DOES OREGON'S CONSTITUTION NEED A DUE PROCESS CLAUSE?"

THOUGHTS ON DUE PROCESS AND OTHER LIMITATIONS ON STATE ACTION

Thomas A. Balmer*

INTRODUCTION

During a legislative hearing last year, an Oregon state senator asked, "Does Oregon's Constitution need a due process clause?" That question raises fundamental issues of constitutional law and of the relationship between the federal and state constitutions. Can and should state courts rely primarily on federal constitutional principles, made applicable to the states through the Fourteenth Amendment's Due Process Clause, in deciding critical questions about the rights of criminal defendants, freedom of speech and religion, and equal protection? Or should state courts focus on their own constitutions—state due process, equal privileges and immunities, and similar "great ordinances" or more specific state provisions—in determining whether state laws and executive branch actions are valid? Would that focus still allow state courts to reach the "right" result in cases where no specific constitutional provision provides a clear basis for decision?

Professor (and later Oregon Supreme Court Justice) Hans Linde's path-breaking 1970 article, *Without "Due Process": Unconstitutional Law in Oregon*,[1] addressed some of those questions and contributed to the state constitutional revolution of the succeeding decades.[2] That

* Chief Justice, Oregon Supreme Court. I am indebted to Zoee Turill Powers and Alletta Brenner for research and editorial assistance and to Jack Landau and Hugh Spitzer for their helpful comments on an earlier draft.

1. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

2. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 113–34 (2009); Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 815–26 (2000); *see also* INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM (Robert F. Nagel ed., 1995) [hereinafter INTELLECT AND CRAFT].

revolution, with its emphasis on examining the text and meaning of state constitutional provisions,[3] has had the positive effect of requiring courts (and litigants) to articulate the specific interests at stake in light of those provisions, rather than engaging in an open-ended inquiry into whether a state's economic regulatory scheme was arbitrary or unreasonable and thus potentially unconstitutional under the Federal Due Process Clause or whether a state law impermissibly interfered with some fundamental right. But it has its shortcomings as well, and, at times, has been susceptible to the same kind of result-oriented decisions for which substantive due-process-driven analysis has long been criticized. In this Essay, I briefly examine several aspects of state court reliance on "due process" provisions—both state and federal—in an effort to see what is lost and what is gained by relying instead on other state constitutional provisions. In doing so, we can see some of the changes in state constitutional interpretation forty-five years after Linde's article and begin to seek an answer to our legislator's question.[4]

I. THE OREGON CONSTITUTION HAS NO DUE PROCESS CLAUSE—BUT THE OREGON SUPREME COURT DIDN'T NOTICE FOR 100 YEARS

We begin where Linde did, with several Oregon cases that purported to rely on the due process clause of the Oregon Constitution and that illustrate what he saw as the shortcomings of constitutional analysis at the time. In *Leathers v. City of Burns*,[5] the Oregon State Supreme Court considered two city ordinances that regulated the unloading and storage of flammable liquids by, among other things, prohibiting unloading fuel from a truck with a capacity of over 2200 gallons and using a storage tank holding more than 3000 gallons (or 4000 for a single service station or facility).[6] A service station operator challenged the constitutionality of the ordinances as arbitrary and unreasonable, arguing that they deprived him of property and liberty interests without due process of

3. Indeed, Linde can be seen as an early "textualist," although not necessarily an "originalist" of the Antonin Scalia variety. Linde's teachings have influenced academics and courts in Oregon and elsewhere. *See* Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 ALB. L. REV. 2027, 2028, 2047–49 (2012–2013).

4. I should note, however, that we are using the questions posed here primarily to illuminate aspects of state constitutional law and that the outlines of any answers are only suggestive and conditional.

5. 444 P.2d 1010 (Or. 1968).

6. *Id.* at 1011.

law.[7] What was as interesting to Linde as the substantive decision in the case—the Court upheld the restriction on tanker size but struck down the storage tank size limit—was the way the Court went about deciding the case and what it said about due process. The Court first summarized the complaint as alleging that "the ordinances violate the due process and equal protection clauses of the Federal and state constitutions."[8] Then, after reviewing the evidence at trial, and to introduce its legal analysis under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court observed, "What we hold applies equally to plaintiff's claim of violation of comparable provisions of the Constitution of Oregon."[9]

Similarly, just a few weeks before *Leathers*, the Court held a municipal vagrancy ordinance unconstitutional on the grounds that the ordinance was "too vague to provide a standard adequate for the protection of constitutional rights."[10] The Court stated that the law invited "arbitrary and discriminatory enforcement,"[11] and held that it violated the "due process clause of [a]rticle I, [s]ection 10 of the Oregon Constitution, as well as the Fourth and Fourteenth Amendments of the United States Constitution."[12]

Professor Linde had the chutzpah to point out that despite the Oregon Supreme Court's statements in *Leathers*, *City of Portland*, and other cases, "*Oregon has no 'due process' clause*. It also does not guarantee the equal protection of the laws."[13] As we will discuss below, the Oregon Constitution has other broad provisions protecting individual rights and liberties from government interference, but it has no provisions that track the text or specific focus of the Due Process or Equal Protection Clauses of the Fourteenth Amendment. To the extent that Oregon courts have sometimes based their decisions on the "due process" or "equal protection" provisions of the Oregon Constitution,

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7. *Id.* at 1015.

8. *Id.* at 1011.

9. *Id.* at 1015.

10. City of Portland v. James, 444 P.2d 554, 557 (Or. 1968).

11. *Id.* at 557.

12. *Id.* at 555. Article 1, section 10 of the Oregon Constitution is worded differently from the Due Process Clauses of the Fifth and Fourteenth Amendments and from similar provisions in other state constitutions. As I discuss below, it is more accurately described as an "open courts," "remedy," or "due course of law" provision. It provides: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." OR. CONST. art. 1, § 10.

13. Linde, *supra* note 1, at 135 (emphasis in original).

they have erred. We have no such provisions.

Linde's legacy had two different and important aspects, and the double entendre of his article's title captures both: First, the absence of a due process clause in the Oregon Constitution and second, the process of constitutional decision-making without relying on the Federal Due Process Clause. As we have just seen, *Without "Due Process"* suggests first that, the Oregon State Supreme Court's occasional contrary statements notwithstanding, the Oregon Constitution does not have a due process clause. Linde urged lawyers and judges to actually read, interpret, and apply constitutional (and other) texts, rather than simply balance an amorphous and malleable understanding of the state's "police power"— another term, Linde often observed, that does not appear in the Constitution of Oregon (or any other state)—against asserted constitutional rights.[14] And he often pointed out that many state constitutions have specific, often detailed, provisions regarding rights of expression, religion, and criminal procedure that are not found in the Federal Bill of Rights and that could provide a firmer basis for state court decisions.[15]

Before long, the Oregon State Supreme Court came around, citing Linde's article and holding (contrary to earlier decisions) that article I, section 10, of the Oregon Constitution was not a due process provision and that the equal privileges and immunities clause (article I, section 20, of the Oregon Constitution) and the Equal Protection Clause of the Fourteenth Amendment were not necessarily "equivalents."[16] In 1985, after Professor Linde had become Justice Linde, the Court, in a routine case, rejected state and federal due process and equal protection challenges to a statute requiring payment of assessed income taxes as a precondition to judicial review of a tax dispute.[17] Writing for the Court, Linde stated that, contrary to the taxpayer's argument, "[a]rticle I,

14. *Id.* at 147–49.

15. *See, e.g.*, State *ex rel.* Oregonian Publ'g Co. v. Deiz, 613 P.2d 23, 28–30 (Or. 1980) (Linde, J. concurring) (discussing constitutional protection of right to open administration of justice under Oregon Constitution and arguing that it is more stringent than that offered by the Federal Bill of Rights).

16. Olsen v. State, 554 P.2d 139, 143 (Or. 1976). Several years earlier, the Court had noted that "Professor Linde demonstrates that [article I, section 10] is not a due process provision, but rather has to do with the protection of legal remedies which assert interests recognized in tort law," but had also pointed out that "[t]his court has not always agreed with him." Sch. Dist. No. 12 of Wasco Cty. v. Wasco Cty., 529 P.2d 386, 391 (Or. 1974). Article 1, section 20 of the Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

17. Cole v. Or. Dep't of Revenue, 655 P.2d 171, 173 (Or. 1982).

section 10, of the Oregon Constitution, which guarantees that 'every man shall have remedy by due course of law for injury done him in his person, property, or reputation,' is neither in text nor in historical function the equivalent of a due process clause."[18] The debate was essentially over.

But the title *Without "Due Process"* also suggests Linde's larger project, namely his argument that state courts should not turn first to the substantive provisions of the Federal Constitution when deciding constitutional cases.[19] Linde asserted—irrefutably, as a matter of logic—that there is no federal due process violation if state law, including the state constitution, provides the relief a party seeks:

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake of parochialism or style, but because the state does not deny any right claimed under the [F]ederal Constitution when the claim before the court in fact is fully met by state law.[20]

This latter impact of Linde's legacy has been much discussed and is thoroughly engrained in Oregon law.[21] Other states, Washington being an example, have reached similar conclusions.[22] But, to return to our legislator's question, has it mattered that Oregon does *not* have a due process clause?

II. THE OREGON COURT IN THE *LOCHNER*/SUBSTANTIVE DUE PROCESS ERA

Interestingly, the cases that Linde used to make his point that the Oregon Constitution lacks a due process clause did not involve

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18. *Id.*

19. *See* Linde, *supra* note 1, at 133–35.

20. Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981). Linde's view may be supported by logic and important prudential considerations, but it is not clear that his central legal contention—that no violation of a federal constitutional right has occurred if a state court vindicates the claim under the state constitution—is correct. In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Court stated that, at least as to nonprocedural federal constitutional guarantees, "the [federal] constitutional violation is complete when the wrongful action is taken." *Id.* at 125; *see also* State v. Stoudamire, 108 P.3d 615, 624–26 (Or. Ct. App. 2005) (Landau, J., concurring) (explaining *Zinermon* in context of applying federal and state search and seizure protections).

21. *See generally, e.g.*, INTELLECT AND CRAFT, *supra* note 1; Symposium, *Symposium on the Work of Justice Hans Linde*, 70 OR. L. REV. 679 (1991) (volume dedicated to discussion of Linde's legacy and impact on state and federal constitutional law); Symposium, *Unparalleled Justice: The Legacy of Hans Linde*, 43 WILLAMETTE L. REV. 157 (2007) (same).

22. *See, e.g.*, State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984).

procedural claims that the state had denied a person life, liberty, or property without adequate process, but rather claims that the state had restricted *substantive* economic or personal liberties protected by the federal and state constitutions.[23] Moreover, Linde's examples were from the 1960s, long after the United States Supreme Court had stopped using "substantive due process" to strike down economic regulation, and as the Court was beginning to use the concept of substantive due process instead to protect rights of privacy and personal autonomy. Nevertheless, it's useful to look back to the era when both state and federal courts often used substantive due process to invalidate statutes regulating labor and other aspects of the economy, and to observe how the Oregon State Supreme Court approached those kinds of challenges. Based on now-discredited cases such as *Lochner v. New York*,[24] the United States Supreme Court is often viewed as having been hostile to labor and economic legislation at the turn of the twentieth century. But, as Emily Zacklin reminds us, the Court, in fact, upheld a number of progressive efforts to protect working people.[25] Rather, as Zacklin argues, state courts—interpreting both state and federal due process clauses (often without even quoting the provisions or differentiating between state and federal law)—struck down many regulatory statutes, and were, on the whole, probably more hostile to labor and other progressive legislation at the time than the United States Supreme Court.[26] Similarly, Hugh Spitzer has surveyed the Washington decisions of the same period and finds that the Washington State Supreme Court in the late nineteenth and early twentieth centuries often struck down regulatory legislation, such as a law providing for the inspection of commodities, even though those commodities were not intended for immediate sale to the public.[27] By the second decade of the new century, however, the Washington State Supreme Court was routinely upholding legislation regulating public utilities, maximum working hours for women, and mandatory workers' compensation insurance.[28]

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23. *See, e.g.*, City of Portland v. James, 444 P.2d 554 (Or. 1968); Leathers v. City of Burns, 444 P.2d 1010 (Or. 1968).

24. 198 U.S. 45 (1905).

25. EMILY ZACKLIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 134–38 (2013).

26. *Id.* at 109.

27. Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric*, 104 PAC. NW. Q. 107 (2013).

28. *Id.* at 108.

But what about Oregon? While the Oregon Supreme Court seriously entertained substantive due process challenges to labor and economic regulation during this period, it generally deferred to the legislature and upheld laws that seemed reasonably related to a legitimate legislative goal. In 1902, for example, a barber challenged a state law that prohibited the operation of barbershops on Sunday, arguing that, by permitting (some) other businesses to remain open, the law was arbitrary and unreasonable.[29] Accordingly, the barber asserted that the act violated the Federal Due Process Clause "in that it deprived [him] of liberty or property without due process of law," and also violated article I, section 1 of the Oregon Constitution "in that it encroached upon his guaranty of equal rights."[30] The Court reviewed the history of Oregon's Sunday closure laws and decisions from around the country upholding such laws as reasonable exercises of the state's police power. Indeed, a similar case—involving a general Sunday closure law that exempted businesses of "necessity and charity," but did not include barbers in that group—had gone to the United States Supreme Court, which had upheld the law.[31] The United States Supreme Court had noted the "wide discretion confessedly necessarily exercised by the states in these matters,"[32] which prohibited only classifications "so palpably arbitrary as to bring the law into conflict with the federal constitution."[33] The Oregon Court followed suit, quoting other state decisions regarding legislation that would prevent "overwork" and protect "the physical welfare of the citizen," and upheld the Sunday closing requirement.[34]

Perhaps the most famous Oregon case of that period was *State v. Muller*,[35] where the Court considered due process and other constitutional challenges to a statute that made it unlawful to employ a woman in a laundry for more than ten hours a day.[36] Curt Muller had been fined ten dollars for employing a Mrs. E. Gotcher for more than the maximum permissible hours at his Portland laundry on September 4,

29. *Ex parte* Northrup, 69 P. 445, 445–46 (Or. 1902).

30. *Id.* at 446. Article I, section 1, of the Oregon Constitution, provides in part: "We declare that all men, when they form a social compact are equal in right." OR. CONST. art. I, § 1.

31. *Northrup*, 69 P. at 493–46 (citing State v. Petit, 77 N.W. 225 (Minn. 1898), *aff'd*, 177 U.S. 164 (1900)).

32. *Id.* at 447 (quoting Petit v. Minnesota, 177 U.S. 164, 168 (1900)).

33. *Id.*

34. *Id.* at 494–47.

35. 85 P. 855 (Or. 1906).

36. *Id.*

1905.[37] Seeking to overturn his conviction, Muller argued that the law interfered with his female employees' liberty of contract and that it discriminated against women and in favor of men.[38] The Oregon Court cited the then-recent decision in *Lochner* for the general proposition that the freedom to contract is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment and "cannot be arbitrarily interfered with by the legislature."[39] But the Court quickly added that "the right to labor and to contract for labor, like all rights, is itself subject to such reasonable limitations as are essential to the peace, health, welfare, and good order of the community."[40] The Court upheld the statute.

When Muller took his case to the United States Supreme Court, Louis Brandeis was recruited to support the state's defense of its statute. He briefed and argued the case (along with a local Oregon lawyer), and prevailed in *Muller v. Oregon*.[41] The Supreme Court opinion's emphasis on the role of women as mothers whose health is "essential to vigorous offspring," and to protecting "the strength and vigor of the race," was certainly a victory for progressive labor legislation, even at the temporary expense of the broader cause of women's equality, including the right to vote that was gaining prominence at the same time.[42] That focus, at least, allowed the Court to distinguish *Lochner*, but it would be almost another thirty years before the Court altered its substantive due process analysis and began regularly upholding labor and economic regulatory legislation against due process challenges.

While the Oregon courts generally upheld progressive legislation under general federal or state constitutional provisions, they certainly took such challenges seriously, often evaluating new laws to decide whether they were "arbitrary" or "unreasonable" or beyond the state's "police power." More interesting perhaps, as *Without "Due Process"* reminds us, is that state courts have continued to apply substantive due process principles to economic and other regulatory statutes long after the United States Supreme Court abandoned that approach in the late 1930s.[43] Robert Williams also has pointed out that states continue to use

37. *Id.*

38. *Id.* at 855–56.

39. *Id.* at 856.

40. *Id.*

41. 208 U.S. 412 (1908). For interesting additional background on the case, see Ronald K.L. Collins & Jennifer Friesen, *Looking Back on* Muller v. Oregon, 69 A.B.A. J. 294 (1983).

42. *Muller*, 208 U.S. at 421.

43. Linde, *supra* note 1, at 163–66.

substantive due process to scrutinize—and occasionally hold unconstitutional—economic regulation, despite the federal courts' "hands-off" approach. In contrast to the *Lochner* era, however, Williams points out that state courts generally act in what they perceive to be the interest of the general public, rather than narrower business interests.[44]

III. THE PIVOT FROM DUE PROCESS TO OTHER, SPECIFIC CONSTITUTIONAL PROVISIONS

If a state constitution lacks a due process clause, and if we follow Linde and consider state constitutional arguments before turning to the Federal Due Process Clause, how should a state court approach broad constitutional challenges to state laws or policies? One answer, driven by Linde's suggestion that courts actually consider the text—the whole text—of their state constitutions, is for litigants and state courts to focus on the narrower and sometimes forgotten provisions that hide in dark corners of many state constitutions.

State constitutions often have more specific protections of individual rights than we find in the Federal Constitution. As a result, at least with respect to these specific provisions, state constitutions may provide more direct guidance to courts. One notable example of such a case is Linde's decision in *Sterling v. Cupp*.[45] In that case, male prison inmates challenged a state practice allowing female prison guards to conduct body searches of male inmates and to monitor them, even in showers or toilets.[46] The inmates argued that those activities violated their constitutional right to privacy.[47] The Oregon Court of Appeals had agreed with the inmates, relying on the United States Supreme Court's then-recent decision in *Griswold v. Connecticut*,[48] in which the Court concluded that the Due Process Clause of the Fourteenth Amendment (when considered with other provisions in the Bill of Rights) protects a "right of privacy," and held that the state policy at issue violated that right.[49]

The Oregon Supreme Court affirmed the court of appeals' decision in *Sterling*, but on a different ground, looking instead to Oregon's own constitution. Justice Linde, consistent with his earlier article, first

44. WILLIAMS, *supra* note 2, at 190–92.

45. 625 P.2d 123 (Or. 1981).

46. *Id.* at 125.

47. *Id.* at 126.

48. 381 U.S. 479 (1965).

49. *See Sterling*, 625 P.2d at 126 (citing *Griswold*, 381 U.S. 479).

rejected the court of appeals' approach of turning to the Federal Due Process Clause before it had considered whether the Oregon Constitution precluded the state's policy.[50] Perhaps to the surprise of the plaintiffs, who had not raised the argument, Linde looked to article I, section 13, of the Oregon Constitution, which provides, "No person arrested, or confined in jail, shall be treated with unnecessary rigor."[51] Nothing in the history of that provision indicated that it had anything to do with searches, pat-downs, or the monitoring of incarcerated individuals, let alone of the gender of the prison guards performing those functions.[52] To fill that gap, Linde looked to and relied upon what he conceded were "nonofficial"[53] standards regarding the treatment of prisoners, including those adopted by the American Bar Association and the American Correctional Association, as well as the Universal Declaration of Human Rights and documents from various United Nations agencies.[54]

Sterling illustrates the strengths and potential weaknesses of focusing on specific state constitutional provisions rather than trying to discern the ill-defined parameters of the substantive aspect of the Due Process Clause—particularly the "right to privacy"—and apply that provision to a novel fact situation. Linde correctly pointed out the difficulties of defining the privacy right protected by the Due Process Clause,[55] but a disinterested observer might question whether the interpretive exercise Linde undertook instead—deciding whether a male prisoner searched or observed while showering by a female guard had been "treated with unnecessary rigor"—was much less open-ended. A dissenting opinion made the reasonable point that there appeared to be nothing to indicate "that the 'unnecessary rigor' clause was intended to authorize the courts to enforce standards of delicacy or courtesy among adults in prison in the name of the constitution," and added that the correctional standards Linde cited "are worthy of respectful attention from the legislature or the executive branch, but they are no substitute for the constitution and they

50. *Id.* at 126.

51. *Id.* at 128.

52. *See id.* at 128–29 (discussing historical underpinnings of provision); *id.* at 140 (Tanzer, J. dissenting) (arguing that there is "no evidence that the 'unnecessary rigor' clause was intended to authorize courts to enforce standards of delicacy or courtesy among adults in prison in the name of the constitution").

53. *Id.* at 130 (majority opinion).

54. *Id.* at 128–32.

55. *Id.* at 129.

do not provide a mandate for judicial intervention."[56]

Nevertheless, *Sterling* reminds us that state constitutions contain a variety of sometimes forgotten provisions that may provide better, or at least state constitution-based, grounds for invalidating state statutes or policies; this may avoid other problems that can arise from reliance on the Due Process Clause. And, as Linde also noted in *Without "Due Process,"* grounding a decision on an independent interpretation of a state constitutional provision, rather than the Due Process Clause, insulates the decision from possible review and reversal by the United States Supreme Court.[57]

A less dramatic, but perhaps more satisfying example of using a narrow, more specific state constitutional provision rather than a more general state or federal provision, can be found in Oregon's handling of challenges to criminal penalties on the ground that they are not proportional to the offense.[58] Article I, section 16, of the Oregon Constitution provides, in part, "[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."[59] In earlier days, if a defendant challenged a sentence as unconstitutional because it was draconian compared to the crime—say, life in prison for a first-time trespass—the defendant and the court would look to the cruel and unusual punishment provision of the Eighth Amendment or to an analogous state constitutional provision.

In a case from the early twentieth century, *State v. Ross*,[60] the defendant was convicted of larceny and sentenced to pay a fine of $576,853.74, to serve five years in the state penitentiary, and to spend one day in the county jail for every two dollars of the fine, not to exceed 288,426 days.[61] The Oregon Supreme Court held that the sentence was so excessive as to constitute cruel and unusual punishment, but engaged in essentially no textual or other analysis of any state or federal

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56. *Id.* at 140 (Tanzer, J., dissenting). The dissent also rejected the "privacy" theory adopted by the court of appeals, pointing out that the plaintiffs had not challenged the State's right to search inmates, but only "the authority of the [S]tate to have the searches performed by persons of either sex." *Id.* at 139. The dissent argued that "plaintiffs' expectation of privacy is not lessened and their exposure to searches is not enlarged according to the sex of the person searching." *Id.*

57. Linde, *supra* note 1, at 134–35, 159–60.

58. *See generally* Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783 (2008).

59. OR. CONST. art. 1, § 16.

60. 104 P. 596 (Or. 1909), *modified*, 106 P. 1022 (Or. 1910), *appeal dismissed*, 227 U.S. 150 (1913).

61. *Ross*, 104 P. at 599.

constitutional provision.[62] A decade later, when a defendant challenged his sentence of six months in jail and a $500 fine for possessing two quarts of "moonshine," the Court expressly addressed under the Oregon Constitution his claim that the sentence was not "proportioned"[63] to the offense, although the decision relied primarily on a United States Supreme Court case interpreting the Eighth Amendment's prohibition of cruel and unusual punishment.[64] More recently, the Court has analyzed the proportionality requirement in detail and developed an analytical structure to guide that determination.[65] That approach has been particularly important because of uncertainty as to whether the Eighth Amendment's prohibition of cruel and unusual punishment contains an implicit ban on sentences that are simply excessive or disproportionate to the crime in some respect, or instead whether the prohibition speaks only to the nature of the sanction itself.[66] By relying on Oregon's explicit proportionality requirement, the Oregon Court has used the appropriate state constitutional provision to examine claims that sentences were excessive, has been able to develop case law interpreting the explicit requirement of proportionality in the constitution, and has, on occasion, overturned criminal sentences on that ground.[67]

The larger point, briefly alluded to before, is that state constitutions often have more specific protections of individual rights than are found in the United States Constitution. Reliance on those state texts—rather than on federal provisions made applicable to the states by the Due Process Clause—is not only legally sound (legally required, Linde would say), but more satisfactory generally because they provide more direct guidance to the courts and have the legitimacy of being traceable to the work of the constitutional framers. Other examples of Oregon's constitution providing more specific provisions than the Federal Constitution include its free expression provision, which is written in broader terms than the First Amendment;[68] the multiple provisions regarding religious liberty, including a specific provision preventing state funds from being spent in support of religion;[69] and the specific directives that "no court shall be secret," and that justice is to be

62. *See Ross*, 106 P. at1024.

63. Sustar v. Cnty. Court of Marion Cnty., 201 P. 445, 448 (Or. 1921).

64. *Id.* at 446, 448.

65. *See, e.g.*, State v. Wheeler, 175 P.3d 438 (Or. 2007).

66. Balmer, *supra* note 58, at 799–804.

67. *See, e.g.*, State v. Rodriguez, 217 P.3d 659 (Or. 2009).

68. *See* OR. CONST. art. I, § 8.

69. *See, e.g.*, *id.* §§ 1–6

administered "openly."[70]

IV. GREAT ORDINANCES: EQUAL PRIVILEGES AND IMMUNITIES, AND DUE COURSE OF LAW

Suppose a government action seems to intrude too far into areas of personal privacy, to be arbitrary and unreasonable, or to discriminate unfairly against a particular person or group—and in contrast to a punishment that involves "excessive rigor" or is not "proportioned to the offense," there is no specific constitutional provision that can plausibly be invoked. Do other provisions of the Oregon Constitution protect those individual rights that are less well-defined? Although, as we have seen, the Oregon Constitution does not contain a true due process clause or an equal protection clause, it does include several of what Williams, quoting Justice Holmes, has called the "great ordinances of the Constitution"—those broadly, and somewhat vaguely, phrased provisions by which constitution writers attempted to circumscribe government actions that they could not (or did not want to) identify with specificity.[71] In the Oregon Constitution, these include the equal privileges and immunities clause[72] and the "due course of law" provision[73] that guarantees open courts and a "remedy by due course of law" for injury to "person, property, or reputation."[74]

Not surprisingly, the Oregon courts have often used those provisions to evaluate challenges to state statutes and actions, and sometimes have found the state action unconstitutional. In *Hewitt v. State Accident Insurance Fund Corp.*,[75] for example, the statute permitted an unmarried woman to collect death benefits upon the death of an unmarried man with whom she had cohabited for over a year, but did not provide for a similarly situated man to receive death benefits.[76] The Court agreed with the plaintiff—an unmarried man—that the statute treated one class of people (unmarried women who had cohabited with unmarried men for a particular time period) more favorably than unmarried men in the same position.[77] The Court described that gender-based classification as

70. *Id.* § 10.

71. WILLIAMS, *supra* note 2, at 336–37 (quoting Vreeland v. Byrne, 370 A.2d 825 (N.J. 1977)).

72. OR. CONST. art. I, § 20.

73. *Id.* § 10.

74. *See id.*; *see also* Linde, *supra* note 1, at 135.

75. 653 P.2d 970 (Or. 1982).

76. *Id.* at 971.

77. *Id.* at 977–79.

"suspect" and thus subject to close scrutiny.[78] Finding no basis to justify the different treatment of women and men in that context, the Court held that the statute violated the equal privileges and immunities clause of article I, section 20.[79]

If the Court's analysis in *Hewitt* sounds suspiciously like that found in federal equal protection decisions, that is because the Court, in fact, cited and relied on those cases. The Court recognized that the Equal Protection Clause was intended to prevent discrimination *against* certain groups or individuals, while the privileges and immunities provision was focused on preventing privileges—usually economic privileges—from being *granted* unequally to favored individuals and groups.[80] Nevertheless, the Court found helpful the equal protection analysis of when differential treatment of similarly situated persons might raise constitutional problems, although it was quick to point out that it did not need to follow then-controlling federal equal protection precedents, which were somewhat equivocal on the issue of gender discrimination.[81]

Hewitt then provided the groundwork for an important court of appeals decision holding that the equal privileges and immunities clause of the state constitution barred the state medical school from offering health insurance benefits to the spouses of employees but not to the similarly situated same sex domestic partners of employees.[82] The same sex partners argued that, although it might be reasonable to limit benefits to spouses, they were unable to become spouses under state law; the effect of the benefit policy and the state statute limiting marriage to two persons of different genders, considered together, denied them a privilege conferred on similarly situated employees.[83] The court of appeals agreed and held that the disparate treatment violated article I, section 20.[84] The court observed that the insurance benefits constituted a privilege that was not made available to the same-sex partners of OHSU employees.[85] Those employees constituted a "class" that was treated differently solely because of their sexual orientation—and that differential treatment was permissible only if it could be justified by

78. *See id.* at 977.

79. *Id.* at 979.

80. *See id*. at 975–76.

81. *Id.* at 974–75.

82. *See* Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 437 (Or. 1998).

83. *Id.* at 444.

84. *Id.* at 448.

85. *Id.*

their sexual orientation.[86] As the Court stated, "The parties have suggested no such justification, and we can envision none."[87]

Although article I, section 20, provides that "[n]o *law* shall be passed" granting privileges and immunities to some that are not equally available to all citizens,[88] the Oregon courts have long held that provision to apply to executive and other government decisions, as well as to laws enacted by the legislature.[89] And, despite the provision's origin in concerns about economic privileges, the courts have viewed it as a more general prohibition on differential treatment, including for example, charging decisions by district attorneys.[90] In one recent case, the state attorney general argued that the Court should disavow its longstanding approach to article I, section 20, and return to what it argued was the original scope of the provision as applying only to the legislature and only to economic benefits. [91] The Court had little trouble rejecting that effort to turn the clock back more than 100 years.[92]

The most obvious other "great ordinance" in the Oregon Constitution, article I, section 10, is the Oregon constitutional provision most frequently confused with the Due Process Clause of the Fourteenth Amendment. It provides:

> No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.[93]

As the text of the provision makes clear, it touches on a number of vital aspects of government and justice. It is referred to as an "open courts" or "remedies" or "due course of law" provision. It is not, however, a "due

86. *Id.* at 447.

87. *Id.*

88. OR. CONST. art. I, § 20.

89. *See, e.g.*, State v. Savastano, 309 P.3d 1083, 1093 (Or. 2013) (describing cases).

90. *See, e.g.*, State v. Clark, 630 P.2d 810 (Or. 1980).

91. *Savastano*, 309 P.3d at 1099.

92. *See id.* (finding that the state's argument "sweeps too broadly" and noting: "[t]he state is correct that many early privileges or immunities cases involved monopolies or other economic benefits, but nothing in the words of the provision or the historical definitions of those words indicates that they do not also apply to noneconomic privileges or immunities conferred by the government"). Interestingly, the ACLU of Oregon filed an amicus brief in the *Savastano* case that took no position on the defendant's underlying argument—that the district attorney was required to have an established policy for charging decisions in order to comply to article I, section 20—but that vigorously opposed the Attorney General's effort to return to a narrower interpretation of the provision. Amended Brief of Amicus Curiae ALCU Foundation of Oregon, Inc., *Savastano*, 309 P.3d 1083 (No. S059973), 2012 WL 3569903.

93. OR. CONST. art. I, § 10.

process" clause, as Linde and others have demonstrated; and indeed its origins trace back to a different chapter of Magna Carta than the chapter that provides the basis for the Due Process Clause in the Federal Constitution.[94] The meaning and proper interpretation of article I, section 10, are beyond the scope of this brief Essay, but its ancient roots, broad application, and contemporary importance place it firmly in the "great ordinance" category. The provision has provided fertile ground for litigants, particularly related to tort claims, and the Oregon courts have sometimes used it to avoid what most people would consider to be grossly unjust results. In *Clarke v. Oregon Health Sciences University*,[95] for example, the Court held unconstitutional a statutory tort claims limit of $200,000 as applied to a claim for medical negligence against a state hospital and its employees, when the conceded economic damages to a newborn caused by the negligence exceeded twelve million dollars.[96] But whether article I, section 10, could be used to protect substantive rights outside the tort context is unclear.

In addition to its importance in tort law, article I, section 10 may protect some procedural rights, although, as we have noted, it is not a due *process* clause. We need to recall that Linde's critique was aimed at substantive due process and the use of state and federal due process analysis to invalidate state statutes—particularly, but not only, regulatory laws—on the grounds that they were arbitrary, unreasonable, or not within the so-called police power of the state.[97] But aside from those categories of cases, article I, section 10 has long been held to provide at least some guarantee of procedural fairness, including an appropriate and fair hearing before a person can be deprived of property rights.[98]

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94. Linde, *supra* note 1, at 136–38. *See generally* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–1202 (1992) (describing history and origins of remedy clauses in state constitutions). Oregon's remedy clause is derived from Chapter 40 of the Magna Carta. *See* Linde, *supra* note 1, at 138. Sir Edward Coke's commentary on the Magna Carta, one of the most commonly read legal texts in early America, expounded on Chapter 40, providing the language from which the remedy clause was later developed: "[E]very Subject of this Realm, for injury done to him in [goods, land or person,] . . . may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay." Schuman, *supra*, at 1199 (alterations in original).

95. 175 P.3d 418 (Or. 2007).

96. *Id.* at. 420–22, 434.

97. *See* Linde, *supra* note 1, at 181–87 (summarizing critique).

98. *See* Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 338–40, 351–57 (Or. 2001) (summarizing procedural due process decisions under article I, section 10); Tupper v. Fairview Hosp. and Training Ctr., Mental Health Div., 556 P.2d 1340, 1345–48 (Or. 1976) (O'Connell, J., specially concurring) (concluding that article I, section 10, required pre-termination notice and

CONCLUSION: DOES OREGON'S CONSTITUTION NEED A DUE PROCESS CLAUSE?

Returning to our legislator's question, one response is that we have a Federal Due Process Clause, so we don't need another one in the state constitution. The *Federal* Due Process Clause protects our procedural and substantive rights, and it is regularly interpreted and applied by federal and state courts. As Alan Tarr notes, in describing Linde's state law first approach, the Federal Due Process and Equal Protection Clauses are "state-failure" provisions, available to protect rights if state law does not.[99] But the United States Supreme Court is the final arbiter of those federal constitutional provisions, of course, so in the absence of an analogous state provision, states lose the potential for a more expansive, rights-protective interpretation of due process. In contrast, the Oregon Supreme Court's interpretation of its own constitution is not subject to federal review, even when that interpretation is different from the United States Supreme Court's interpretation of parallel federal constitutional provisions. When one considers the importance of the state constitution's free speech and search and seizure provisions (as interpreted by the Oregon courts) to Oregon law, and our preference not to rely on federal interpretations of the parallel federal constitutional guarantees, the inability to take the same approach to rights that could be protected under a state due process clause starts to look significant.

Looking at the Oregon Constitution as it is, without a due process clause, does it protect the rights we think important? Like many state constitutions, Oregon's contains a number of provisions that expressly protect rights or impose limits on government actions, often in robust terms. Our free speech provision, article I, section 8, for example, protects the right to "speak, write, or print freely on any subject whatever," although each person is "responsible for the abuse of this right."[100] The constitution bars the appropriation of money for any religious institution,[101] protects the right of the "people to bear arms for the defence [sic] of themselves,"[102] provides specific directions

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related procedural protections to state employee; criticizing majority for relying on federal due process without first considering state constitution). Moreover, the procedural aspects of article I, section 10, are supported by specific provisions protecting the right to a jury trial in criminal (article I, section 11) and civil cases (article I, section 17).

99. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 184 (1998).

100. OR. CONST. art. I, § 20.

101. *Id.* § 5.

102. *Id.* § 27.

regarding bail,[103] and requires that punishments be proportioned to the offense,[104] just to name a few. More recent provisions give crime victims the right to participate in proceedings against those who have caused them harm and the right to receive restitution.[105] And just recently in November 2014, voters approved an "equal rights amendment," providing that equal rights "shall not be denied or abridged . . . on account of sex."[106] When state courts rely on those specific state constitutional provisions, rather than the Federal Due Process Clause, they have more substantive guidance from the state constitution's framers about the meaning and scope of the restrictions they sought to impose on state government and the rights they wanted to protect.

Even without a due process clause that tracks the Fifth and Fourteenth Amendments, the Oregon Constitution has provisions that protect some important procedural rights, ranging from specific rights related to jury trials and appellate review to the more general right to a "remedy by due course of law for injury" to person, property or reputation in article I, section 10.[107] And in terms of substantive review of statutes and other state actions, the Oregon Constitution, as noted previously, does contain two broadly phrased, potentially far-reaching, provisions: The open courts/remedies provision of article I, section 10,[108] and the equal privileges and immunities provision of article I, section 20.[109] But the extent to which those provisions could be interpreted to protect the kind of individual rights covered by the "substantive" component of the Federal Due Process Clause is unclear.

Are there potential laws or policies so oppressive, intrusive, or unfair that most thoughtful people would consider them beyond the authority of state government—but that do not appear to violate any existing provision of the Oregon Constitution? Take, for example, the ban on the use of contraceptives by married couples that gave rise to the "right to privacy" articulated in *Griswold*.[110] A more far-fetched hypothetical, but perhaps useful for discussion purposes, would be a state law that ordered the removal of children from their parents at the age of two, to be returned to the parents at age ten. Such a law would presumably be

103. *Id.* §§ 14, 16.

104. *Id.* § 13.

105. *Id.* § 42.

106. *Id.* § 46.

107. *Id.* § 10.

108. *Id.*

109. *Id.* § 20.

110. Griswold v. Connecticut, 381 U.S. 479 (1965).

found to violate parental rights protected by "substantive due process" under the Fourteenth Amendment, despite the fact that nothing in the Constitution speaks specifically to such rights.

Does the Oregon Constitution offer anything to citizens who might challenge the hypothetical statute allowing the state to take custody of all children? Certainly, a court would look hard at the "remedy" clause and the equal privileges and immunities provision, both of which are written in capacious, general terms and which sometimes have been interpreted expansively—although neither speaks very clearly to rights of parenthood, privacy, or personal autonomy. Some decisions interpreting the "remedy" clause have stated that it provides a remedy only for rights that existed when the Oregon Constitution was adopted in 1857,[111] and although the equal privileges and immunities provision has played the role of an equal protection clause, it has been interpreted as a bar against discrimination and unequal treatment, rather than as the source of unenumerated personal rights.[112]

An Oregon court faced with a claim asserting a novel constitutional right could perhaps draw some support from article I, section 33, which provides, "[t]his enumeration of rights, and privileges shall not be construed to impair or deny others retained by the people."[113] That provision, of course, is almost identical to the Ninth Amendment, which the Supreme Court relied upon, in part, in *Griswold*.[114] It suggests, at a minimum, that the framers of the Oregon Constitution did not view the specific "rights" and "privileges" enumerated in the Oregon Bill of Rights as encompassing all the rights that Oregonians "retain." But it gives no indication of what those rights might be or the sources to which one might look for them, let alone the scope and limitations of any unenumerated rights.[115]

The task, however, probably would not be any less daunting—or less firmly rooted in constitutional text, or less controversial—than the

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111. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 356 (Or. 2001).

112. *See, e.g.*, Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 445–47 (Or. 1998) (discussing meaning and application of article 1, section 20); Hewitt v. State Accident Ins. Fund, 653 P.2d 970, 975–78 (Or. 1982) (same).

113. OR. CONST. art. 1, § 33.

114. *Griswold*, 381 U.S. at 484–87.

115. Few cases discuss or even cite article I, section 33. However, in *Hall v. Northwest Outward Bound School*, 572 P.2d 1007 (Or. 1977), Justice Linde suggested an extremely limited view of the provision, stating that any "rights, and or privileges" would probably need to be asserted by the legislature, rather than by the judiciary, and that the only rights that could be "retained" would be rights that were recognized as such at the time the Oregon Constitution was adopted. *Id.* at 1010–11 n.11. Whether Linde's brief comments are correct or not is a topic for another day.

efforts of the United States Supreme Court to decide what is protected by the substantive component of the Federal Due Process Clause. Certainly, in states like Oregon and Washington, with their strong traditions of independent state constitutional analysis, the courts would approach such challenges with open minds—and likely would not find the absence of a state due process clause to make much difference one way or the other. On the other hand, as discussed above, the texts, origins and purposes of Oregon's remedy and equal privileges and immunities provisions are distinct from those of a true "due process" clause. A due process clause in the Oregon Constitution would be another "great ordinance" in the constitutional toolkit, another source courts could look to in constitutional cases to help ensure that the fundamental rights of Oregon citizens are protected, even as state and local governments engaged in the necessary regulatory activities that our society needs to function effectively. In the end, perhaps Oregon's constitution could use a due process clause after all.

Addendum Q

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The Failed Discourse of State Constitutionalism

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THE FAILED DISCOURSE OF STATE CONSTITUTIONALISM

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INTRODUCTION

Fifteen years ago, Justice William Brennan wrote an article in which he called upon state courts to "step into the breach" left by what Brennan perceived to be the U.S. Supreme Court's retreat from its commitment to the protection of individual rights.[1] Brennan urged state supreme courts to seize control of the protection of constitutional rights by looking to state constitutions as potentially more generous guarantors of individual rights than the U.S. Constitution as construed by the Burger Court. Brennan's article, which has been called the "Magna Carta" of state constitutionalism,[2] earned him the sobriquet of "patron saint" of state constitutional law[3] and gave birth to a movement advocating state independence in constitutional decisionmaking. Adherents of this "New Federalism" movement,[4] who include among their number several distinguished state jurists[5] and some prolific aca-

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) [hereinafter Brennan, *State Constitutions*]; *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *Bill of Rights*].

2. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

3. Earl M. Maltz, *False Prophet — Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 429 (1988).

4. The movement has also been called the "New Judicial Federalism" to distinguish it from a legislative program pushed during the Reagan Administration that was also called "New Federalism." The Reagan Administration program involved making changes in federal law designed to reallocate governmental responsibilities from the federal to state governments. The New Federalism under discussion here is a state-initiated movement to achieve judicial rather than legislative independence from the federal government, and on a constitutional rather than programmatic level.

5. Former Oregon Supreme Court Justice Hans Linde, Wisconsin Supreme Court Justice Shirley Abrahamson, New Jersey Supreme Court Justice Stewart Pollock, New York Court of Appeals Judge Judith Kaye, and Washington Supreme Court Justice Robert Utter have been

demics,[6] have produced a voluminous body of commentary studying the decisions of state supreme courts, and exhorting them to greater decisional independence.[7] Judging from this literature, the advocates of New Federalism are extraordinarily optimistic about the prospects for state constitutional law achieving the independence and prominence necessary not only to meet Justice Brennan's challenge, but to fulfill what they regard as the promise of a genuinely federal system of government.[8]

The recent retirement of Justices Brennan and Thurgood Marshall, the last two liberals on the U.S. Supreme Court,[9] and the corresponding solidification during the 1990-1991 Term of the Court's conservative majority, make this an appropriate time to reconsider the potential role of state constitutional law in American society. Are state courts, as proponents of New Federalism contend, developing an independent body of constitutional jurisprudence? If so, will state courts assume the dominant role traditionally occupied by the Supreme Court in articulating and protecting individual rights? If not, can they assume such a role, and should they?

In this article, I approach these questions in two steps. First, I examine the status of state constitutional law as it is practiced today. I conclude that, contrary to the claims of New Federalism, state constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements. I argue that the fundamental defect responsible for this state of affairs is the failure of state

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among the most active contributors to the New Federalism literature. *See, e.g.*, Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEXAS L. REV. 1141 (1985); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399 (1987); Hans A. Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Pollock, *supra* note 2; Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989).

6. Ronald K.L. Collins, Robert F. Williams, and Donald E. Wilkes, Jr. have been among the more active expounders of New Federalism. Representative examples of their work include Ronald K.L. Collins, *Reliance on State Constitutions — The Montana Disaster*, 63 TEXAS L. REV. 1095 (1985); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

7. For comprehensive bibliographies of the literature, both old and new, dealing with state constitutional law, see DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 317-35 (Bradley D. McGraw ed., 1985); TIM J. WATTS, STATE CONSTITUTIONAL LAW DEVELOPMENT: A BIBLIOGRAPHY (1991); Earl M. Maltz et al., *Selected Bibliography on State Constitutional Law*, 20 RUTGERS L.J. 1093 (1989).

8. *See infra* notes 37-38 and accompanying text.

9. Justice Blackmun is today often considered a liberal. This shows how times have changed. During his early years on the Court he was considered a centrist, if not a conservative. *See* Philip B. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 268.

courts to develop a coherent discourse of state constitutional law — that is, a language in which it is possible for participants in the legal system to make intelligible claims about the meaning of state constitutions.

Second, I analyze the reasons for the failure of state courts to develop such a discourse. After rejecting several frequently offered explanations, I conclude that the failure of state constitutional discourse reflects a much deeper failure, a failure of state constitutionalism itself. The central premise of state constitutionalism is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it. This premise, however, cannot serve as the foundation for a workable state constitutional discourse because it is not a good description of actual state constitutions; it embraces theoretical inconsistencies that undermine its value as a framework for a coherent discourse; and it takes an obsolete and potentially dangerous view of the texture and focus of American national identity.

Before turning to the analysis itself, I want to convey a better sense of the problem I will be addressing by relating a story of sorts about state constitutional law. It is a story that I believe describes the experience of a great many lawyers in this country.

Imagine that you are researching potential challenges that your client could make to a state law. You research federal constitutional law and find that you have a potential argument under, let us say, the Equal Protection Clause. But you soon find that the standard applied by the federal courts — suppose rational basis review applies — is so deferential that your federal claim is a guaranteed loser. Good lawyer that you are, though, you recall that your state constitution also contains an equal protection clause. Perhaps, you think to yourself, the state constitution offers more favorable possibilities for your client.

You now begin to research state constitutional law. What do you find? One distinct possibility is that the state courts have held that the state provision means exactly the same thing as the federal provision, and that whatever analysis the federal courts use under the federal Constitution is the analysis that should be used under the state constitution as well.[10] This result is unsatisfying, but at least it ends your research. After confirming your conclusion, you abandon further state constitutional research as unproductive — it adds nothing to your case. If you mention the state constitution at all, it might be a pro

10. *See infra* notes 99-129 and accompanying text.

forma citation just to remind the court of the dual nature of your claim.

Now suppose you are luckier, and find that the state provision either has never been construed,[11] or that the state supreme court has held that the meaning of the state constitutional provision is not dependent on the meaning of the federal one. Perhaps you even find a handful of cases in which the state courts have rejected the analogous federal analyses and have reached results different from those that federal courts would reach.[12] Your heart is filled with hope. Although you will not find your argument handed to you on a silver platter, you at least have an opening, it seems, to craft an argument that the state constitutional provision has a meaning more favorable to your client than its federal counterpart.

You now get down to serious work. After all, you know how to "do" constitutional law. You will comb the state decisions to unearth the relevant history of the provision at issue. You will figure out which framers of the state constitution the state supreme court considers influential, and you will discover useful tidbits concerning their constitutional philosophy. You will ferret out from state supreme court decisions broad language about the history, purpose, structure, and political theory of the state constitution. You will then weave these materials together into a coherent and convincing story about the state constitution, perhaps contrasting it with the familiar stories of the federal Constitution. This story will form the basis for your state constitutional claim on behalf of your client.

When you undertake this research, here is what you are likely to find. After reading dozens of state constitutional decisions, you have absolutely no sense of the history of the state constitution. You do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking. You find nothing in the decisions indicating how the various provisions of the document fit together into a coherent whole, and if you do find anything at all it is a handful of quotations from federal cases discussing the federal Constitution. You are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more important to the people than others. If you have found state court decisions departing from the federal approach to the corresponding federal provision, you have no idea why the courts departed from fed-

11. State constitutions are often less thoroughly elaborated than the federal Constitution. *See infra* note 69.

12. *See infra* notes 141-61 and accompanying text.

eral reasoning; at best, you are left with the vague impression that the courts simply thought the dissents in analogous federal cases more persuasive. But nothing in these state opinions gives you any idea of what you, as an advocate, could say to convince the state courts once again to reject the federal approach as a matter of state constitutional law.

As a result of this uncertainty, you are unable to draft an argument in which you have the slightest confidence, and you end up throwing anything you can think of at the court and praying that something hits the mark. If you are really dispirited, you may decide to abandon the state constitutional claim entirely, concluding that your client's money is better spent on trying to develop a novel federal constitutional argument; at least you will have some chance of evaluating the merits of such an argument, whereas you have virtually no idea what will succeed or fail in state court.

This story illustrates what I call the poverty of state constitutional discourse, by which I mean the lack of a language in which participants in the legal system can debate the meaning of the state constitution. Further, to the extent that such a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of *lingua franca* of constitutional argument generally. My aim in this article is to demonstrate more formally the poverty of state constitutional discourse and to offer an explanation for this state of affairs.

Specifically, Part I describes in more detail the concept of a state constitutional discourse. Part II examines the New Federalism movement and its claims concerning the maturation of state constitutional law. In Part III, I summarize the results of a survey of over 1200 cases decided by state supreme courts during 1990 to document my claim that state constitutional discourse is impoverished and inadequate to the tasks that any constitutional discourse is designed to accomplish. Part IV discusses and rejects three common explanations for the poverty of state constitutional discourse. In Part V, I argue that the real reason for the failure of state constitutional discourse is the failure of state constitutionalism itself, which is internally inconsistent and relies on inadequate and outdated assumptions concerning the nature of state and national identity. As a result, state courts do not talk in the way state constitutionalism predicts because to do so would be to talk in a way that makes no sense. Part VI explores some possible resolutions of this dilemma.

I. CONSTITUTIONAL DISCOURSE

A. *Definition*

In the analysis that follows, I use the term *constitutional discourse* in a very specific sense. By constitutional discourse, I mean *a language and set of conventions that allow a participant in the legal system to make an intelligible claim about the meaning of the constitution.* This definition is dense, so I will break it down somewhat. First, by "participant in the legal system," I mean primarily lawyers, judges, and litigants — the people who carry on the daily business of adjudicating actual controversies within the legal system.[13] Second, by "claim about the meaning of the constitution," I mean simply any statement to the effect that the relevant constitution, or any of its provisions, has a certain meaning. Examples of such claims might include the following: "The constitution embodies our society's commitment to the treatment of all citizens with equal dignity"; or "The Fourth Amendment prohibits police officers from frisking an individual without some reason to suspect that the individual may be armed"; or "Constitutional due process does not require the legislature to deal with every aspect of an economic problem at once."

By "intelligible claim," I mean a claim about the meaning of the constitution that is (1) acknowledged by other participants in the legal system to be a proper way of talking about the meaning of the constitution, and (2) capable of being understood by them, and therefore capable of being the subject of further constitutional discourse. These are simply the conditions necessary for any sort of meaningful conversation to take place.[14] With respect to a constitution, a claim must be intelligible if it is to be disputed by opposing counsel or adjudicated by a judge. In our legal system, for example, a claim about the meaning of the Constitution based on astrological portents would be considered unintelligible under this definition because astrological arguments are not acknowledged to be a proper way of talking about constitutions.[15]

13. Much legal discourse incorporates the convenient fiction that only litigants make legal claims and arguments, and that their lawyers never do ("plaintiff argues," "defendant contends," and so on). Whether the litigant or the lawyer is considered the "real" participant in the legal system is immaterial to my analysis, although I expect that my analysis would be of interest primarily to lawyers, since they usually craft the arguments that form the actual raw material on which the legal system acts.

14. *See, e.g.*, JAMES B. WHITE, HERACLES' BOW 33 (1985) [hereinafter WHITE, HERACLES]; JAMES B. WHITE, JUSTICE AS TRANSLATION 23 (1990) [hereinafter WHITE, TRANSLATION]; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation,* 100 HARV. L. REV. 1189, 1233 (1987).

15. *Cf.* PHILIP BOBBITT, CONSTITUTIONAL FATE 6 (1982) ("[O]vert religious arguments or appeals to let the matter be decided by chance or by reading entrails . . . are not part of our legal grammar.").

Finally, when I refer to "federal constitutional discourse" and "state constitutional discourse," I refer to a language and set of conventions that allow participants in the legal system to make intelligible claims about the federal and state constitutions, respectively.[16]

This definition of constitutional discourse is at the same time narrow and broad. It is narrow in that it excludes talk about a constitution that takes place outside the legal system. Those who analyze constitutions in their sociological, political, or historical contexts doubtless engage in a useful sort of constitutional discourse, but it is a sort of discourse I shall not be concerned with here except to the extent that such analyses are or can be used within the legal system to support legal claims about the meaning of the Constitution.[17]

On the other hand, the definition is broad in that it includes anything at all that the participants in the legal system consider an appropriate argument about constitutional meaning. While some have argued that legitimate constitutional discourse should be confined to certain types of arguments — for example, arguments about the constitutional text and intent of the Framers[18] — I include here any type of argument widely made and accepted. Thus, if astrological or theological arguments were deemed by participants in the legal system to be appropriate bases for adjudicating constitutional claims, they would fall within the definition of constitutional discourse used here.

B. *The Significance of Constitutional Discourse*

Before going any further, it seems appropriate to ask: Why does constitutional discourse, thus defined, matter? Constitutional discourse matters very much, for several reasons. First, it is the means by which authoritative interpretations of constitutions are produced. In our system of government, not all expressions of opinion about constitutions are equal; courts have the final say,[19] and, at least with respect to constitutional issues that come before them, the only say that is authoritative in terms of guiding real exercises of real governmental power. Because courts are passive in our system, responding only to

16. Because federal constitutional claims can be raised in state courts, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), and state constitutional claims can be raised in certain federal court cases, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), I do not distinguish here between participants in the federal legal system and participants in state legal systems.

17. For examples of studies of the role played by the U.S. Constitution in nonlegal public life, see MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986) [hereinafter KAMMEN, MACHINE]; MICHAEL KAMMEN, SOVEREIGNTY AND LIBERTY: CONSTITUTIONAL DISCOURSE IN AMERICAN CULTURE (1988).

18. *See* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed,* 49 OHIO ST. L.J. 1085 (1989).

19. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

requests for judicial action, constitutional discourse is generally the only means by which positive constitutional law is made, other than by adopting or amending a constitution. In this sense, constitutional discourse gives legal life to the constitution within the legal system of which the constitution is a part.

But constitutional discourse is more than a mechanical procedure for producing the authoritative interpretations of the constitution needed to effectuate constitutional government. It is also the means by which participants in the legal system debate among themselves the meaning of the document. One side makes a claim about the meaning of the constitution; the other side responds by disputing that claim and making its own different one, which the first side disputes. The court then jumps into the exchange, questioning, accepting, rejecting, or modifying the claims made by the parties and reaching a conclusion. This debate among the participants plays a significant role in shaping the authoritative constitutional pronouncements the judicial system ultimately yields.

That constitutional discourse comprises a debate about the meaning of the constitution has important implications for a society that conceives of itself as living under that constitution. For what do we debate when we debate the meaning of a constitution? It has often been observed that any discourse is in a sense a means of self-definition, both for the individuals who engage in the discourse and the community of individuals among whom the discourse takes place.[20] As Richard Sherwin has argued, "it is through discourse itself that who we are and the community and culture we belong to take on an embodied existence in the world."[21] Thus, virtually any type of discourse is a means of debating the identity — the internal roles, relations, and ethos — of the community in which it occurs.[22]

But if this is true of discourse generally, it seems especially true of constitutional discourse because a constitution is a document that self-consciously defines a communal identity. In Part V, I discuss the nature of constitutions and American constitutionalism in some detail. For now, it is sufficient to say that a constitution, according to our legal and social conventions, is a document meant to identify a polit-

20. *See, e.g.*, WHITE, TRANSLATION, *supra* note 14, at ix, 23, 217; WHITE, HERACLES, *supra* note 14, at 34, 80, 169; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989); Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 5 (1989).

21. Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 564 (1988).

22. WHITE, HERACLES, *supra* note 14, at 34, 96, 98; WHITE, TRANSLATION, *supra* note 14, at 215-17.

ical community and to set out some of the most fundamental principles according to which the members of the community wish to live their lives. Consequently, to debate the meaning of a constitution, as participants in the legal system do when they engage in constitutional discourse, is to debate some aspect of the most fundamental characteristics of the constitutional community's understanding of its own identity. It is to claim that we are (or are not) a certain type of people, who hold dear certain values and not others, and who act in certain ways in particular situations.

Thus, constitutional discourse is an integral aspect not only of constitutional law as a body of positive legal authority, but of societal self-identification as well. As a result, to monitor a society's constitutional discourse is in an important sense to take the pulse of that society's efforts to understand itself.

C. *Federal Constitutional Discourse as a Model*

My purpose in Part III is to describe and criticize state constitutional discourse as it is currently practiced. In particular, I shall argue that state constitutional discourse is "impoverished." In order to get a better sense of what this conclusion entails, we may usefully contrast state constitutional discourse with its far more successful cousin, American federal constitutional discourse.

Our federal constitutional discourse is extraordinarily rich. Perhaps as a result of the age or stability of the U.S. Constitution, a participant in the legal system can today make claims about the meaning of the Constitution in a variety of ways. Among the types of arguments about the meaning of the Constitution widely acknowledged to be appropriate are arguments from the language and structure of the constitutional text; from history and the intent of the Framers; from constitutional theory; from judicial precedent and legal doctrine; and from a virtually limitless number of value systems dealing with matters such as ethics, justice, and social policy.[23] This is more than enough raw material to allow a wide variety of disparate claims about the meaning of the Constitution, including claims that some otherwise active participants in the discourse may well consider outlandish. Indeed, some critics of federal constitutional jurisprudence, most prominently originalists, have argued that federal constitutional discourse is *too* rich — that too many types of arguments have been incorporated into the discourse, and that some of them do not furnish a

23. *See* Fallon, *supra* note 14; BOBBITT, *supra* note 15.

legitimate language in which to make claims about the meaning of the Constitution.[24]

There is another reason for choosing federal constitutional discourse as a model of a successful constitutional discourse: it is the model adopted by the New Federalism movement as the one toward which state constitutional discourse should aspire.

II. NEW FEDERALISM

Today's New Federalism movement has its roots in two phenomena. The first is the liberal reaction in the mid-1970s to the jurisprudence of the Burger Court. As the Burger Court slowed the expansion of constitutionally protected individual rights begun by the Warren Court, many liberals began to look to state courts to take up the Warren Court's legacy in the form of rights-protective state constitutional rulings.[25] The second phenomenon is a much older and sparser tradition of criticizing state courts for ignoring state constitutions as a source of law and for failing to develop vigorous and independent bodies of state constitutional law irrespective of the character of the constitutional jurisprudence of the U.S. Supreme Court.[26] This strand of thought is often marked by criticism of state constitutions as well, often on the ground that state constitutions are poorly thought out or insufficiently "constitutional" in outlook.[27]

The marriage of these two schools gave birth to a New Federalism movement whose adherents, although occasionally impelled by different motives,[28] shared the ultimate goal of creating in every state a vigorous, independent body of state constitutional law capable of

24. For an overview of originalism, see Farber, *supra* note 18.

25. *See Project Report: Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L. L. REV. 271 (1973) [hereinafter *Project Report*]; Brennan, *State Constitutions, supra* note 1; Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 CAL. L. REV. 273 (1973); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); *see also* Ronald K.L. Collins, *Reliance on State Constitutions — Away From a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1 (1981); Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property Under State Constitutional Law, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 51.

26. *See* Scott H. Bice, Anderson *and the Adequate State Ground,* 45 S. CAL. L. REV. 750 (1972); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon,* 49 OR. L. REV. 125 (1970); William F. Swindler, *State Constitutions for the 20th Century,* 50 NEB. L. REV. 577, 583-89 (1971); Orrin K. McMurray, Note, *Some Tendencies in Constitution Making,* 2 CAL. L. REV. 203, 220-24 (1914); Note, *California's Constitutional Amendomania,* 1 STAN. L. REV. 279, 280-81 (1949) [hereinafter Note, *Amendomania*]; *see generally* Charles R. Adrian, *Trends in State Constitutions,* 5 HARV. J. ON LEGIS. 311 (1968).

27. *See, e.g.,* Swindler, *supra* note 26, at 590, 593; McMurray, *supra* note 26, at 207, 210; Note, *Amendomania, supra* note 26, at 279-80.

28. Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law,* 13 VT. L. REV. 13, 34-35 (1988).

standing by itself as a basis for constitutional rulings by state courts. Both groups also shared the belief that state constitutional law was not living up to its potential as a source of independent law. Much of the early literature was therefore devoted to criticizing state court decisions for what New Federalism advocates saw as sloppy or inappropriate constitutional decisionmaking practices. These practices included avoiding reliance on state constitutions altogether;[29] analyzing state constitutions in a perfunctory manner that provided little guidance to litigants and lower courts;[30] and inappropriately relying on federal rulings and analyses as a guide to construction of state constitutions.[31]

As New Federalism matured, its adherents began increasingly to take the view that state constitutional jurisprudence should be something more than a vehicle for relitigating civil rights battles lost in the federal courts. Although some critics have argued that virtually all New Federalism proponents are motivated by the bare desire to achieve a liberal political agenda,[32] it seems clear that an overwhelming consensus has developed within the movement that "reactive" state constitutional jurisprudence — state rulings that reject federal constitutional decisions merely because the state court disagrees with the result — is generally inappropriate.[33] Rather, state constitutional

29. *E.g.*, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 957-58 (1982) (observing that most state courts failed to look to state constitutions); Abrahamson, *supra* note 5, at 1147 (noting that state courts fell silent in this area from the late 1950s through the 1970s); Charles G. Douglas, III, *State Judicial Activism — The New Role for State Bills of Rights*, 12 SUFFOLK L. REV. 1123, 1144 (1978) (state constitutions "moribund"); Stanley Mosk, *State Constitutionalism After Warren: Avoiding the Potomac's Ebb and Flow*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 201 ("[S]tate courts were guilty of a dismal performance in enforcing provisions of their own constitutions."); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 587 (1986) (State constitutional law suffered "generations of neglect — for which state courts bear a great deal of responsibility."); Ronald K.L. Collins, *Reliance on State Constitutions: Some Random Thoughts*, *in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 1, 4 (describing state constitutional law as "dormant").

30. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 390 (1980).

31. Todd F. Simon, *Independent But Inadequate: State Constitutions and Protection of Freedom of Expression*, 33 KAN. L. REV. 305, 308 (1985); *Developments in State Constitutional Law: 1989*, 21 RUTGERS L.J. 903, 1111 (1990); *see also* Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 736-37 (1988).

32. *E.g.*, Earl M. Maltz, *The Political Dynamic of the "New Judicial Federalism,"* 2 EMERGING ISSUES IN ST. CONST. L. 233, 233 (1989).

33. *E.g.*, Collins, *supra* note 25, at 2-3; Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 779, 786 (1982); Ken Gormley, *Ten Adventures in State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 29, 35 (1988); A.E. Dick Howard, *The Renaissance of State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 1, 12-13 (1988); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENVER U. L. REV. 85, 95 (1985); Kaye, *supra* note 5, at 418; Robin B. Johansen, Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 300 (1977).

law must go its own way not in order to achieve a particular result, but because it is jurisprudentially an independent body of law.

New Federalism advocates support their arguments for state constitutional independence in several ways. Some claim a historical primacy for state constitutions. State constitutions, they argue, predated the federal Constitution and served in many respects as models consulted by the drafters of the federal Constitution and Bill of Rights.[34] In addition, state constitutions were originally intended to be the primary vehicles for protecting the liberties of Americans, not the supplementary charters they have in many ways become.[35] Others stress the many differences between the state and federal constitutions. They argue that a state constitution is a charter of government created by and for a different political sovereign; that it is a distinct document with a text that often differs significantly from its federal counterpart; and that state courts are institutions distinct from federal courts in both their authority and the circumstances under which that authority is exercised.[36] These differences, it is argued, necessarily give rise to a distinct and independent body of law.

Finally, some argue that a vigorous and independent body of state constitutional law is not only contemplated, but virtually required, by the American system of federalism. In a federal system, the states are supposed to be counterweights to federal power, an arrangement designed to protect liberty.[37] A strong, independent state constitutional jurisprudence is an important aspect of state power and independence, and thus a necessary condition of a healthy federalism.[38]

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34. Norman Dorsen, *State Constitutional Law: An Introductory Survey,* 15 CONN. L. REV. 99, 99-101 (1982); Linde, *supra* note 30, at 380-81; Wilkes, *supra* note 6, at 223-24; Ronald F. Williams, *State Constitutional Law Processes,* 24 WM. & MARY L. REV. 169, 175 (1983).

35. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts,* 63 TEXAS L. REV. 977, 979 (1985); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 239, 239.

36. *See* Howard, *supra* note 25, at 934-40; Howard, *supra* note 33, at 1, 8; Kaye, *supra* note 5, at 403; Linde, *supra* note 5, at 173, 181-83; Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights,* 20 RUTGERS L.J. 881, 893-901 (1989); Lawrence Gene Sager, *Foreword: State Constitutions and the Strategic Space Between the Norms and Rules of Constitutional Law,* 63 TEXAS L. REV. 959, 973-76 (1985); Utter, *supra* note 35, at 241-43; Williams, *supra* note 6, at 355, 397-404.

37. THE FEDERALIST NOS. 45, 46 (James Madison).

38. *See* Collins, *supra* note 25, at 5-6; Shirley S. Abrahamson, *Homegrown Justice: The State Constitutions, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 306, 314. For a different view, see Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism,* 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98 (1988); Maltz, *supra* note 3. It has also been suggested that the U.S. Constitution pursues federalism even more directly by giving states the power to create federal constitutional rights; this occurs because the content of the rights protected by the Ninth Amendment is dictated by the content of the rights protected by state constitutions. *See* Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitu-*

As Justice Stanley Mosk of the California Supreme Court has observed, New Federalism thus offers something for both liberals and conservatives: it can offer liberals a continuation of the Warren Court's expansion of constitutional rights, while at the same time offering conservatives "the triumph of federalism."[39]

Although New Federalism proponents are basically united on the need for vigorous, independent state constitutional law, they divide over the issue of how such a body of law should be developed. A sizable majority seems to prefer what has come to be known as the "primacy" approach to state constitutional interpretation,[40] an approach usually identified with former Oregon Supreme Court Justice Hans Linde, who has been called the "intellectual godfather" of New Federalism.[41] The primacy approach holds that state courts confronted with constitutional issues should look to the state constitution in the first instance and should interpret it in a principled way that takes account of the text, history, structure, and underlying values of the document.[42] In other words, state courts should approach their state constitutions just as the U.S. Supreme Court would approach the federal Constitution — as a unique and highly significant document with a meaning that can and must be derived through independent analysis of the document itself.

In contrast, a minority of New Federalism proponents prefer the "interstitial" approach to state constitutional adjudication.[43] This approach holds that state courts should look in the first instance to the federal Constitution where that document can provide a basis for decision. Only if federal constitutional law approves the challenged state action, or is ambiguous, should the state court then turn to the state

tional Law, 1990 WIS. L. REV. 1229; Eric B. Schnurer, *It Is a Constitution We Are Expanding: An Essay on Constitutional Past, Present, and Future,* 1 EMERGING ISSUES IN ST. CONST. L. 135 (1988).

39. Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative,* 63 TEXAS L. REV. 1081, 1081 (1985).

40. Among the many who have endorsed the primacy approach are Abrahamson, *supra* note 29, at 962-63; Douglas, *supra* note 29, at 1145-46; Falk, *supra* note 25, at 285-86; *Project Report, supra* note 25, at 289; Frank G. Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts,* 13 VT. L. REV. 145, 146 (1988); Simon, *supra* note 31, at 316; Utter, *supra* note 35, at 247; Collins, *supra* note 29, at 7-9.

41. Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics,* 64 WASH. L. REV. 5, 5 (1989) (quoting Jeffrey Toobin, *Better Than Burger,* NEW REPUBLIC, Mar. 4, 1985, at 10, 11).

42. Linde, *supra* note 5, at 178-81; Linde, *supra* note 30, at 380, 392.

43. *Developments in the Law: The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1330-31 (1982) [hereinafter *Developments in the Law*]; Hudnut, *supra* note 33, at 99-100; *see also* Peters, *supra* note 29, at 589-92 (advocating flexible approach to state constitutional interpretation).

constitution.[44] According to Justice Stewart Pollock of the New Jersey Supreme Court, the most articulate defender of the interstitial approach, this method is preferable to the primacy approach because it acknowledges the U.S. Constitution as the basic protector of individual rights in our society.[45] State constitutional law thus plays a more modest role than it would under the primacy approach.[46] However, Justice Pollock has cautioned that in order to avoid a state constitutional jurisprudence that merely reacts to federal rulings, state courts must diverge from federal holdings and results only in accordance with appropriate objective criteria.[47]

In 1983, New Federalism received an unlikely boost from the U.S. Supreme Court. In *Michigan v. Long,*[48] the Court reconsidered its prior rulings concerning the doctrine of adequate and independent state grounds. Under this doctrine, the Supreme Court will not review a state court decision that rests on state law grounds even if the state decision also rests on federal law grounds for which a federal appeal normally would be available.[49] The Court had reasoned that because state law is unreviewable by federal courts, a Supreme Court decision on the federal issue could not affect the outcome of the case and would therefore be an advisory opinion beyond the Court's Article III jurisdiction.[50] In *Long,* the Court held that it would henceforth consider a state court decision to rest on adequate and independent state grounds only if it "indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds."[51] Thus, the Court now requires state courts to say explicitly when their deci-

44. Pollock, *supra* note 2, at 718; *see also Developments in the Law, supra* note 43, at 1356-66 (discussing application of the interstitial model).

45. Pollock, *supra* note 2, at 718.

46. *See Developments in the Law, supra* note 43, at 1358 ("The state court's role is not to construct a complete system of fundamental rights from the ground up.").

47. Pollock, *supra* note 2, at 718; *see also* State v. Hunt, 450 A.2d 952, 965-67 (N.J. 1982) (Handler, J., concurring) (suggesting seven criteria for determining when the court should diverge from federal constitutional law).

A third approach has been identified in which state courts resolve all parallel state and federal constitutional claims regardless of the outcome of either analysis; that is, the court will not stop its analysis after turning to one constitution or the other, even if that analysis provides a definitive resolution to the case. This approach has been accurately criticized for creating an unreviewable state body of federal constitutional dicta. Bice, *supra* note 26; Pollock, *supra* note 35, at 983. *But see* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds,* 63 TEXAS L. REV. 1025, 1029-41 (1985) (arguing that this approach allows state courts to contribute to the development of federal constitutional law).

48. 463 U.S. 1032 (1983).

49. 463 U.S. at 1038-42.

50. 463 U.S. at 1040; Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), *overruled on other grounds by* Michigan v. Long, 463 U.S. 1032 (1983).

51. 463 U.S. at 1041.

sions rest on state grounds if state courts want to insulate their decisions from Supreme Court review.

Some New Federalism proponents have condemned *Long* because they view it as resting on a presumption that state courts will decide cases on federal grounds, a presumption that they consider disrespectful to state sovereignty and contrary to established principles of federalism.[52] This criticism is greatly overblown. Not only can the *Long* requirement of clarity be satisfied simply by adding a caption or explanatory sentence to a court's opinion,[53] but it requires state courts to do exactly what New Federalism proponents have been urging them to do: think explicitly about the grounds of their decisions, and make those grounds clear in their opinions.[54]

All in all, New Federalism advocates seem unremittingly optimistic about the prospects for achieving the movement's goals. They point with pride to the fact that state courts have decided over four hundred cases construing state constitutions to provide greater protections for individual rights than the federal Constitution.[55] They write articles about state constitutional law with titles that include words such as "revival," "reincarnation," "renaissance," "revolution," and "reemergence."[56] They devote close scholarly attention to independent state constitutional decisions,[57] and they have held numerous sym-

52. *See, e.g.*, William W. Greenhalgh, *Independent and Adequate State Grounds: The* Long *and the Short of It, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 211, 214-21.

53. The New Hampshire Supreme Court routinely does this. *See infra* notes 172-74 and accompanying text.

54. Joseph R. Grodin, *Some Reflections on State Constitutions,* 15 HASTINGS CONST. L.Q. 391, 399 (1988). *See also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). There the Supreme Court refused to disturb on federal constitutional grounds a California ruling that the state constitution provided greater protections to freedom of speech than did the federal Constitution. 447 U.S. at 88. In reaching this decision the Court relied on the California Supreme Court's clearly stated reasons for concluding that broader state-protected rights of expression did not impermissibly infringe on appellants' federal property or First Amendment rights. 447 U.S. at 78, 83-84.

55. David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 221 (1988); *see also* Sol Wachtler, *Our Constitutions — Alive and Well,* 61 ST. JOHN'S L. REV. 381, 397 (1987) (stating that state courts issued 350 such opinions between 1970 and 1984).

56. Abrahamson, *supra* note 29, at 951; Brennan, *Bill of Rights, supra* note 1, at 535; James C. Harrington, *Reemergence of Texas Constitutional Protection,* 2 EMERGING ISSUES IN ST. CONST. L. 101, 101 (1989); Howard, *supra* note 33, at 1; *Symposium on the Revolution in State Constitutional Law,* 13 VT. L. REV. 11, 11 (1988).

57. *See, e.g.*, John H. Buttler, *Oregon's Constitutional Renaissance: Federalism Revisited,* 13 VT. L. REV. 107 (1988); Galie, *supra* note 33; Howard, *supra* note 33; Howard, *supra* note 25; Levinson, *supra* note 25, at 51; Simon, *supra* note 31; Wilkes, *supra* note 6; Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 166; Williams, *supra* note 6.

posia on state constitutional law.[58] A new journal called *Emerging Issues in State Constitutional Law* has even been established to provide a forum for such commentary.[59]

Is this optimism well founded? Have state courts responded to Justice Brennan's call and begun to develop, in the past fifteen years, an independent jurisprudence of state constitutional law? The answer will be found by examining current state constitutional discourse. If a robust, independent state constitutional law exists, it must be manifested by an equally robust and independent state constitutional discourse that allows participants in state legal systems to raise, debate, and adjudicate claims about the meaning of state constitutions.[60]

New Federalism predicts that such a discourse could take two possible forms. If a state adopted the primacy approach to constitutional adjudication, it would develop a state constitutional discourse in which intelligible claims about the meaning of the state constitution could be based on the text, history, structure, and underlying values of the state constitution. Such a discourse would in all likelihood closely resemble federal constitutional discourse in tone and style, although its participants would be free to accept or reject the legitimacy of any or all of the language or conventions of the cognate federal discourse. Moreover, any similarities in case outcomes or doctrine would be purely fortuitous, since the state discourse would stand on its own. Thus, if a state court happened to reach the same result under the state constitution as the federal courts have reached under the U.S. Constitution, that congruity might only reflect the fact that both constitutions are rooted in similar historical or political circumstances.

If a state adopted an interstitial approach to constitutional adjudication, its state constitutional discourse would take a slightly different form. Instead of being independent and internally complete, such a discourse would focus on the ways in which the state and federal con-

58. *E.g.*, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7 (Williamsburg Conference); *State Constitutions in a Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1988); *Symposium on State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391 (1988); *Symposium on State Constitutional Law*, 64 WASH. L. REV. 1 (1989); *Symposium on the Revolution in State Constitutional Law*, *supra* note 56; Symposium, *The Emergence of State Constitutional Law*, 63 TEXAS L. REV. 959 (1985); Symposium, *Special Section: The Connecticut Constitution*, 15 CONN. L. REV. 7 (1982).

59. The journal is published by the National Association of Attorneys General. The inaugural issue appeared in 1988.

60. *See supra* section I.B. This is a very different method of evaluating the condition of state constitutional law than that employed by many New Federalists, who seem to view the number of state decisions deviating from federal law as an important indicator of the health of state constitutional law. However, deviations from federal law alone do not necessarily indicate the presence of a robust and independent state constitutional discourse. *See infra* notes 143-50 and accompanying text.

stitutions differ from each other. Thus, state constitutional discourse would be a "discourse of distinctness" — it would comprise a language and set of conventions enabling participants in the legal system to argue that provisions of the state constitution mean something different from their federal counterparts. Because this discourse would use federal constitutional discourse as a starting point, it would probably have to incorporate the various elements of federal constitutional discourse such as text, framers' intent, constitutional theory, judicial precedent, and societal values. However, state constitutional discourse would contain additional features that would allow participants to apply these elements of federal constitutional discourse to the state constitution and to construct intelligible arguments that the state and federal constitutions differ in dispositive ways.[61]

It is possible, and perhaps likely, that these two different types of state constitutional discourse would end up looking very much the same. If there were an irreducible difference between them, it would be this: while both types of discourse would yield meanings for the state constitution, participants in a discourse accompanying the interstitial approach would care fundamentally about the meaning of the federal Constitution, whereas participants in a discourse accompanying the primacy approach would not.

With this discussion in mind, we now have the tools to assess the optimistic claims of New Federalism. In the next Part, I review state constitutional discourse as it was practiced in 1990, and conclude that it not only falls immensely short of New Federalism ideals, but often seems barely to exist at all.[62]

III. THE POVERTY OF STATE CONSTITUTIONAL DISCOURSE

The editors of the Draft Model State Constitution have accurately observed that there can really be no such thing as a model state constitution because there is no such thing as a model state.[63] It unfortunately follows that the only completely accurate way to examine the status of state constitutional law would be to look at every relevant

61. The interstitial approach is generally less applicable to state constitutional provisions without federal analogue, of which there are many. *See infra* notes 243-55 and accompanying text. Proponents of the interstitial approach have not outlined how they would interpret such provisions, but it seems that they would be driven by necessity to use something like the primacy approach.

62. I should note here that the reader who is willing to accept my conclusions about the poverty of state constitutional discourse, whether from personal experience or on faith, can skip the following Part and turn directly to my analysis of the problem in Parts IV and V without loss of continuity.

63. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION vii (rev. 6th ed. 1968).

decision of every state court. That would have made my project unmanageable, so I have narrowed the field of inquiry in four ways. First, I have confined myself to a sampling of seven states: New York, Massachusetts, Virginia, Louisiana, California, Kansas, and New Hampshire.[64] Second, I have examined only decisions of the highest court of each state.[65] Third, I have excluded decisions in which the state high court did not write a full opinion, or at least perform some kind of legal analysis. Thus, I have not considered summary or memorandum decisions, or any other type of decision that does not reveal in the decision itself the nature of the case and the court's reasoning. Finally, I have confined my analysis to cases decided during a single year, 1990, the most recent for which published state high court deci-

64. I selected this sample in the following way. Going into the research, I hypothesized that five factors might be relevant to the condition of constitutional law and discourse in any given state: (1) the size of the state; (2) its age; (3) the presence of an unusual founding history; (4) the continuity of its constitutional traditions; and (5) the nature of the constitutional text. The size of the state would be relevant because of the sheer number of cases litigated: the more constitutional cases litigated, the more constitutional rulings made, and the more developed the state's body of constitutional law. The age of the state would be relevant for the same reason; older states would have had a longer period in which to develop a substantial body of constitutional rulings. An unusual founding history would be relevant in that it might be reflected in the state constitution, thereby providing an occasion for developing constitutional doctrines different from federal constitutional law. The presence of such differences might then serve as a focal point for the development of a strong, independent body of state constitutional law. The continuity of a state's constitutional traditions would be relevant in two ways. First, a constitution in long continuous use is more likely to be extensively construed than a relatively new document. Second, a history of frequent constitutional revisions might be indicative of an approach by the people of the state toward constitutional law that differs from the approach taken by the nation toward the national Constitution. Finally, peculiarities of the constitutional text might be the occasion for developing independent bodies of state constitutional law; they might also indicate underlying state attitudes concerning the functions that constitutions ought to serve. In looking at state constitutions in this last category, however, it became clear that the search for "peculiarities" would be too subjective, so I decided eventually to look only at the length of the constitutional text.

According to these criteria, a representative sample of states would include states of varying sizes, ages, and histories, with constitutional traditions of varying continuity and constitutions of varying lengths. To keep the sample size manageable, I tried to choose states that were interesting for more than one quality. The states selected fit the criteria as follows. New York and California are very large, and New Hampshire is very small. New York, Massachusetts, Virginia, and New Hampshire are very old states; Louisiana, Kansas, and California are intermediate to young. I avoided extremely young states such as Alaska and Hawaii because it seemed unlikely that they have had the time necessary to develop a substantial body of constitutional law. Louisiana has an unusual history of French and Spanish influence, and is the only state in the union to retain a civil law system. New York, with its background of early Dutch settlement, also has a somewhat atypical history. With respect to continuity, Massachusetts and New Hampshire have had only one constitution each since they became states; Louisiana has had eleven constitutions, the most of any state. Finally, the New Hampshire and Massachusetts constitutions are among the shortest of state constitutions, the New York constitution among the longest. Kansas fell into the middle of the pack in virtually every category, and was selected for that reason.

65. This is probably just as well, since it seems that state supreme courts are far more likely to devote sustained attention to state constitutional issues than are lower state courts. Also, it is often difficult to obtain good data on state trial court decisions. In contrast, state supreme court opinions are all published and readily available.

sions were available.[66] These reductions yielded an overall sample size of 1208 cases.

In addition to systematically examining the cases included in the sample, I have also delved more anecdotally into decisions rendered in other states and in different years. This spot-checking supports the conclusions derived from studying the primary sample.

A. *General Trends*

1. *The Infrequency of State Constitutional Decisions*

One of the most striking aspects of state constitutional decisions is their relative infrequency. In calendar year 1990, the U.S. Supreme Court issued 137 full opinions, of which 73, or 53%, involved resolution of at least one federal constitutional issue. None of the state courts surveyed here construed its own state constitution with anything remotely approaching that frequency. Even using the most generous method of counting state constitutional decisions,[67] the courts of the sample states decided state constitutional issues in only about 21% of their cases, or about 40% as often as the U.S. Supreme Court construed the federal Constitution. Broken down by state, the rates were California, 31%; Massachusetts, 24%; New Hampshire, 26%; New York, 20%; Kansas, 18%; Louisiana, 15%; and Virginia, 7%.[68]

66. While focusing on a single year may result in some distortion due to annual variations in caseload and the like, I suspect that the more recent the focus, the more any distortion would tend to favor the predictions of New Federalism. This is because independent state constitutional decisions are more likely with the passage of time, for two reasons. First, the more recent the year, the more time the message of the New Federalism has had to penetrate the state judiciaries. Second, the U.S. Supreme Court continues each year to slow or reverse the expansion of federally protected rights, thus providing state courts with more to react against, to the extent that their constitutional jurisprudence is at heart a reactive one.

67. A small percentage of the opinions surveyed were unclear as to whether the courts' holdings rose to constitutional dimensions; a much larger percentage were unclear as to whether the courts' rulings were based on the state or federal constitution. For the purpose of comparing constitutional decision rates, I have counted all these ambiguous decisions among the state constitutional rulings. However, I have excluded rulings that unambiguously relied only on the U.S. Constitution. For a more complete breakdown of state decisions, see *infra* note 68. For a discussion of cases that do not clearly identify the constitution upon which the court relies, see *infra* notes 85-98 and accompanying text.

68. The actual numbers are as follows (all figures refer to cases decided in 1990). In 1990, the New York Court of Appeals issued 240 opinions containing some kind of legal analysis. Of these, 184 involved no constitutional issue of any kind, 7 involved only a federal constitutional claim, and 37 dealt with state constitutional claims. An additional 12 opinions left unclear whether the holding of the case rose to constitutional dimensions. During the same period, the Massachusetts Supreme Judicial Court issued 273 full opinions. Of these, 186 involved no constitutional issues, 12 raised only a federal constitutional issue, 62 arguably dealt with at least one state constitutional question, and in 13 cases it was unclear whether the ruling had constitutional dimensions.

The Virginia Supreme Court over the same period issued 147 full opinions. Of these, 130 involved no constitutional issue, 7 raised only a federal constitutional claim, and 8 arguably involved state constitutional claims. In another 2 cases, it was unclear whether the ruling had

State constitutional law thus comprises a significantly smaller proportion of the state high court docket than federal constitutional law does for the Supreme Court. Although it is not clear from this data alone whether the dearth of state constitutional cases is due to the failure of litigants to raise such claims or to a weeding out of constitutional cases due to jurisdictional or procedural considerations, I suggest reasons below to suspect the former. Either way, the lack of decisions alone retards the development of state constitutional law and discourse — the development of a language, after all, requires the opportunity to speak.[69]

2. *Grudging Resort to the State Constitution*

Just as striking as the infrequency of state constitutional decisions, and undoubtedly one of its causes, is what can only be characterized as a general unwillingness among state supreme courts to engage in any kind of analysis of the state constitution at all. I will use New York as an example, although this unwillingness exists to an equal or greater extent in Massachusetts, Virginia, and Kansas, and to a somewhat lesser extent in California and Louisiana.

The grudging character of the New York Court of Appeals' state constitutional analyses permeates the great majority of its decisions in the sample. In 1990, the court decided 37 cases that can arguably be viewed as resting in whole or in part on the state constitution. In 12 of them, the only mention of the state constitution consists of either a passing acknowledgement that a party is raising a state constitutional claim; a citation, without further comment, to the state constitution; or the bare assertion that the case comes out the same way under both the state and federal constitutions.[70] In other words, the opinions con-

constitutional dimensions. The Louisiana Supreme Court issued 149 full opinions, of which 119 involved no constitutional issue, 8 raised only federal constitutional issues, 21 dealt with at least one state constitutional issue, and one was unclear as to its constitutional roots.

The California Supreme Court issued 118 full opinions in 1990, of which 36 contained at least one issue of state constitutional law. An additional 76 involved no constitutional issue, and 6 cases dealt only with federal constitutional issues. The Kansas Supreme Court issued 142 opinions; 100 of these raised no constitutional issue, 16 dealt only with federal constitutional issues, 21 involved or arguably involved state constitutional issues, and in 5 cases it was unclear whether the case had constitutional dimensions.

In 1990, the New Hampshire Supreme Court issued 139 full opinions. Of these, 98 did not address any constitutional question, 34 dealt with state constitutional claims, 5 involved only federal claims, and in 2 cases it was unclear whether the case had constitutional dimensions.

69. This may be especially true given that state constitutions are on average almost four times as long as the U.S Constitution. Albert L. Sturm, *The Development of American State Constitutions,* 12 PUBLIUS 57, 74-76 (1982). It seems logical that state constitutions would thus require considerably more exegesis than the federal Constitution in order to play a comparable role in state law.

70. People v. Carter, 566 N.E.2d 119, 120, 123 (N.Y. 1990), *cert. denied,* 111 S. Ct. 1599 (1991); Johnson Newspaper Corp. v. Melino, 564 N.E.2d 1046, 1047, 1049 (N.Y. 1990); People

tain nothing that could be regarded as analysis of the state constitution. In 12 more opinions, there is no mention of or citation to *any* constitution; the court merely holds that some "right" or "constitutional right" is at issue.[71]

Consider some examples. In *People v. Sides,*[72] a criminal defendant claimed inadequate assistance of counsel under both the state and federal constitutions. The court held that the defendant's "right to counsel" had been violated, but gave no indication of whether the relevant right was a state or federal one.[73] In *People v. Cain,*[74] the court reversed a conviction on the ground that the defendant had been denied his "right to be present, with counsel, at all material stages of a trial."[75] The court then cited both the U.S. and New York constitutions, but did not say whether its ruling rested on one or both.[76] In *In re Jamal C.,*[77] the court ruled that the respondent had "no constitutional right to the presence of counsel."[78] The court did not cite any constitution at all. In none of these cases did the court make any statement of the kind required by *Michigan v. Long* to the effect that its decision rested on adequate and independent state grounds.

In each of these cases it is essentially impossible to determine by reading the case whether it is a state constitutional ruling at all. Such cases squelch the development of state constitutional discourse in at least two ways. First, ambiguity about the basis of the court's ruling

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v. Ortiz, 564 N.E.2d 630, 632 (N.Y. 1990); Schneider v. Sobol, 558 N.E.2d 23, 24 (N.Y. 1990); McKenzie v. Jackson, 556 N.E.2d 1072 (N.Y. 1990); People v. Basora, 556 N.E.2d 1070, 1071 (N.Y. 1990); People v. Cain, 556 N.E.2d 141, 143 (N.Y. 1990); Seelig v. Koehler, 556 N.E.2d 125, 126 (N.Y. 1990), *cert. denied,* 111 S. Ct. 134 (1990); Forti v. New York State Ethics Commn., 554 N.E.2d 876, 882-86 (N.Y. 1990); People v. Hernandez, 552 N.E.2d 621, 624 (N.Y. 1990), *affd. sub nom.* Hernandez v. New York, 111 S. Ct. 1859 (1991); People v. Sides, 551 N.E.2d 1233, 1234 (N.Y. 1990); People v. Cintron, 551 N.E.2d 561, 566, 567 (N.Y. 1990).

71. People v. Rodriguez, 564 N.E.2d 658, 659 (N.Y. 1990) ("due process right to be present at trial"); People v. LaClere, 564 N.E.2d 640, 641 (N.Y. 1990) ("right to counsel"); People v. Thomas, 563 N.E.2d 280, 281 (N.Y. 1990) ("right to have counsel at the lineup"); People v. Gordon, 563 N.E.2d 274, 275 (N.Y. 1990) ("showup identification"); City of New York v. State, 562 N.E.2d 118, 121 (N.Y. 1990) ("equal protection argument"); People v. Harris, 559 N.E.2d 660, 661 (N.Y. 1990) ("due process" right); *In re* Lionel F., 558 N.E.2d 30, 31 (N.Y. 1990) ("double jeopardy"), *cert. denied,* 111 S. Ct. 304 (1990); People v. Garcia, 555 N.E.2d 902, 902 (N.Y. 1990) ("ineffective assistance of counsel"); People v. Wandell, 554 N.E.2d 1274, 1274 (N.Y. 1990) ("effective assistance of counsel"); People v. Gonzales, 554 N.E.2d 1269, 1270 (N.Y. 1990) ("right to counsel"), *cert. denied,* 111 S. Ct. 99 (1990); *In re* Jamal C., 553 N.E.2d 1018, 1019 (N.Y. 1990) ("constitutional right to the presence of counsel"); People v. Tuck, 551 N.E.2d 578, 578 (N.Y. 1990) ("right to confrontation").

72. 551 N.E.2d 1233, 1234 (N.Y. 1990).

73. 551 N.E.2d at 1235.

74. 556 N.E.2d 141 (N.Y. 1990).

75. 556 N.E.2d at 143.

76. 556 N.E.2d at 143.

77. 553 N.E.2d 1018 (N.Y. 1990).

78. 553 N.E.2d at 1019.

impairs the usefulness of a case for the purpose of debating the meaning of the state constitution. This is because it is highly awkward, if not impossible, to use a case as the basis for an argument about the meaning of the state constitution if it is unclear from the case itself whether the case is even about the state constitution.

Second, such ambiguity is self-perpetuating. Suppose one party claims that a case construes the state constitution and the other party contends that it deals with the federal Constitution. It is very unlikely that a state court, particularly a lower court, will attempt to resolve such a dispute. In all likelihood, the court will hold that it need not resolve the ambiguity; all we need to know, the court will say, is that controlling state precedent recognizes the existence of a constitutional right in the circumstances at hand. Consequently, the court need only apply the ambiguous case, resulting in a ruling of equal ambiguity. Eventually, a small body of law may evolve that cannot be traced with any confidence to either the state or federal constitutions.[79] Such a development can only inhibit the creation of a robust state constitutional discourse. The most fundamental requirement for the creation of a discourse is agreement concerning when participants should be understood to be engaging in the discourse. Decisions such as these virtually preclude any such understanding.

Just as important, however, is the message that the court sends when, like the New York Court of Appeals, 65% of its decisions explicitly or arguably involving the state constitution share these flaws. The message is: "This activity is not important to us. We will not treat such claims with much attention or care, so you are probably wasting your time raising them." It is hard to conceive of a lawyer who would spend much time developing a thorough or novel state constitutional claim after receiving such a message from the state's highest court.

The result of the Court of Appeals' approach to state constitutional claims has been to discourage litigants from making such claims at all. This discouragement appears between the lines of New York decisions, which show their disdain for the state constitution by giving short shrift to the great majority of state constitutional claims. But another important sign of this discouragement is the comparatively low proportion of cases — probably no more than 15%[80] — on the

79. For an example of this, see the discussion of State v. Prewett, *infra* notes 96-98 and accompanying text.

80. See *supra* note 68 for a numerical breakdown of decisions. The 15% figure is derived by counting state constitutional decisions in a more realistic way than they were counted in note 67, *supra*, that is, by excluding from the total those decisions that were unclear as to whether they

Court of Appeals docket that even request a state constitutional ruling of any kind.

This last conclusion is borne out by other data. For example, both the New York and U.S. constitutions protect the freedom of speech.[81] In 1990, New York trial courts issued a total of 3 published opinions dealing with free speech claims under the state constitution.[82] During the same period, U.S. district courts sitting in New York issued 15 published opinions adjudicating free speech claims under the First Amendment.[83] This suggests that when litigants in New York had a choice of going to federal or state court on constitutional issues dealing with free speech, they overwhelmingly chose to go to federal court, even though they may thereby have lost the chance to raise a claim under the state constitution. Obviously, these litigants placed a very low value on the opportunity to raise a state constitutional claim.[84]

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had any sort of constitutional dimension. That leaves 37 out of 240 cases, or approximately 15%.

81. U.S. CONST. amend. I; N.Y. CONST. art. I, § 8.

82. People v. Perkins, 558 N.Y.S.2d 459 (Dist. Ct. 1990); People v. Reynolds, 554 N.Y.S.2d 391 (City Ct. 1990); People v. Blanchette, 554 N.Y.S.2d 388 (City Ct. 1990). A fourth case, People v. Pennisi, 563 N.Y.S.2d 612 (Sup. Ct. 1990), is unclear as to whether the constitutional claim adjudicated is a federal or state claim. A fifth case, Delano Village Cos. v. Orridge, 553 N.Y.S.2d 938 (Sup. Ct. 1990), seems clearly to decide a free speech claim under the federal Constitution but is unclear about whether the ruling should also be understood as one under the state constitution. Also during 1990, the Court of Appeals decided 2 free speech claims under the state constitution. Johnson Newspaper Corp. v. Melino, 564 N.E.2d 1046 (N.Y. 1990); Golden v. Clark, 564 N.E.2d 611 (N.Y. 1990). Research for this footnote was confined to published decisions.

83. Piesco v. City of New York, 753 F. Supp. 468 (S.D.N.Y. 1990) (retaliatory discharge); New York News, Inc. v. Metropolitan Transp. Auth., 753 F. Supp. 133 (S.D.N.Y. 1990) (restricting sale of newspapers); Levin v. Harleston, 752 F. Supp. 620 (S.D.N.Y. 1990) (academic freedom); Central Am. Refugee Ctr. v. City of Glen Cove, 753 F. Supp. 437 (E.D.N.Y. 1990) (seeking employment); New York State Assn. of Career Schools v. State Educ. Dept., 749 F. Supp. 1264 (W.D.N.Y. 1990) (regulation of schools); Uryevick v. Rozzi, 751 F. Supp. 1064 (E.D.N.Y. 1990) (employment rules); New Alliance Party v. Dinkins, 743 F. Supp. 1055 (S.D.N.Y. 1990) (regulation of political party rally); Wojnarowicz v. American Family Assn., 745 F. Supp. 130 (S.D.N.Y. 1990) (state copyright law); Don King Prods., Inc. v. Douglas, 742 F. Supp. 778 (S.D.N.Y. 1990) (libel); New York State Natl. Org. for Women v. Terry, 737 F. Supp. 1350 (S.D.N.Y. 1990) (civil rights); Starace v. Chicago Tribune Co., 17 Media L. Rep. (BNA) 2330 (S.D.N.Y. 1990) (libel); Selkirk v. Boyle, 738 F. Supp. 70 (E.D.N.Y. 1990) (public employment); Bordell v. General Elec. Co., 732 F. Supp. 327 (N.D.N.Y. 1990) (workplace confidentiality); Saraceno v. City of Utica, 733 F. Supp. 538 (N.D.N.Y. 1990) (retaliatory discharge); Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990) (regulation of begging).

Again, research did not extend to unpublished district court opinions. Also excluded from this group are any cases that could not reasonably have been adjudicated in state court. For example, 14 cases in which the United States was a plaintiff or defendant have been excluded.

84. This result is even more surprising given the New York Court of Appeals' explicit assertion that the state constitution provides greater protection for free speech than the federal Constitution. Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270, 1277-78 (N.Y. 1991); O'Neill v. Oakgrove Constr., 523 N.E.2d 277, 280 n.3 (N.Y. 1988). On the other hand, even when the court claims to expand constitutional protection, it seems to do so in a way that does not greatly assist the development of a state constitutional discourse. For example, the court has said that New York "has its own exceptional history and rich tradition" of freedom of the press, *Immuno*

3. *Obscurity Concerning the Basis of Rulings*

One aspect of the grudging character of state constitutional decisions discussed above is the failure of the court to specify whether its analyses and rulings relied on the state or federal constitutions. This obscurity is so prevalent, however, that it requires separate discussion. It has already been noted that a substantial proportion of the New York decisions share this flaw. The situation in other states is similar.

In 29 cases decided by the Massachusetts Supreme Judicial Court the court failed entirely to specify whether certain of the parties' claims, much less its own analysis and ruling, rested on state or federal constitutional grounds, or both.[85] For example, in *Commonwealth v. Matthews,*[86] the defendant claimed, according to the court, that the exclusion of certain jurors violated his "constitutional right to a random selection of jurors from a fair cross-section of the community."[87] The court did not say whether the defendant's "constitutional right" was a state or federal one and, although it cited only Massachusetts

AG., 567 N.E.2d at 1278, but it fails to define that history and tradition and to explain why they require results that differ from federal law. For a discussion of this assertion/counterassertion problem, see *infra* notes 141-50 and accompanying text.

85. Commonwealth v. Lanoue, 563 N.E.2d 1367, 1369 (Mass. 1990) (inadequate assistance of counsel); Commonwealth v. Todd, 563 N.E.2d 211, 213 (Mass. 1990) (suppression of statement); Strasnick v. Board of Registration in Pharmacy, 562 N.E.2d 1333, 1337-38 (Mass. 1990) (due process); Commonwealth v. Colon-Cruz, 562 N.E.2d 797, 802-05 (Mass. 1990) (suppression of confession, suggestive identification); Commonwealth v. Rosado, 562 N.E.2d 790, 795-96 (Mass. 1990) (inadequate assistance of counsel); Commonwealth v. Colon, 558 N.E.2d 974, 979-82 (Mass. 1990) (suppression of confession); Commonwealth v. Zagranski, 558 N.E.2d 933, 935 (Mass. 1990) (probable cause); Commonwealth v. Tart, 557 N.E.2d 1123, 1130-31 (Mass. 1990) (self-incrimination); Commonwealth v. Moses, 557 N.E.2d 14, 16-18 (Mass. 1990) (stop and frisk); Commonwealth v. Bousquet, 556 N.E.2d 37, 41-43 (Mass. 1990) (suppression, inadequate assistance of counsel); Commonwealth v. Dunn, 556 N.E.2d 30, 32-35 (Mass. 1990) (suppression issues); Luna v. Superior Court, 555 N.E.2d 881, 883 (Mass. 1990) (waiver of privilege against self-incrimination); Commonwealth v. Roberts, 555 N.E.2d 588, 589-90 (Mass. 1990) (suppression of defendant's statement); Commonwealth v. Pratt, 555 N.E.2d 559, 566-67 (Mass. 1990) (search warrant sufficiency); Commonwealth v. Perrot, 554 N.E.2d 1205 (Mass. 1990) (suppression issue); Commonwealth v. Downey, 553 N.E.2d 1303, 1307 (Mass. 1990) (suppression of pretrial identification); Richardson v. Sheriff of Middlesex County, 553 N.E.2d 1286, 1290-93 (Mass. 1990) (prison conditions); Commonwealth v. Mamay, 553 N.E.2d 945, 952-53 (Mass. 1990) (inadequate assistance of counsel); Care & Protection of Martha, 553 N.E.2d 902, 908 (Mass. 1990) (due process); Commonwealth v. Couture, 552 N.E.2d 538, 539-40 (Mass. 1990) (probable cause); Commonwealth v. Gomes, 552 N.E.2d 101, 104-05 (Mass. 1990) (right to counsel); Commonwealth v. Robbins, 552 N.E.2d 77, 79-80 (Mass. 1990) (suppression in connection with search of auto; requires application of "constitutional principles"); Commonwealth v. Berrio, 551 N.E.2d 496, 499 (Mass. 1990) (due process); Commonwealth v. Davis, 551 N.E.2d 39, 41-42 (Mass. 1990) (due process, equal protection); Commonwealth v. Yesilciman, 550 N.E.2d 378, 382-83 (Mass. 1990) (adequacy of search warrant); Commonwealth v. Pope, 549 N.E.2d 1120, 1126 n.8 (Mass. 1990) (ineffective assistance of counsel); Commonwealth v. Bembury, 548 N.E.2d 1255, 1261-62 (Mass. 1990) (due process); Commonwealth v. Durning, 548 N.E.2d 1242, 1247-48 (Mass. 1990) (due process); Commonwealth v. Matthews, 548 N.E.2d 843, 848 (Mass. 1990) (right to jury representing fair cross-section of community).

86. 548 N.E.2d 843 (Mass. 1990).

87. 548 N.E.2d at 848.

cases in its analysis, gave no indication, such as a *Long* statement, that its analysis rested on state constitutional grounds.

In 9 cases, the court went so far as to state explicitly that the litigants were raising a claim under both the state and federal constitutions, but then failed to specify the basis of its own analysis.[88] For example, *Commonwealth v. Purdy*[89] involved a cruel and unusual punishment claim under both the federal and state constitutions. In ruling on the claim, the court relied on one Massachusetts and one federal case, cited to neither the state nor federal constitution, and made no *Long* statement. It is thus impossible to tell whether this case should be considered part of state or federal constitutional discourse.

The Virginia Supreme Court decided only 8 cases that can plausibly be viewed as involving state constitutional issues.[90] In 6 of these cases the court failed to specify whether its analysis dealt with the federal or state constitution. Typical is *Brown v. Brown,*[91] which dealt with an unidentified procedural due process issue. The courts of Louisiana[92] and California[93] also regularly failed to specify the basis of

88. Commonwealth v. Scott, 564 N.E.2d 370, 374-75 (Mass. 1990) (right to exculpatory evidence); Commonwealth v. Purdy, 562 N.E.2d 1347, 1351-52 (Mass. 1990) (cruel and unusual punishment); Commonwealth v. Rosado, 562 N.E.2d 790, 794 (Mass. 1990) (right to speedy trial); Commonwealth v. Cameron, 553 N.E.2d 898 (Mass. 1990) (roadblock); Commonwealth v. Freeman, 552 N.E.2d 553, 555-57 (Mass. 1990) (due process/tainted grand jury); Commonwealth v. Rutkowski, 550 N.E.2d 362, 363-64 (Mass. 1990) (warrant description); Commonwealth v. Pope, 549 N.E.2d 1120, 1125-26 (Mass. 1990) (right to remain silent); Commonwealth v. Durning, 548 N.E.2d 1242, 1248-50 (Mass. 1990) (due process right to present a defense); Commonwealth v. Santoro, 548 N.E.2d 862, 863-64 (Mass. 1990) (standing to challenge search).

89. 562 N.E.2d 1347 (Mass. 1990).

90. Brown v. Brown, 397 S.E.2d 837, 839 (Va. 1990); Commonwealth v. Burns, 395 S.E.2d 456, 458-460 (Va. 1990); Hamer v. School Board, 393 S.E.2d 623, 625-626 (Va. 1990); Hess v. Snyder Hunt Corp., 392 S.E.2d 817, 820-821 (Va. 1990); R.G. Moore Bldg. Corp. v. Committee for the Repeal of Ordinance R(C)-88-13, 391 S.E.2d 587, 591 (Va. 1990); Mu'min v. Commonwealth, 389 S.E.2d 886, 890-891, 892-893 (Va. 1990); Smith v. Commonwealth, 389 S.E.2d 871, 876 (Va. 1990); Occoquan Land Development Corp. v. Cooper, 389 S.E.2d 464, 467 (Va. 1990). Only in *R.G. Moore* and *Hess* did the court clearly state whether its analysis was based on the federal or state constitutions.

91. 397 S.E.2d 837 (Va. 1990).

92. Of 21 arguably relevant constitutional decisions, 9 (43%) failed to specify whether the constitution under discussion was the state or federal one. State v. Byrd, 568 So. 2d 554, 560-61 (La. 1990) (scope of search warrant); State v. Roberts, 568 So. 2d 1017, 1019 (La. 1990) (due process/"fundamental fairness"); Louisiana State Bar Assn. v. Keys, 567 So. 2d 588, 591 (La. 1990) (due process); Palermo Land Co. v. Planning Commn., 561 So. 2d 482, 491-96 (La. 1990) (due process); State v. Burrell, 561 So. 2d 692, 698-99 (La. 1990) (fair trial/change of venue), *cert. denied,* 111 S. Ct. 799 (1991); State v. Wille, 559 So. 2d 1321, 1335-36, 1338-39 (La. 1990) (vagueness, ineffective assistance of counsel); State v. Lee, 559 So. 2d 1310, 1313-15 (La. 1990) (exclusion of blacks from venire); State v. Jones, 558 So. 2d 546, 551-52 (La. 1990) (vagueness); Caracci v. Louisiana State Racing Commn., 556 So. 2d 1249 (La. 1990) (due process).

93. Almost all of the 36 decisions rendered by the California Supreme Court in 1990 that handled state constitutional issues were death penalty appeals. While the death penalty review cases of the California Supreme Court are noteworthy for their clarity and thoroughness, the court still issued 23 opinions in which at least one constitutional issue was analyzed without any indication of whether the constitutional analysis was based on the federal or state constitution.

their constitutional rulings, although to a somewhat lesser extent.

The Kansas Supreme Court has raised ambiguity about the constitutional basis of judicial rulings to something of an art form. In 13 out of 21 relevant cases, the court referred to some sort of constitutional right without specifying its source.[94] To further confuse things, in 6 cases the court held opaquely that it "adopted" the relevant federal standard.[95] For example, in *State v. Prewett*[96] the court discussed a

People v. Hayes, 802 P.2d 376, 393, 397, 398, 401, 402, 413-15 (Cal. 1990) (ineffective assistance of counsel), *cert. denied,* 60 U.S.L.W. 3359 (1991); People v. Benson, 802 P.2d 330, 353-57 (Cal. 1990) (prosecutorial misconduct), *cert. denied,* 116 L. Ed. 2d 277 (1991); People v. Kaurish, 802 P.2d 278, 289-90, 305-06 (Cal. 1990) (prosecutorial misconduct, inadequate assistance of counsel, equal protection), *cert. denied,* 112 S. Ct. 121 (1991); People v. Gallego, 802 P.2d 169, 188-89, 192-93, 204-06 (Cal. 1990) (waiver of counsel, venue/fair trial, prosecutorial misconduct), *cert. denied,* 116 L. Ed. 2d 277 (1991); People v. Anderson, 801 P.2d 1107, 1112-14, 1116-18 (Cal. 1990) (dilution of juror sense of responsibility, prosecutorial misconduct), *cert. denied,* 112 S. Ct. 148 (1991); People v. Gonzalez, 800 P.2d 1159, 1202-03 (Cal. 1990) (ineffective assistance of counsel), *cert. denied,* 112 S. Ct. 117 (1991); *In re* Crooks, 800 P.2d 898 (Cal. 1990) (due process, double jeopardy); People v. Ortiz, 800 P.2d 547, 552, 555-56 (Cal. 1990) (right to counsel, due process); People v. Kelly, 800 P.2d 516, 530-31, 533-34, 537-39 (Cal. 1990) (venue/fair trial, juror bias, prosecutorial misconduct), *cert. denied,* 112 S. Ct. 117 (1991); People v. Medina, 799 P.2d 1282, 1297-99, 1303 (Cal. 1990) (prosecutorial misconduct, "right to be personally present"), *cert. granted in part and motion granted,* 116 L. Ed. 2d 276 (1991); People v. Frank, 798 P.2d 1215, 1221, 1223, 1225-26 (Cal. 1990) (double jeopardy, ineffective assistance of counsel, prosecutorial misconduct), *cert. denied,* 111 S. Ct. 2816 (1991); People v. Sanders, 797 P.2d 561, 580-81 (Cal. 1990) (due process), *cert. denied,* 111 S. Ct. 2249 (1991); People v. Rodriguez, 795 P.2d 783 (Cal. 1990) (due process); People v. Stankewitz, 793 P.2d 23, 43-44, 45, 50-53 (Cal. 1990) (juror bias, discriminatory peremptory challenges, ineffective assistance of counsel), *cert. denied,* 111 S. Ct. 1432 (1991); People v. Gordon, 792 P.2d 251, 263-64, 271 (Cal. 1990) (fair trial, prosecutorial misconduct), *cert. denied,* 111 S. Ct. 1123 (1991); People v. Ramirez, 791 P.2d 965, 981, 984-85 (Cal. 1990) (waiver of right to cross-examination, ineffective assistance of counsel), *cert. denied,* 111 S. Ct. 1025 (1991); Dahlman v. State Bar, 790 P.2d 1322, 1325 (Cal. 1990) (due process); People v. Miller, 790 P.2d 1289, 1314-15, 1317-18 (Cal. 1990) (prosecutorial misconduct, unfair trial), *cert. denied,* 111 S. Ct. 713 (1991); People v. Mattson, 789 P.2d 983, 1017-18 (Cal.) (ineffective assistance of counsel), *cert. denied,* 111 S. Ct. 591 (1990); People v. Clark, 789 P.2d 127, 135-36, 158-59 (Cal.) (voir dire/juror bias, prosecutorial misconduct), *modified,* 50 Cal. 3d 1157a, *cert. denied,* 111 S. Ct. 442 (1990); People v. Douglas, 788 P.2d 640, 651-53, 674-75, 682 (Cal. 1990) (fair trial, double jeopardy, ineffective assistance of counsel); People v. Lewis, 786 P.2d 892, 907-08 (Cal. 1990) (ineffective assistance of counsel); People v. Thompson, 785 P.2d 857, 874-77 (Cal.) (voluntariness of confession), *cert. denied,* 111 S. Ct. 226 (1990).

94. State v. White, 785 P.2d 950, 954, 956 (Kan. 1990) (coerced confession; harmless error); State v. Pioletti, 785 P.2d 963, 975, 976 (Kan. 1990) (double jeopardy; prosecutorial misconduct); State v. Graham, 799 P.2d 1003 (Kan. 1990) (admissibility of statements); State v. Wesson, 802 P.2d 574, 581 (Kan. 1990) (double jeopardy), *cert. denied,* 111 S. Ct. 2866 (1991); State v. Weis, 792 P.2d 989, 991, 992 (Kan. 1990) (seizure); State v. Alires, 792 P.2d 1019, 1022 (Kan. 1990) (suggestive identification); State v. Searles, 793 P.2d 724, 728, 732, 733 (Kan. 1990) (due process; double jeopardy); State v. Probst, 795 P.2d 393 (Kan. 1990) (suppression issue); State v. Bailey, 799 P.2d 977 (Kan. 1990) (validity of stop); State v. Prewett, 785 P.2d 956, 961 (Kan. 1990) (suppression); State v. Toler, 787 P.2d 711, 714, 715 (Kan. 1990) (warrant validity); State v. Jones, 787 P.2d 726, 727 (Kan. 1990) (admissibility of statement); State v. Massey, 795 P.2d 344, 348 (Kan. 1990) (representative jury).

95. State v. Smith, 799 P.2d 497, 501 (Kan. 1990); State v. Massey, 795 P.2d 344, 348 (Kan. 1990); State v. Searles, 793 P.2d 724, 728 (Kan. 1990); State v. Jones, 787 P.2d 726, 728 (Kan. 1990); State v. Toler, 787 P.2d 711, 716 (Kan. 1990); State v. Prewett, 785 P.2d 956, 961 (Kan. 1990).

96. 785 P.2d 956 (Kan. 1990).

rule announced by the U.S. Supreme Court under the Fourth Amendment, and then said that the standard so announced "has been approved by this court."[97] Otherwise, the case contains no indication as to whether the ruling is one under the state or federal constitution, or both. Of course, one might speculate that the court would have no reason to "approve" a U.S. Supreme Court standard if it were merely applying binding federal law, so the use of this language demonstrates the state constitutional basis of the holding. Things are not that clear, however. The court in *Prewett* nowhere mentioned the state constitution, nor did it make any *Michigan v. Long* statement, or use any other kind of language that could be construed as an attempt to insulate the decision from further review. Moreover, although the court cited one of its previous decisions to support its contention that it had adopted the federal standard, that case contains precisely the same ambiguity concerning the basis of the court's ruling as *Prewett* itself.[98]

4. *Lockstep Analysis*

One reason state courts may fail to specify when constitutional rulings rest on state or federal grounds is that it so often seems not to matter because the two documents have exactly the same meaning — they have been interpreted in what is sometimes called "lockstep."[99] For example, in 11 of the 22 Massachusetts cases in which litigants raised both state and federal constitutional claims, the court held that the relevant analysis and result were the same under both constitutions on the facts of the case. Thus, the constitutional standards that will be applied in Massachusetts to some types of due process,[100] fair trial,[101] use immunity,[102] and ineffective assistance of counsel

97. 785 P.2d at 961.

98. State v. Walter, 670 P.2d 1354, 1358 (Kan. 1983). To make matters worse, *Walter* refers approvingly to a prior Kansas lower court decision "adopting" the federal rule. State v. Rose, 665 P.2d 1111 (Kan. Ct. App. 1983). That case, apparently the source of the chain of ambiguity in this line of cases, describes the reason for its ruling as follows:

> We have no reason to believe the Kansas Supreme Court would . . . hold that the Kansas Constitution requires Kansas to adopt a rule similar to that in [prior U.S. Supreme Court cases]. Thus, all prior Kansas decisions . . . inconsistent with [a very recent Supreme Court case that modified the rule announced in the prior cases] will no longer be followed by this court.

665 P.2d at 1115. It is still unclear from this statement whether *Rose* is a decision under the federal or state constitution, or both.

99. *See* Brennan, *Bill of Rights, supra* note 1, at 550-51; Maltz, *supra* note 38.

100. Care and Protection of Robert, 556 N.E.2d 993 (Mass. 1990) (standard of proof for loss of custody); Opinion of the Justices, 563 N.E.2d 203 (Mass. 1990) (protection of property interests).

101. Commonwealth v. Gagnon, 557 N.E.2d 728 (Mass. 1990) (right to present evidence).

102. Commonwealth v. Kerr, 563 N.E.2d 1364 (Mass. 1990).

claims,[103] as well as to a wide variety of search and seizure issues,[104] are identical under the state and federal constitutions. Moreover, in another 5 cases adjudicating claims relying solely on the state constitution, the court nevertheless looked to federal law for guidance, and applied an analysis used by federal courts under the federal Constitution.[105] These cases suggest that participants in the Massachusetts legal system, including the Supreme Judicial Court, have no particular need to distinguish clearly between the state and federal constitutions, because the two documents to a large extent have the same meaning and can thus be used interchangeably.

Much the same is true in other states. In the only 2 Virginia cases explicitly presenting alternative claims under the federal and state constitutions, the court held that the same result obtained under the federal and state constitutions.[106] Similarly, in 6 Louisiana cases where state and federal constitutional claims were raised separately, the Louisiana Supreme Court held that the relevant analysis and the outcome were the same under both constitutions.[107]

California presents an interesting example of the tendency to interpret state and federal constitutions in lockstep. The California Constitution provides: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[108] This provision stands as an open invitation to the development of an independent state constitutional jurisprudence. In 1990, there was no sign that this invitation had been taken up: in 14 of the 15 cases where litigants raised both state and federal constitutional challenges to the same government action, the court reached precisely the same result

103. Commonwealth v. Cardenuto, 548 N.E.2d 864 (Mass. 1990).

104. Commonwealth v. Wunder, 556 N.E.2d 65 (Mass. 1990) (probable cause); Commonwealth v. Cast, 556 N.E.2d 69 (Mass. 1990) (exception to warrant requirement); Commonwealth v. Moses, 557 N.E.2d 14 (Mass. 1990) (stop and frisk); Commonwealth v. Tart, 557 N.E.2d 1123 (Mass. 1990) (warrantless administrative search involving request to produce state permit); Commonwealth v. Price, 562 N.E.2d 1355 (Mass. 1990) (standing to challenge search).

105. Commonwealth v. Allen, 549 N.E.2d 430 (Mass. 1990) (probable cause); Commonwealth v. Melendez, 551 N.E.2d 514 (Mass. 1990) (suppression); Commonwealth v. Bray, 553 N.E.2d 538 (Mass. 1990) (retroactivity of decision for purposes of jury instruction); O'Connor v. Police Commr., 557 N.E.2d 1146 (Mass. 1990) (urinalysis); Gauthier v. Police Commr., 557 N.E.2d 1374 (Mass. 1990) (urinalysis).

106. Hess v. Snyder Hunt Corp., 392 S.E.2d 817 (Va. 1990); R.G. Moore Bldg. Corp. v. Committee for the Repeal of Ordinance R(C)-88-13, 391 S.E.2d 587 (Va. 1990).

107. Moresi v. Department of Wildlife and Fisheries, 567 So. 2d 1081 (La. 1990) (existence of civil damages action directly under state constitution for unconstitutional searches and seizures); Paillot v. Wooton, 559 So. 2d 758 (La. 1990) (procedural due process); State in Interest of J.A.V., 558 So. 2d 214 (La. 1990) (due process/statutory vagueness); State *ex rel.* Adams v. Butler, 558 So. 2d 552 (La. 1990) (double jeopardy); Gulf States Utils. Co. v. Louisiana Pub. Serv. Commn., 556 So. 2d 573 (La. 1990) (due process); *In re* Adoption of B.G.S., 556 So. 2d 545 (La. 1990) (due process).

108. CAL. CONST. art. I, § 24.

under both constitutions. This constitutional congruity extended to issues involving the right to a public trial,[109] the disproportionality of a death sentence,[110] the right to a representative jury,[111] juror bias regarding the death penalty,[112] the right to counsel,[113] suppression of involuntary confessions,[114] inadequate assistance of counsel,[115] due process rights,[116] the discriminatory use of peremptory challenges,[117] and the right to confront witnesses.[118] In 5 additional cases, the court held the state and federal constitutions to have identical meanings by force of the operation of California's Proposition 8, a constitutional amendment dramatically limiting the scope of the state's exclusionary rule.[119]

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109. People v. Thompson, 785 P.2d 857, 867-68 (Cal. 1990).

110. People v. Turner, 789 P.2d 887, 916 (Cal. 1990); People v. Marshall, 790 P.2d 676, 691-92 (Cal. 1990).

111. People v. Mattson, 789 P.2d 983, 994-95 (Cal. 1990); People v. Sanders, 797 P.2d 561, 569 (Cal. 1990).

112. *Mattson,* 789 P.2d at 995-97; *Sanders,* 797 P.2d at 577.

113. *Mattson,* 789 P.2d at 1011-13.

114. *Marshall,* 790 P.2d at 683; People v. Benson, 802 P.2d 330, 343 (Cal. 1990); People v. Gallego, 802 P.2d 169, 201-02 (Cal. 1990). The last case was a pre-Proposition 8 case, so the court held that the state and federal constitutions required the same result on the facts of the case even before Proposition 8 intervened to prevent such an analysis. *See infra* note 119.

115. *Marshall,* 790 P.2d at 698-99; *In re* Fields, 800 P.2d 862 (Cal. 1990).

116. People v. Gonzalez, 800 P.2d 1159, 1172-73 (Cal. 1990); People v. Medina, 799 P.2d 1282, 1288-91 (Cal. 1990); People v. Frank, 798 P.2d 1215 (Cal. 1990); San Diego County Dept. of Social Servs. v. Russell S., 795 P.2d 1244, 1251-53 (Cal. 1990); People v. Jones, 792 P.2d 643, 656-58 (Cal. 1990).

117. People v. Sanders, 797 P.2d 561, 574 (Cal. 1990); People v. Hayes, 802 P.2d 376, 391-92 (Cal. 1990).

118. *Frank,* 798 P.2d at 1221.

119. People v. Thompson, 785 P.2d 857, 874 (Cal. 1990); People v. Luttenberger, 784 P.2d 633, 639 (Cal. 1990); People v. Prather, 787 P.2d 1012 (Cal. 1990); People v. Douglas, 788 P.2d 640, 654-55 (Cal. 1990); People v. Kelly, 800 P.2d 516, 525-30 (Cal. 1990). Although the results in these cases may be correct, the court's reasoning is almost certainly wrong, and illustrates the degree to which the current California Supreme Court has become attached to federal constitutional law.

Proposition 8, also known as the Victims' Bill of Rights, *Prather,* 787 P.2d at 1014, was adopted by initiative in 1982. The provision quite simply forbids the exclusion of "relevant evidence" in criminal cases, CAL. CONST. art. I, § 28(d); it is, in essence, a constitutional repeal of the state's exclusionary rule. *See* Wilkes, *supra* note 6 (arguing that state constitutional amendment process has been used to limit the state constitutional rights of criminal defendants). Of course, so long as the federal Constitution forbids the introduction of some types of evidence, not all evidence of guilt will be admitted, but such exclusions will be the result of federal, not state constitutional restrictions.

Rather than interpreting the proposition to sweep away the exclusionary rule as a matter of state law — its obvious purpose — the court has interpreted it to cut down state constitutional protections only as far as the minimum level of federal protections. *In re* Lance W., 694 P.2d 744 (Cal. 1985); People v. Luttenberger, 784 P.2d 633 (Cal. 1990). While this will of course be the practical result of any case in which a defendant invokes the exclusionary rule as a matter of state and federal constitutional law, such a result should come about not because both constitutions provide the same protection but because the state constitution provides none and the federal Constitution sets a mandatory floor by operation of the Fourteenth Amendment. *Cf.* Collins, *supra* note 25, at 15 ("There is no constitutional impediment preventing state courts from grant-

Like ambiguity regarding the basis of a constitutional ruling, lockstep analysis of the state constitution discourages the development of an independent state constitutional discourse. First, it discourages participants in the legal system from making arguments clearly and distinctly based on the state constitution by reducing the potential benefit from effort invested in developing such an argument. Indeed, because the federal Constitution is generally more fully elaborated than its state counterparts, lockstep analysis tends to elevate federal law into the law of choice for the interpretation of the state constitution; it provides a generous source of off-the-shelf standards and analyses for application to state constitutional problems. Second, lockstep analysis is conducive to the perception that the state constitution is some sort of redundancy — that it is a source of law that has no particular value or purpose and therefore need not be taken seriously. When state constitutional arguments come to be seen as "garbage arguments,"[120] the likelihood that litigants or courts will devote much attention to the state constitution is drastically reduced.

Nevertheless, the mere congruity of state and federal constitutional outcomes need not by itself produce these results. The wording of many state constitutional provisions is identical to or closely approximates the wording of corresponding federal provisions, and the historical roots of state constitutions often intertwine with those of the national document; as Chief Justice David Brock of the New Hampshire Supreme Court has noted, certain striking similarities between the construction given the state and federal constitutions are "logical, given their common ancestry."[121] In these circumstances, it might well be unremarkable if state and federal constitutional law overlapped to a considerable extent. This possibility underlies in part the appeal of the interstitial approach to state constitutional interpretation: because there is a strong likelihood of doctrinal similarity, it is argued, courts should start with the federal analysis and deviate from it only

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ing a lesser degree of protection under state [constitutional] law, *provided* only that these courts then . . . apply . . . the federal Constitution . . . ."). What the court seems to forget is that it is permissible in our system for a state constitution to provide less protection than the U.S. Constitution, as well as more. Indeed, the only case the court decided in 1990 in which it held the state constitution to provide broader protections than the federal Constitution involved application of standards that preceded the adoption of Proposition 8, and which no longer apply in California. People v. Gonzalez, 800 P.2d 1159, 1169 n.3 (Cal. 1990).

120. Abrahamson, *supra* note 5, at 1162 (quoting Eric Klumb, Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure,* 62 MARQ. L. REV. 596, 620 n.145 (1979)).

121. State v. Pellicci, 580 A.2d 710, 720 (N.H. 1990) (Brock, C.J., concurring); *see also* Kaye, *supra* note 5, at 412 ("Common objectives, common drafters and common models naturally engender common texts.").

for clearly defined reasons.[122] Yet not even devotees of the interstitial approach suggest that state courts should indiscriminately copy federal analysis into state constitutional law. If state deviations from federal constitutional law may be justified only by textual, historical, or political factors specific to the state constitution,[123] it follows that doctrinal similarities must be justified by the absence of such factors. Thus, it is not necessarily lockstep interpretation itself that suppresses state constitutional discourse so much as *unexplained* lockstep interpretation.

Do state courts explain adequately the reasons for lockstep rulings? I suspect that by now the reader will be unsurprised to learn that they do not; in fact, state courts almost never explain the basis for lockstep rulings. For example, the Virginia Supreme Court did not explain the congruity of outcomes in the 2 lockstep cases it decided, except to assert in one case that "we refuse to give any broader interpretation" to the state constitution's due process guarantee.[124] The Kansas Supreme Court decided 4 cases in lockstep with federal constitutional law;[125] in none of these cases did the court say much more than that the state constitution affords "the same protections" as,[126] or is "identical in scope" to,[127] the federal Constitution. The situation was much the same in New York. In *People v. Hernandez,*[128] for example, the court held that the federal and state equal protection clauses produced the same result; the court's only explanation for this congruity was its assertion, without further elaboration, that "no justification for breaking new ground as to [the state] clause . . . is sufficiently advanced."[129]

These conclusory rulings do not provide participants in the legal system with any way to recognize situations in which the state constitution should be understood to be similar to the federal Constitution. The litigant who asks why the two documents have the same meaning in a particular case is told by the court, in effect, "they just do." Such

122. *See supra* notes 43-47 and accompanying text.

123. *See* Pollock, *supra* note 2, at 718-19.

124. R.G. Moore Bldg. Corp. v. Committee for the Repeal of Ordinance R(C)-88-13, 391 S.E.2d 587, 591 (Va. 1990).

125. State v. Wesson, 802 P.2d 574 (Kan. 1990); Love v. One 1967 Chevrolet El Camino, 799 P.2d 1043 (Kan. 1990); State v. Hall, 793 P.2d 737 (Kan. 1990); *In re* Lucas, 789 P.2d 1157 (Kan. 1990).

126. *Lucas,* 789 P.2d at 1160.

127. *Love,* 799 P.2d at 1048.

128. 552 N.E.2d 621 (N.Y. 1990).

129. 552 N.E.2d at 624.

a response makes any kind of further debate about the relative meanings of the state and federal constitutions a virtual impossibility.

5. *Silence on State Constitutional History*

If state constitutional law lacks a discourse of constitutional similarity, it also largely lacks a discourse of constitutional distinctness, something that members of the interstitial school of New Federalism hold to be a requirement of proper state constitutional adjudication.[130] For example, state constitutional history is a factor often cited as a legitimate basis for interpreting state constitutional provisions differently from their federal counterparts, yet state courts almost never resort to the state's constitutional history in the way that federal courts routinely do.

Consider the Massachusetts Constitution, which dates to 1780 and is the oldest continually operative constitution in the United States.[131] The state constitution was drafted primarily by John Adams, a pivotal figure in the nation's founding, and the author of a treatise on constitutional law that heavily influenced thinking about constitutions during the period following independence.[132] One might expect Adams' views to play a pivotal role in the Massachusetts Supreme Judicial Court's constitutional jurisprudence, and to furnish the basis for divergent interpretations of the state constitution to the extent that Adams' views differed from those of the federal Constitution's Framers. Yet the court has almost never mentioned Adams for any purpose;[133] indeed, one would never know from reading the court's decisions that the Massachusetts Constitution had any kind of history at all.[134]

As with Massachusetts, the Virginia court has been strangely silent on the state's constitutional history. The Virginia Declaration of

130. *See supra* note 47 and accompanying text.

131. Sturm, *supra* note 69, at 75.

132. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 567-68 (1969).

133. A computer search of Supreme Judicial Court decisions, unrestricted by date, revealed only six cases in which the court mentioned John Adams, and in most of these the mention is peripheral to resolution of the case. *See* Commonwealth v. Sheppard, 441 N.E.2d 725, 742 (Mass. 1982) (concurring opinion), *revd. sub nom.* Massachusetts v. Sheppard, 468 U.S. 981 (1984); Commonwealth v. St. Germain, 408 N.E.2d 1358, 1366 n.18 (Mass. 1980); Commonwealth v. Cundriff, 415 N.E.2d 172, 177 (Mass. 1980); Opinion of the Justices, 309 N.E.2d 476, 480 n.5 (Mass. 1974); Opinion of the Justices, 271 N.E.2d 335, 341 (Mass. 1971); Parker v. Simpson, 62 N.E. 401, 407 (1902).

134. In addition to the paucity of references to John Adams, a computer search of Supreme Judicial Court decisions, unrestricted by date, revealed that the court has never mentioned Elbridge Gerry or Rufus King, and has mentioned Samuel Adams only once. Commonwealth v. Nissenbaum, 536 N.E.2d 592, 596 n.5 (Mass. 1989). All were leading figures during the founding period and signers of the Declaration of Independence or federal Constitution.

Rights was drafted by George Mason, and James Madison later used it as a model for the federal Bill of Rights. One might think that Mason's views would carry some weight in Virginia's construction of its own Declaration of Rights, yet the Virginia Supreme Court appears to have consulted Mason's views only once since 1925[135] — far fewer times than the U.S. Supreme Court has turned to Mason.[136] Thomas Jefferson's name is similarly missing from the Virginia Supreme Court's jurisprudence.[137] Like Sherlock Holmes' dog that did not bark in the night,[138] the court's silence seems significant; the court treats the state constitution, when it treats it at all, like some kind of ahistorical, authorless text.[139] In so doing, it limits greatly the available ways of talking about the state constitution, thus constraining the scope of any potential state constitutional discourse.[140]

Similarly, Louisiana possesses a unique Spanish and French heritage that could easily account for potentially significant differences between the state and federal constitutions, especially given that it accounts for Louisiana's adherence to the civil law rather than the common law, a feature of the legal landscape shared by no other American state. But the constitutional decisions of the Louisiana Supreme Court give no hint of this unique historical and legal background. Nor is there anything in California state constitutional rulings to suggest that the state was settled under frontier conditions that differed, perhaps significantly, from the conditions under which eastern seaboard states were founded. In short, the state constitutional discourse of distinctness predicted by New Federalism has largely failed to materialize.

B. *Exceptions*

Although the general trends in state constitutional law contradict the claims of New Federalism, proponents of New Federalism might

135. Reid v. Gholson, 327 S.E.2d 107, 112 n.10 (Va. 1985). This reference was found by performing a computer search, unrestricted by date, of the opinions of the Virginia Supreme Court contained in a database that includes opinions going back to 1925.

136. Among the many such decisions, see, for example, Welch v. Texas Dept. of Highways & Pub. Transp., 483 U.S. 468, 483 (1987); Solem v. Helm, 463 U.S. 277, 285-86 n.10 (1983); McDaniel v. Paty, 435 U.S. 618, 629 n.9 (1978); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28 (1973).

137. An unrestricted computer search of Virginia high court decisions turned up only one relevant reference, and a minor one at that. *See* Chaves v. Johnson, 335 S.E.2d 97, 102 (Va. 1985) (quoting one short passage from Jefferson's first inaugural address).

138. *Pace* Marshall J. Tinkle, *State Constitutional Law in Maine: At the Crossroads,* 13 VT. L. REV. 61, 67 (1988).

139. I am indebted to my colleague Don Korobkin for this observation.

140. *Cf. supra* note 69.

take comfort from a few exceptions, which I review here for that reason. Occasionally, state courts do diverge from federal law or engage in independent state constitutional analysis. However, even these exceptions often turn out on closer examination to represent less of a departure from the general trends than seems apparent at first glance.

1. *Divergences from Federal Law*

State courts of course do not always interpret the state constitution in lockstep with federal law; occasionally they strike out on their own, a development that New Federalism advocates generally applaud.[141] The sample surveyed here contains several examples of such divergences. However, the existence of divergent holdings does not necessarily indicate a healthy state constitutional discourse.

Let us return to New York, which again is fairly representative of the sample states as a group. In 1990, the New York Court of Appeals held in 4 cases that the state constitution provides greater protection of individual rights than does the federal Constitution.[142] Consider *People v. Dunn.*[143] There, a criminal defendant challenged a search under the state and federal constitutions. The court began its opinion by analyzing the claim under the Fourth Amendment of the U.S. Constitution, and held that no search had occurred as a matter of federal constitutional law.[144] Apparently following a more or less interstitial approach, the court then turned explicitly to the state constitutional claim. So far, so good; the court's analysis is systematic, and would clearly be insulated from Supreme Court review under *Michigan v. Long.*

The court framed the relevant state constitutional question as whether it should adopt as a matter of state constitutional law the analysis of the controlling federal case.[145] The court then pointed out that it had interpreted the state constitution independently from the federal Constitution in the past, and concluded that it would do so

141. *See supra* note 55 and accompanying text. The existence of state decisions that diverge from federal law seems to be considered a major empirical indicator of state court independence.

142. People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990); People v. Van Pelt, 556 N.E.2d 423 (N.Y. 1990); People v. Vilardi, 555 N.E.2d 915 (N.Y. 1990); People v. Davis, 553 N.E.2d 1008 (N.Y. 1990).

143. 564 N.E.2d 1054 (N.Y. 1990).

144. 564 N.E.2d at 1056-57.

145. 564 N.E.2d at 1057. This approach should not be confused with a proper interstitial approach to state constitutional interpretation. Proponents of the interstitial approach do not suggest that state courts decide whether a federal rule should be adopted as the state law based on the merits of the federal rule; rather, they urge state courts to adopt whatever rule an independent construction of the state constitution requires, but to do so only when required to reach the state constitutional issue. *See supra* notes 43-47 and accompanying text.

again here.[146] The heart of its analysis is contained in a footnote. "Unlike the Supreme Court," the New York court thought the analysis under the state constitution should have a different "focus" from controlling Fourth Amendment precedent.[147] The proper focus, it said, was contained in a particular federal circuit court opinion which the New York court found "persuasive."[148] However, the court in no way explained what about this case was persuasive, or why a federal court discussing the federal Constitution should be understood to be saying anything persuasive about the New York Constitution. The New York court went on to cite a dissenting Supreme Court opinion by Justice Brennan, as well as some previously decided New York cases, before concluding that a search *had* occurred under the state constitutional standard, although the defendant's state constitutional rights had not been violated by that search.[149]

Consider this case for a moment from the perspective of state constitutional discourse. Suppose you are a criminal defense lawyer. Your client was arrested by New York police as the result of a search that is factually distinguishable from the circumstances of *Dunn.* You want to move to suppress the fruits of the search, and you are quite certain that such a motion will fail under controlling Supreme Court precedent interpreting the Fourth Amendment. When you bring the motion, you therefore include a claim under the New York Constitution which, you argue, provides broader protections to criminal defendants than the Fourth Amendment. In light of *Dunn,* what kind of an argument can you craft?

Certainly you cannot use *Dunn* to support any kind of argument suggesting that differences in the text, framers' intent, or founding history of the state constitution justify a different result. Indeed, as far as appears from *Dunn,* such arguments have not the slightest currency with the Court of Appeals. You can perhaps imitate the winning approach in *Dunn* by finding old federal lower court cases that went your way before the Supreme Court ruled against the position you advocate, and you may find good language from the dissenters in the relevant Supreme Court cases — but what can you say about these rulings? That they are "persuasive"? Suppose the prosecutor says: "No, they're not persuasive. The majority Supreme Court opinion is much more persuasive." How can you respond?

The truth is, you cannot respond. Although *Dunn* provides you

146. 564 N.E.2d at 1057.

147. 564 N.E.2d at 1057-58.

148. 564 N.E.2d at 1058 n.4.

149. 564 N.E.2d at 1058.

with plenty of ideas for *assertions,* it provides nothing useful for *argument.* You can assert that the state constitution is more protective than the Fourth Amendment; you can assert that the New York courts have been willing to depart from federal analyses in the past; you can assert that some case favorable to you is persuasive; but you can neither back up these assertions with arguments if challenged, nor explain why the assertions are relevant to and properly describe your particular case. At bottom, *Dunn* furnishes the litigant with no language in which to engage in intelligible debate with an opponent or with a judge over the meaning of the state constitution. At best, the participants who want to engage in such a debate — and a criminal defendant may want desperately to do so — can make a series of counterassertions about the meaning of the constitution. But an exchange of conflicting assertions about the constitution does not amount to a meaningful constitutional discourse.[150]

The situation is much the same in Massachusetts. Although the Supreme Judicial Court decided 3 cases in 1990 holding that the state constitution provides broader protection of individual rights than the federal Constitution,[151] its opinions reveal no intelligible discourse of distinctness on which litigants could rely in order to build effective arguments concerning the ways in which the state and federal constitutions differ.

For example, in *Commonwealth v. Amendola,*[152] the court adopted as a matter of state constitutional law the federal Fourth Amendment automatic standing rule, a rule that the U.S. Supreme Court announced in a 1960 case,[153] but recently abandoned.[154] The court's only explanation for departing from what appears to be its usual practice of following current federal Fourth Amendment law was that the concerns of the earlier Supreme Court decision "remain valid today,

150. To like effect is People v. Davis, 553 N.E.2d 1008 (N.Y. 1990), another case in which the court diverged from federal holdings. There, the court considered a right to counsel claim under the state and federal constitutions. Although the court held that the New York constitution provided broader protection than the federal, and cited contrasting state and federal cases to prove it, the court never said why or in what way the state constitution provided enhanced protection. 553 N.E.2d at 1010-11. Rather, it simply concluded that the case should come out in a certain way, which is to say that it made an assertion of its own, unsupported by the elements of constitutional discourse to which other participants in the legal system might be able to respond intelligibly. 553 N.E.2d at 1011-13.

151. Commonwealth v. Amendola, 550 N.E.2d 121 (Mass. 1990); Commonwealth v. Melendez, 551 N.E.2d 514 (Mass. 1990); Commonwealth v. Lyons, 564 N.E.2d 390 (Mass. 1990).

152. 550 N.E.2d 121 (Mass. 1990).

153. Jones v. United States, 362 U.S. 257 (1960).

154. United States v. Salvucci, 448 U.S. 83 (1980).

despite the current Supreme Court's shift in thinking."[155] This ruling prompted a dissent from Justice Nolan, who criticized the court for departing from settled federal law "without so much as a plausible argument that the Massachusetts Constitution requires the expansion."[156]

Amendola provides little basis for participants in the Massachusetts legal system to do much more than make assertions and counter-assertions about the meaning of the state constitution; it does not contribute meaningfully to any discourse of constitutional distinctness. And even if the court's language about the "concerns" of a prior federal decision could be parlayed into some kind of debate, there is nevertheless a distinctly hit-or-miss feeling to the court's decisions on whether to adhere to or depart from federal holdings. Thus, in *Commonwealth v. Cote,*[157] the court said in response to a claim of state constitutional distinctness that the state constitution may "afford more substantive protection" than the federal Constitution,[158] and found that the issue under scrutiny raised "a closer question" under the state constitution than under the federal, but ended up rejecting the claim of distinctness without any useful explanation.[159] Likewise, in *Commonwealth v. Cast,*[160] the court acknowledged that the state constitution provided "greater protection against unlawful search and seizure" than its federal counterpart, but held against the defendant anyway because the defendant had offered no reason to support his contention that more protection should be available on the facts of the particular case.[161]

Again, these cases are virtually useless from the perspective of state constitutional discourse. There is really no plausible way to look at *Amendola, Cote,* and *Cast* and build any kind of intelligible argument about why the Massachusetts Constitution required a departure from the federal approach in one but not the others. Prosecutors and defense counsel can use these cases only to contradict each other, not to debate the meaning of the state constitution.

155. 550 N.E.2d at 125.

156. 550 N.E.2d at 127.

157. 556 N.E.2d 45 (Mass. 1990).

158. 556 N.E.2d at 50 (quoting Commonwealth v. Blood, 507 N.E.2d 1029, 1033 n.9 (Mass. 1987)).

159. 556 N.E.2d at 50.

160. 556 N.E.2d 69 (Mass. 1990).

161. 556 N.E.2d at 79, 79-80.

2. *Independent Analysis*

The cases that most closely support the claims of New Federalism are those in which state courts engaged in true independent analysis of the state constitution using the traditional tools of constitutional interpretation. A potentially promising bright spot is Louisiana, where in a substantial minority of cases the Louisiana Supreme Court approached state constitutional questions more systematically and thoroughly than the cases discussed above. In 8 1990 cases — nearly 40% of the total state constitutional cases decided — the court seemed noticeably more willing not only to acknowledge that it was being asked by litigants to construe the state constitution, but actually to honor the request.[162] The cases in this subset of the court's decisions are not always as thorough or as systematic as they could be, nor do they generally contain the type of *Long* language necessary to insulate them from further review. Nevertheless, the tone of these opinions suggests that the Louisiana Supreme Court will take state constitutional claims seriously at least some of the time.

For example, in *Department of Transportation and Development v. Dietrich,*[163] the court considered a question arising under the eminent domain provisions of the state constitution. Although the court's analysis was brief, it included consideration of the text of the relevant provision of the 1974 constitution, that provision's predecessor in the previous constitution, and some judicial precedent relevant to the construction of the provision.[164] *Dietrich* thus provides some guidance to participants in the legal system concerning the proper way to talk about the meaning of the constitution; presumably, a litigant will be able in a future case to craft an argument, if one is available, based on the text of a provision of the current constitution and its counterpart in the previous constitution.

In 3 other cases from this group, the court performed something like the type of analysis one might expect to find in a robust constitutional discourse, discussing the text and history of constitutional provisions, the structure of the state constitution, prior state judicial

162. State v. Miller, 571 So. 2d 603 (La. 1990) (double jeopardy); Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081 (La. 1990) (civil remedies for unconstitutional search and seizure); Moore v. Roemer, 567 So. 2d 75 (La. 1990) (judicial jurisdiction); Williams v. Ragland, 567 So. 2d 63 (La. 1990) (judicial retirement); State v. Green, 566 So. 2d 623 (La. 1990) (method of appointing state ethics board); State v. Spellman, 562 So. 2d 455 (La. 1990) (due process); State v. Burrell, 561 So. 2d 692 (La. 1990) (right to notice of aggravating circumstances); Department of Transp. & Dev. v. Dietrich, 555 So. 2d 1355 (La. 1990) (eminent domain).

163. 555 So. 2d 1355 (La. 1990).

164. 555 So. 2d at 1358-59.

decisions, and the understanding of the provisions' framers.[165] The high courts of Kansas,[166] Massachusetts,[167] and New York[168] also decided a small number of cases that treated state constitutional claims with comparable respect.

3. *The California Caseload*

This subsection and the next examine briefly some peculiarities of specific states that make them exceptions of sorts to the general trends outlined in the previous section.

Two unusual aspects of the California Supreme Court's caseload complicate any attempts to generalize about its state constitutional decisions. First, it seems that the majority of the cases in which the California court wrote analytical opinions involved only two kinds of disputes: mandatory death penalty appeals, all of which involved multiple issues of federal and state constitutional law; and attorney discipline cases, of which only a handful involved constitutional issues. Thus, the court's caseload may not provide a representative sample of issues arising under the state constitution.

Second, many if not most of the state constitutional issues facing the court arose from provisions incorporated into the state constitution by popular initiative rather than by constitutional convention or ratification of legislatively proposed amendments. The California Supreme Court has plainly adopted an interpretive approach to such constitutional provisions that treats them more like statutes than constitutional provisions. That is, the court tends to rely heavily on the

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165. *See* Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081 (La. 1990); Moore v. Roemer, 567 So. 2d 75 (La. 1990); Williams v. Ragland, 567 So. 2d 63 (La. 1990).

166. *See* Colorado Interstate Gas Co. v. Board of County Commrs., 802 P.2d 584 (Kan. 1990); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541 (Kan. 1990).

167. *See* Society of Jesus v. Boston Landmarks Commn., 564 N.E.2d 571 (Mass. 1990); Opinions of the Justices, 556 N.E.2d 1002 (Mass. 1990); Collins v. Secretary of the Commonwealth, 556 N.E.2d 348 (Mass. 1990).

168. *See* People v. Ohrenstein, 565 N.E.2d 493, 498-99 (N.Y. 1990) (discussing history and purpose of provision prohibiting use of public money for private undertakings and relying on previous New York cases, some of them very old, to interpret provision); People v. Van Pelt, 556 N.E.2d 423 (N.Y. 1990) (concluding that state constitution provides broader protection of individual rights than federal Constitution and resting conclusion on state standards of fundamental fairness and ethical duties of state prosecutors); People v. Vilardi, 555 N.E.2d 915 (N.Y. 1990) (same); People v. Kern, 554 N.E.2d 1235, 1241 (N.Y. 1990) (examining text of state constitutional provision, comparing it to text of corresponding federal provision, and touching upon understanding of the 1938 constitutional convention that drafted state provision). Other cases in which the court could be considered to have engaged in more considered constitutional analysis are People v. Scalza, 563 N.E.2d 705 (N.Y. 1990) (performing perfunctory constitutional analysis of provision establishing county courts); City of New York v. State, 562 N.E.2d 118 (N.Y. 1990) (construing home rule provision); People v. Bing, 558 N.E.2d 1011 (N.Y. 1990) (construing right to counsel provision); Motor Vehicle Mfrs. Assn. v. State, 550 N.E.2d 919, 923-24 (N.Y. 1990) (construing state court jurisdictional provisions).

text and what it calls the voters' intent[169] rather than more "constitutional" factors such as the structure and political theory of, and values expressed in, the document. The court's approach is consistent with and may even be required by the theory of the state constitution, which places restrictions on the types of measures that can be added to the constitution by initiative.[170] The California Supreme Court is thus sometimes put in the strange position of striking down parts of the state constitution as unconstitutional.[171] This phenomenon suggests that the state constitution may be viewed as creating two classes of constitutional provisions, some of which are more "constitutional" than others. But whatever the basis of the court's statutory approach to initiative-generated constitutional provisions, the approach limits the types of elements that are likely to enter into the state constitutional discourse.

4. *New Hampshire*

I have saved New Hampshire for last because its state constitutional jurisprudence in several respects departs dramatically from that of the states surveyed above, in ways that make the state a New Federalist's dream. At the same time, though, the court's decisions show that even a court that actively pursues New Federalism's ideals may be unable to escape the imposing shadow of federal constitutional law.

The New Hampshire Supreme Court is a court trying mightily to seize independent control of state constitutional law. First, unlike any of the other courts we have examined, it has consciously developed a habit of making *Michigan v. Long* statements in its opinions dealing with the state constitution. Thus, the court routinely states specifically that its rulings are made under "our own interpretation of the New Hampshire Constitution,"[172] or "as a matter of State law."[173] Where the court examines federal constitutional rulings in the course of its state constitutional analysis, it is often at pains to point out that it looks to federal law "not as binding precedent but only for guidance."[174] These pronouncements seem more than adequate to insulate the state rulings from federal review.

Second, the court has begun to develop conventions governing the

169. *E.g.*, Davis v. City of Berkeley, 794 P.2d 897 (Cal. 1990).

170. *See* Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990).

171. *See Raven*, 801 P.2d at 1089.

172. State v. Gallant, 574 A.2d 385, 391 (N.H. 1990).

173. State v. Thompson, 571 A.2d 266, 268 (N.H. 1990).

174. State v. Bosquet, 578 A.2d 853, 855 (N.H. 1990); *accord* State v. Williams, 581 A.2d 78, 80 (N.H. 1990); State v. Gallant, 574 A.2d 385, 391 (N.H. 1990).

circumstances under which it will construe the state constitution. Most prominently, the court has explicitly stated its intention to adopt a primacy approach to state constitutional claims under which it will adjudicate state constitutional issues before turning to federal ones.[175] In addition, the court has held that as a general rule it will not consider state constitutional claims unless they were properly raised in the court below.[176]

Finally, the court has proceeded to rest a comparatively large proportion of its constitutional rulings on state grounds. In 1990, the court decided state constitutional issues in 34 (24%) of the 139 full opinions it issued. In 12 of these cases, the court resolved the case on state constitutional grounds without ever considering how it might come out under the federal Constitution.[177] In 8 cases, the court looked to federal law for guidance but ultimately grounded its opinion firmly in the state constitution.[178] In 4 cases, the court considered parallel claims under the state and federal constitutions where the relevant standards were the same and would have yielded the same outcome, yet deliberately refrained from performing a federal constitutional analysis and instead rested the case exclusively on state constitutional grounds.[179] And in one additional case, the court held that the state constitution provided greater protection than the comparable federal provision.[180] Thus, nearly three quarters of the court's state constitutional decisions were based on the state constitution independent of federal law.

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175. *See* State v. Ball, 471 A.2d 347, 351 (N.H. 1983).

176. *See* State v. Dellorfano, 517 A.2d 1163, 1166 (N.H. 1986).

177. State v. Elliott, 585 A.2d 304 (N.H. 1990) (grand jury indictment); Opinion of the Justices, 584 A.2d 1342 (N.H. 1990) (taxation); Lussier v. New England Power Co., 584 A.2d 179 (N.H. 1990) (right to jury trial); State v. Gooden, 582 A.2d 607 (N.H. 1990) (double jeopardy); *In re* Estate of McQuesten, 578 A.2d 335 (N.H. 1990) (takings and due process); State v. Eason, 577 A.2d 1203 (N.H. 1990) (rights to produce evidence and to confront); Appeal of Maddox, 575 A.2d 1 (N.H. 1990) (impartial administrative decisionmaker); State v. Monsalve, 574 A.2d 1384 (N.H. 1990) (due process); New Hampshire Mun. Trust Workers' Compensation Fund v. Flynn, 573 A.2d 439 (N.H. 1990) (local government funding); Kiluk v. Potter, 572 A.2d 1157 (N.H. 1990) (state court jurisdiction); State v. Lachapelle, 572 A.2d 584 (N.H. 1990) (notice of criminal charges); State v. Smith, 571 A.2d 279 (N.H. 1990) (right to bear arms, procedural due process).

178. State v. Williams, 581 A.2d 78 (N.H. 1990) (right to jury trial); State v. Pellicci, 580 A.2d 710 (N.H. 1990) (searches); State v. Bousquet, 578 A.2d 853 (N.H. 1990) (right to jury trial); *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990) (equal protection); Dover v. Imperial Casualty & Indem. Co., 575 A.2d 1280 (N.H. 1990) (equal protection); State v. Gallant, 574 A.2d 385 (N.H. 1990) (searches); State v. Field, 571 A.2d 1276 (N.H. 1990) (exclusionary rule); State v. Thompson, 571 A.2d 266 (N.H. 1990) ("knock-and-announce" rule).

179. State v. Bousquet, 578 A.2d 853 (N.H. 1990) (right to jury trial); *In re* Certain Scholarship Funds, 575 A.2d 1325 (N.H. 1990) (equal protection); State v. Green, 575 A.2d 1308, 1315 (N.H. 1990) (searches); State v. Settle, 570 A.2d 895, 897 (N.H. 1990) (sufficiency of indictment).

180. State v. Pellicci, 580 A.2d 710 (N.H. 1990) (holding canine sniff a search under state constitution).

Yet even in this New Federalism paradise, all is not entirely well. For example, despite its attempts to distinguish clearly between state and federal constitutional claims, the New Hampshire Supreme Court has sometimes fallen prey to the same kinds of obscurities we have seen in the decisions of other state high courts. Thus, in 4 cases the court failed to specify whether the constitutional claim under consideration was a state or federal claim,[181] and in 8 cases both federal and state constitutional claims were raised but the basis of the court's ruling was unclear.[182]

A much more fundamental problem with the court's state constitutional jurisprudence, however, is that its independence is ultimately illusory. The court has held explicitly that the state and federal constitutions have essentially the same meaning in a variety of circumstances involving issues such as probable cause, interrogations, due process, and ineffective assistance of counsel.[183] Moreover, in many instances where the court has expressly asserted decisional independence under state law, the language and structure of its analyses of the state constitution are quite clearly borrowed from federal constitutional law.[184] For example, the state constitution's equal protection analysis and terminology is precisely the same as the federal,[185] even if the state and federal courts might not always agree on the applications of the relevant tests. Together, these types of cases account for nearly half of the court's state constitutional caseload.

Most importantly, notwithstanding whatever legal independence the court may have achieved from federal constitutional law, it has failed to achieve any kind of independence in its constitutional discourse. For all its talk of independence, the New Hampshire Supreme Court rarely decides a case without keeping one eye on the comparable decisions of the U.S. Supreme Court. In addition, the New Hampshire court's opinions are largely devoid of any kind of language that could

181. State v. Zurita, 584 A.2d 758 (N.H. 1990) (confessions); State v. Plante, 577 A.2d 95 (N.H. 1990) (confessions); State v. Green, 575 A.2d 1308 (N.H. 1990) (challenge to stop); Kakris v. Montbleau, 575 A.2d 1293 (N.H. 1990) (due process).

182. State v. Pond, 584 A.2d 770 (N.H. 1990) (double jeopardy); Bussiere v. Cunningham, 571 A.2d 908 (N.H. 1990) (due process liberty); Humphrey v. Cunningham, 584 A.2d 763 (N.H. 1990) (ineffective assistance of counsel); State v. Fennell, 578 A.2d 329 (N.H. 1990) (ineffective assistance of counsel); State v. Cox, 575 A.2d 1320 (N.H. 1990) (right to present exculpatory evidence); State v. Green, 575 A.2d 1308 (N.H. 1990) (interrogation); State v. Tucker, 575 A.2d 810 (N.H. 1990) (suppression); State v. Davis, 575 A.2d 4 (N.H. 1990) (probable cause). In all but the first two of these cases, the court held that the applicable analysis was the same under either constitution, but failed to specify whether the basis of its holding was the state or federal constitution, or both. In none of the cases did the court make a *Long* statement.

183. See the last six cases cited *supra* note 182.

184. *See supra* note 178.

185. *E.g., In re* Certain Scholarship Funds, 575 A.2d 1325, 1326-27 (N.H. 1990).

furnish the basis for a discourse of distinctiveness — a way of explaining differences between the state and federal constitutions. The current New Hampshire Constitution has been in effect since 1784, and it is hardly implausible that small, relatively isolated New Hampshire could have developed over the past two centuries some kinds of cultural and political differences from the rest of the nation that would show up in its constitutional discourse and jurisprudence. Yet one searches the state court's decisions in vain for any indication of such differences; there is no discussion of the state's founding history, no mention of its constitution's framers, and no suggestion that the fundamental values or character of the people of the state differ in any way from those of the people of the nation.

C. *Conclusions*

The overwhelming impression left by an examination of state constitutional decisions is that state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law. With a handful of exceptions, the decisions fail to address state constitutional issues squarely and independently from federal constitutional jurisprudence, and show no sign of any discourse of distinctness that would allow participants in the legal system to craft intelligible arguments about the nature of any differences between the state and federal constitutions.

By engaging in extensive lockstep analysis, many courts have also created an atmosphere in which it is unnecessary to distinguish between the state and federal constitutions because they are generally held to have the same meaning. This reduces state constitutional law to a redundancy and greatly discourages its use and development. In the few cases in which courts hold the state and federal constitutions to be distinct, they often seem to have done so in a way that is so idiosyncratically result-oriented as to provide little basis for further intelligible debate about the nature of the differences between the two documents that account for the court's departures from federal norms. Certainly, litigants can hardly be confident about replicating the results of such cases in factually distinct circumstances.

Furthermore, the lesson of *Michigan v. Long* seems not to have penetrated the jurisprudence of any state other than New Hampshire. By failing to specify when holdings rest on state constitutional grounds and by borrowing extensively from federal case law when construing their state constitutions, state courts not only confuse participants in the state legal system but also leave themselves highly vul-

nerable to Supreme Court review of decisions that may rest on adequate and independent state grounds.

When he was still on the Oregon Supreme Court, Hans Linde complained that "[a] generation of lawyers . . . seems literally speechless" when faced with questions of state constitutional law.[186] In view of the actual condition of state constitutional law, however, such silence seems understandable enough when lawyers lack a language in which to speak, or at best have a language that is too impoverished to allow them to say anything worthwhile.[187]

IV. THE STANDARD EXPLANATIONS

We have seen that state constitutional discourse is for the most part far from the vigorously independent discourse New Federalism hoped for; it is impoverished by comparison to federal constitutional discourse, and it generally fails to provide a language that participants in the legal system can use effectively to debate the meaning of the state constitution. State courts often seem downright reluctant to construe their state constitutions at all, and when they do so their opinions are often vague, perfunctory, or almost entirely dependent on analytic strategies and terminology borrowed from federal constitutional discourse.

Why should this be the case? Why, after more than two centuries of state constitutionalism, has state constitutional law so spectacularly failed to flourish? Advocates of New Federalism have come up with several standard and widely accepted explanations for this phenomenon. In this section, I review these explanations, and argue that they fail to account for the poverty of state constitutional discourse.

A. *The Fourteenth Amendment*

By far the most widely accepted explanation for the poverty of contemporary state constitutional law holds that it was marginalized by the Fourteenth Amendment incorporation doctrine. Until the early part of this century, the U.S. Supreme Court adhered to the view that the federal Bill of Rights constrained only the federal government; any similar restrictions on state government, if they existed, were contained in state constitutions.[188] Starting in the 1930s, however, and continuing into the 1960s, the Supreme Court began to inter-

186. Linde, *supra* note 30, at 391.

187. For a different view of the constitutional jurisprudence of the New York Court of Appeals, see Vincent M. Bonaventre, *State Constitutionalism in New York: A Non-Reactive Tradition,* 2 EMERGING ISSUES IN ST. CONST. L. 31 (1989).

188. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

pret the Fourteenth Amendment as incorporating many of the standards contained in the Bill of Rights as limitations on state power.[189]

Proponents of what I shall call the "Fourteenth Amendment thesis" argue that the process of incorporation "federalized" the business of interpreting constitutional rights.[190] By making states enforce federal constitutional standards,[191] incorporation "obscured the functional independence" of state courts,[192] and required state courts to look to federal law in order to resolve a wide variety of constitutional issues. As a result, the argument goes, state courts have simply gotten into the habit of looking to federal constitutional law for the answer to constitutional questions, whether state or federal.[193]

This explanation is wholly inadequate; indeed, it is not an explanation of state court behavior at all, but rather a description of such behavior. Under our system of government, states are independent sovereigns and state supreme courts are the final arbiters of constitutional self-government on the state level. In the early days of the republic, state courts often jealously guarded against any perceived federal encroachments on state sovereignty and independence. In *Martin v. Hunter's Lessee,*[194] for example, the Virginia courts rejected the authority of the Supreme Court to review state court decisions on federal law; the Supreme Court thus had to struggle with state courts over what now seem some of the least controversial aspects of constitutional federalism.

While we no longer expect state courts to resist rulings that the Supreme Court is entitled to make and enforce, we might well expect state courts to continue to protect state sovereignty and independence where it is possible to do so. Had state courts in the middle decades of this century been animated by such a spirit, there was certainly nothing stopping them from staving off the federal dominance in constitutional rights brought about by the Supreme Court's incorporation decisions. For example, state courts could have utilized their state

189. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 772-74 (2d ed. 1988).

190. *E.g.,* Kaye, *supra* note 5, at 404-05; Linde, *supra* note 30, at 382-83; Gary L. McDowell, *Foreword: Rediscovering Federalism? State Constitutional Law and the Restoration of State Sovereignty,* 21 RUTGERS L.J. 797, 802-07 (1990).

191. Brennan, *State Constitutions, supra* note 1, at 495.

192. *Developments in the Law, supra* note 43, at 1328.

193. *See* Howard, *supra* note 25, at 878 ("During the activist Warren years, it was easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law."); *accord Project Report, supra* note 25, at 274.

194. 14 U.S. (1 Wheat.) 304 (1816).

constitutions before the Supreme Court began its string of incorporation decisions, thereby preventing the Court from gaining the impression that states would not protect the fundamental rights of U.S. citizens unless forced to do so by the imposition of federal constitutional standards.[195] Or, upon perceiving a threat to state sovereignty, state courts could have seized the initiative in elaborating constitutional rights by giving generous interpretations to their state constitutions, something they did not even begin to do until recently, when it was probably too late. The real question is thus not whether incorporation changed the constitutional landscape, but why state courts did nothing to influence the final result.[196]

Furthermore, even if the Fourteenth Amendment thesis could explain the withering of state constitutional jurisprudence in the area of individual rights, it has no power to explain the current extent to which federal constitutional discourse dominates state constitutional law. It is useful here to distinguish between two types of state constitutional provisions. *Dependent* provisions are provisions of the state constitution that have federal analogues capable of controlling the outcome of cases in which both provisions apply. For example, a state search and seizure provision is dependent because it has a federal analogue — the Fourth Amendment — capable of controlling the outcome of the case, depending on the interpretation the federal courts have given it. An *independent* state constitutional provision is one that cannot be displaced, regardless of whether an analogous federal constitutional provision exists. For example, a state constitutional provision governing executive power is independent because the state court's construction of that provision will define the extent of the governor's power regardless of how the Supreme Court interprets the powers of the President under the federal Constitution.

The Fourteenth Amendment thesis could at best explain why federal constitutional discourse has come to dominate the state constitu-

195. State courts arguably had such poor records of protecting the fundamental rights of their citizens, *see supra* note 29, that there was nothing for the Fourteenth Amendment to marginalize.

196. A variation of the Fourteenth Amendment thesis holds that state courts failed to develop independent state constitutional law because they were literally "too busy" keeping up with rapidly changing federal constitutional law to pay much attention to their own constitutions. *See* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 4; A.E. Dick Howard, *A Frequent Recurrence to First Principles,* Introduction to *id.,* at xi, xv. It is surprising that such an argument could be seriously advanced. Nobody has claimed that state courts failed to continue developing state *common* law during this period because the constitutional decisions of the Supreme Court kept them too busy. Nor is there any evidence that lower *federal* courts had the slightest difficulty "keeping up" with the Supreme Court's constitutional rulings. Indeed, the Supreme Court incorporation cases could just as easily be viewed as *saving* time for state courts by providing vivid demonstrations of the proper way to interpret a constitution.

tional discourse of dependent provisions of state constitutions. If the outcome of a state constitutional case dealing with free speech or involuntary confessions turns in the final analysis on whether any standard set by the state constitution satisfies the demands of the controlling federal constitutional provision,[197] state courts might develop a tendency to use the terms of the federal discourse even when discussing the state constitutional issue. In reality, however, state courts have adopted the federal analysis and terms of debate not merely when construing dependent provisions governed by Fourteenth Amendment incorporation, but also for many independent state constitutional provisions that federal law — as incorporated in the Fourteenth Amendment — is powerless to affect.

Consider, for example, the political question doctrine. The doctrine, a judicial gloss on the jurisdictional provisions of Article III of the federal Constitution, holds that federal courts may not hear certain types of cases for which the exercise of judicial power is deemed inappropriate.[198] Typically, the doctrine is invoked in instances where the Supreme Court would conceive itself to be meddling in the legitimate affairs of other branches of government; for example, the doctrine applies to cases in which the court lacks expertise or which involve the exercise of a power constitutionally committed to the executive or legislative branches.[199] Several state supreme courts have held that state court jurisdiction is limited by a state version of the federal political question doctrine, and some courts have more or less expressly incorporated the leading federal cases into the state's political question jurisprudence.[200]

Now it is certainly possible for a state constitution to contain a political question doctrine, and it is even possible for the state doctrine to be so similar to the federal version that precisely the same analysis could be used for both — possible, but highly unlikely. Unlike the federal courts, which are courts of limited jurisdiction, state courts

197. *See* U.S. CONST. art. VI, cl. 2; amend. 14.

198. The leading case is still Baker v. Carr, 369 U.S. 186, 217 (1962). *See also* Goldwater v. Carter, 444 U.S. 996, 998-1000 (1979) (Powell, J., concurring).

199. *Baker*, 369 U.S. at 217.

200. *See* Pellegrino v. O'Neill, 480 A.2d 476, 481-83 (Conn. 1984); State *ex rel.* Oberly v. Troise, 526 A.2d 898, 904-05 (Del. 1987); Trustees of Hawaiian Affairs v. Yamasaki, 737 P.2d 446, 455-56 (Haw. 1987); Kluk v. Lang, 531 N.E.2d 790, 797 (Ill. 1988); Gilbert v. Gladden, 432 A.2d 1351, 1354 (N.J. 1981); State *ex rel.* Meshel v. Keip, 423 N.E.2d 60, 64 (Ohio 1981); People v. Ohrenstein, 549 N.Y.S.2d 962, 971 (App.Div. 1989), *affd. on other grounds*, 565 N.E.2d 493 (N.Y. 1990) (adopting *Baker* analysis). Other cases are collected in Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405 (1984).

may be courts of general jurisdiction.[201] In the absence of limiting constitutional language, the ordinary presumption would be that state courts are constitutionally empowered to hear cases, not that they share a limitation in common with federal courts.[202] Further, virtually all state courts have significant common law powers that federal courts lack. The power to elaborate the common law is a power to make law, and to do so in what are nowadays extremely complex areas such as tort liability and contractual relations. The political question doctrine, however, is based on the incompetence of federal courts to invade the legislative sphere, or to deal with complex aspects of social policy — actions that state courts take routinely when exercising their common law powers. Thus, it is not at all clear that state courts should be subject to a political question limitation, and if they are, it seems implausible that the state limitation would be nearly so restrictive as the federal one.[203]

Similarly, several state supreme courts have adopted the federal interpretation of the Speech or Debate Clause[204] and the federal separation of powers bar on the legislative veto,[205] both aspects of state constitutional law that might be expected to differ, perhaps significantly, from their federal counterparts.[206] The Fourteenth Amend-

201. Scott v. Sandford, 60 U.S. (19 How.) 393, 401-02 (1857); Aldinger v. Howard, 427 U.S. 1, 15 (1976).

202. This phenomenon can be seen clearly in state law dealing with standing. Many states have far more relaxed rules of standing than federal courts due to the unrestricted jurisdiction of state courts. *See generally* Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEXAS L. REV. 1269, 1298-303 (1985). Others permit their courts to issue advisory opinions, something federal courts are forbidden to do because of the lack of a case or controversy. U.S. CONST. art. III, § 2, cl. 1; *see* Charles M. Carberry, Comment, *The State Advisory Opinion in Perspective*, 44 FORDHAM L. REV. 81 (1975).

203. *Cf.* Dennis NettikSimmons, *Towards a Theory of State Constitutional Jurisprudence*, 46 MONT. L. REV. 261, 285 (1985).

204. U.S. CONST. art. I, § 6, cl. 1.

205. *See* INS v. Chadha, 462 U.S. 919 (1983).

206. For example, a state version of the Speech or Debate Clause might differ from the federal version because state legislatures, unlike Congress, have the direct power to pass legislation insulating themselves from liability under state law for statements made or things done in the course of their legislative duties. In addition, state courts have the power to create exceptions to common law doctrines, such as libel, for such public policy reasons as immunizing legislators in appropriate situations. These factors might suggest an extremely narrow reading for a state Speech or Debate Clause on the theory that the state legislature or courts can always broaden the scope of legislative immunity.

Similarly, there is no good reason to assume that the legislative veto would be unconstitutional under a state constitution. The Supreme Court invalidated the use of legislative vetoes on separation of power grounds, INS v. Chadha, 462 U.S. 919 (1983), but the structure of separation of powers under state constitutions often differs dramatically from the federal division of power. For example, governors often have line-item veto powers; courts often have lawmaking and rulemaking powers; and lower-ranking executive branch officials, such as attorneys general and comptrollers, are often independently elected. Given these differences, it does not necessarily follow that the separation of powers means the same thing under a state constitution as under the U.S. Constitution.

ment thesis fails to explain the willingness of state courts to adopt federal doctrine in these areas in which state constitutional law operates completely independently of federal power.

B. *Lawyers and Law Schools*

The second most popular explanation for the languishing of state constitutional law offered by New Federalism advocates is that lawyers who appear in state court fail to raise independent state constitutional arguments.[207] Some have added that the fault really lies with the law schools, which fail to teach state constitutional law.[208] This finger-pointing, which seems especially popular with state judges,[209] is occasionally accompanied by a disapproving suggestion of lawyer laziness: "[T]o make an independent argument under the state [constitution]," former Justice Hans Linde has admonished, "takes homework — in texts, in history, in alternative approaches to analysis."[210]

The suggestion that lawyers are somehow responsible for the failure of state courts to develop state constitutional jurisprudence is frankly absurd. Lawyers will make the arguments they need to make to win cases. If lawyers are not making state constitutional arguments, it is because doing so does not help them win.[211] As the survey of state constitutional cases in the previous section shows, state courts often discourage the making of such arguments by their own adjudicatory practices.

As for law schools, it is undoubtedly always popular to blame them for ills of the legal system, and sometimes such blame may be justified — but not in this case. It is true that few law schools offer courses in the constitutional law of particular states; but it is equally true that few law schools offer courses in the contract, tort, or property law of particular states. Somehow law school graduates are able to work effectively within the state common law systems after a legal education in general principles of those areas of law, and constitutional law is no different. The real problem is not the education in

207. Abrahamson, *supra* note 5, at 1161-63; Collins, *supra* note 25, at 19 n.69; James C. Kirby, Jr., *Expansive Judicial Review of Economic Regulation Under State Constitutions, in* DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, *supra* note 7, at 94, 94-95; Linde, *supra* note 30, at 391-92; Pollock, *supra* note 2, at 721-22; Collins, *supra* note 29, at 9 & n.75.

208. Abrahamson, *supra* note 5, at 1163; Abrahamson, *supra* note 29, at 964; Douglas, *supra* note 29, at 1147; Kaye, *supra* note 5, at 405; Linde, *supra* note 30, at 392; Linde, *supra* note 5, at 174-75; Collins, *supra* note 29, at 5-6.

209. See the articles by Judge Judith Kaye, *supra* note 5, former Justice Hans Linde, *supra* notes 5 and 30, Justice Shirley Abrahamson, *supra* notes 5 and 29, and Justice Charles G. Douglas, III, *supra* note 29.

210. Linde, *supra* note 30, at 392.

211. Abrahamson, *supra* note 5, at 1162-63.

state constitutional law offered by law schools, but the one offered by state courts.

C. *Lack of Historical Data*

A third explanation sometimes given for the impoverishment of state constitutional law is the dearth of historical materials related to the founding of the state constitution.[212] The lack of such materials can hinder the search for constitutional meaning by making it extremely difficult to reconstruct the intent of the framers, thereby hindering the development of an independent state constitutional discourse and making the turn to federal analogues more appealing. This is a cogent explanation, but, as it turns out, one available to very few states.

Among the fifty states, only Massachusetts, Vermont, and New Hampshire now operate under constitutions adopted in the eighteenth century.[213] The present constitutions of eighteen states were adopted after 1900, and fifteen states operate under constitutions that were adopted between 1875 and 1899.[214] The recency of these documents greatly enhances the possibility of meaningful historical research. Moreover, even the older constitutions have been amended so often that the adoption of many significant constitutional provisions is likely to be well recorded.[215] And even where recordkeeping at constitutional conventions was skimpy, other sources such as newspaper accounts and the personal correspondence of delegates can help fill in the historical gaps. Work by Justice Robert F. Utter of the Washington Supreme Court illustrates the type of creative historical research that can be done in this area.[216]

Finally, detailed historical records are simply not necessary to create a rich constitutional discourse. Chief Justice John Marshall lacked many of the historical sources that are readily available to and routinely consulted by judges and lawyers today,[217] yet he managed none-

212. *See, e.g.*, Teachout, *supra* note 28.

213. Sturm, *supra* note 69, at 75-76.

214. *Id.* at 74-76.

215. Grodin, *supra* note 54, at 393-95 (discussing documentation of 1849 California constitutional convention); Vito J. Titone, *State Constitutional Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 459-63 (1987).

216. *See* Utter, *supra* note 35, at 253-59; Robert F. Utter, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988).

217. For example, James Madison's notes of the constitutional convention were not published until 1840, after his death. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 viii-ix (Adrienne Koch ed., 1966).

theless almost single-handedly to found the rich and intricate federal constitutional discourse that we have inherited.

V. THE FAILURE OF STATE CONSTITUTIONALISM

If none of the reasons examined above explains the poverty of modern state constitutional discourse, what can explain it? In this Part, I argue that the cause of the problem is a failure that goes much deeper than the actions of the Supreme Court, the state bar, or the law schools. All these groups, as well as state courts themselves, are responding to the same underlying phenomenon: the failure of state constitutionalism itself to provide a workable model for the contemporary practice of constitutional law and discourse on the state level. In particular, state courts do not talk about state constitutions in the way New Federalism advocates because to do so would be to talk in a way that, under present conditions, simply makes no sense.

A. *State Constitutionalism*

State constitutionalism lies at the intersection of two powerful American political doctrines: federalism and constitutionalism. Federalism provides a theory of statehood, constitutionalism a theory of the nature of constitutions. Together, these two sets of principles provide a guiding, foundational approach to the interpretation of state constitutions, an approach that has decisively shaped the thinking of New Federalism advocates, as well as state courts themselves.

1. *Federalism*

The fundamental organizing principle that distinguishes states from other political entities in our system of government is the familiar notion of federalism. According to federalist doctrine, the United States is a unique kind of republic composed of individual state governments and a single, overarching national government. Although the states are "constituent parts" of the United States,[218] they are not in any essential way subordinate to the national government. Rather, the state and national governments together comprise a system of dual sovereignty[219] in which each government is deemed to be an independent sovereign, but in distinct spheres of action.[220] Madison, for example, conceived that the national government would have primary

218. THE FEDERALIST, *supra* note 37, No. 9 (Alexander Hamilton), at 76.

219. RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 48-76 (1987).

220. THE FEDERALIST, *supra* note 37, No. 39 (James Madison), at 244; *see* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 51-52 (1984).

responsibility for "external objects, as war, peace, negotiation and foreign commerce"; the states, on the other hand, would exercise sovereignty principally over "the lives, liberties, and properties of the people."[221]

At the time of the framing of the Constitution, there was some disagreement over the idea of dividing governmental sovereignty in this way; some thought that sovereignty was by its nature indivisible, and that any attempt to divide it must fail. The Framers solved this theoretical difficulty by locating a single, indivisible sovereignty in the people themselves. As ultimate sovereign, the people could divide up the powers of government and distribute them as they saw fit.[222] Thus, according to Madison, "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."[223]

Under this plan, the people have organized themselves for purposes of self-government in the following way. First, all the people of the United States together constitute a society that has created and is jointly subject to the rule of the national government within its designated scope. Second, the people have divided themselves into separate, smaller societies — the states — and are subject in this second capacity to the rule of the government of the state in which they reside.[224] Every citizen thus belongs to two distinct political societies, each constituted for a different purpose and having different powers and characteristics.

In this way, federalism provides a clear political definition of statehood.[225] According to federalist doctrine, a state is a self-governing political society of individuals who comprise a subset of all American citizens. The state government is created by the people of the state and given such powers as the people deem appropriate, other than those specifically delegated to the United States, another self-governing society to which the people of the state also belong. The state government thus possesses whatever independent sovereign power the

221. THE FEDERALIST, *supra* note 37, No. 45, at 292-93; *see also id.* No. 39 (James Madison), at 245 (states would exercise "a residuary and inviolable sovereignty over all other objects" not put within power of national government).

222. *See* BERGER, *supra* note 219, at 51-52 (remarks of James Wilson).

223. THE FEDERALIST, *supra* note 37, No. 46, at 294.

224. *See* THE FEDERALIST, *supra* note 37, No. 39 (James Madison), at 245.

225. Federalism's political premises rest on other philosophic considerations that are not directly relevant here, such as Enlightenment era epistemology and related theories of natural law. For a survey of these ideas, see MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987). For a more complete discussion of the contours of the doctrine of popular sovereignty, see James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 200-13 (1990).

people of the state choose to give it, within the potential realm of activity allowed it by the national political society.

2. *Constitutionalism*

The other half of the state constitutionalism equation is the notion of constitutionalism — the idea that a constitution is a unique document of political foundation. Like federalism, constitutionalism is close to the heart of American political theory and rests on many of the same political premises.

The pithiest, although by no means the first, expression of the essence of American constitutionalism is Chief Justice John Marshall's remark in *McCulloch v. Maryland:*[226] "[W]e must never forget," he wrote, "that it is *a constitution* we are expounding."[227] This cryptic phrase aptly captures the judicial view, embraced consistently ever since, that a constitution is different from other types of documents that courts may be called upon to interpret and must be approached at all times with those differences in mind.

The first and foremost difference between a constitution and other sources of law is that a constitution is considered to be a direct act of the sovereign people themselves.[228] Because the people are the sovereigns in our system and the government merely the people's agents, a constitution speaks with a political authority that no law or other governmental action can ever attain. The constitution is thus a form of higher law that always binds the government, and is unchangeable except by further action of the people themselves.[229] That a constitution is written only further evidences the people's intent that it be permanent.

But it is not only the authority of a constitution that distinguishes it from other forms of law; it differs in subject matter as well. A constitution is a charter of self-government; it is the means by which the people communicate to their agents the scope of authority that may be wielded in the people's behalf.[230] As a result, according once again to Chief Justice Marshall, the nature of a constitution "requires, that only its great outlines should be marked, [and] its important objects

226. 17 U.S. (4 Wheat.) 316 (1819).

227. 17 U.S. (4 Wheat.) at 407.

228. *See, e.g.*, U.S. CONST. pmbl. ("We the People . . . "); Gardner, *supra* note 225, at 200-13.

229. *See, e.g.*, RAOUL BERGER, DEATH PENALTIES 66 (1982); Henry Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353, 376 & n. 135, 392 (1981); Earl Maltz, *Foreword: The Appeal of Originalism,* 1987 UTAH L. REV. 773, 801-02.

230. *Cf.* THE FEDERALIST, *supra* note 37, No. 10 (James Madison), at 82; No. 2 (John Jay), at 37; No. 46, at 294; No. 78 (Alexander Hamilton), at 467.

designated."[231] To use the current language of the Supreme Court, the Constitution embodies the "fundamental values" of the American people.[232]

Although these principles of constitutionalism are most often associated with the U.S. Constitution, they are generally thought to apply with equal force to state constitutions. The only difference is that the federal Constitution is thought to express the fundamental values and choices of the national polity, and state constitutions are thought to express the fundamental values of the various state polities that have adopted them. Thus, many state supreme courts use the language of "fundamental values" when construing their state constitutions;[233] as Judge Judith Kaye of the New York Court of Appeals has written, the state constitution is "that set of values to which we have bound ourselves, the values that transcend even our currently made choices."[234]

3. *Constitutionalism and Constitutional Discourse*

In addition to their political dimensions, constitutionalism and federalism also suggest a way of thinking about the community-defining aspects of constitutional discourse. Because a constitution is a document that by definition embodies the most fundamental decisions of a polity concerning the ways in which its members want to live their lives, a constitution necessarily reveals a wealth of information about the character of those who, politically speaking, are its authors.[235] To place instructions in a constitution is to say that certain things shall or shall not be done, and to constrain the actions of the government in this way is to say that we are a people who will not tolerate (or who require) certain types of behavior toward one another. The content of a constitution can thus reflect some of the most essential and intimate

231. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

232. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("The Constitution . . . is a document announcing fundamental principles in value-laden terms"); *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (Constitution embodies "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); Spaziano v. Florida, 468 U.S. 447, 471 (1984) (Stevens, J.) (Eighth Amendment reflects "a fundamental value that the Framers wished to secure against legislative majorities").

233. *See, e.g.*, Hatchard v. Westinghouse Broadcasting Co., 532 A.2d 346, 350 (Pa. 1987) (stating that state constitution establishes reputation as "fundamental right[ ]"); Bernzen v. City of Boulder, 525 P.2d 416, 419 (Col. 1974) (stating that state constitution designates recall, initiative, and referendum as "fundamental rights . . . which the people have reserved unto themselves"); Pacheco v. School Dist. No. 11, 516 P.2d 629, 633 (Col. 1973) (Kelley, J., dissenting) (stating that state constitution guarantees "fundamental values" against erosion by legislature).

234. Kaye, *supra* note 5, at 421.

235. *See supra* notes 19-22 and accompanying text; *see also* Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988).

aspects of the character of the people who adopted it, a feature that courts can occasionally exploit in order to assist them in construing the constitution in difficult cases.[236]

In this view, as noted earlier, constitutional discourse transcends the bounds of any particular legal dispute or occasion for judicial action; it becomes instead a forum in which the members of a polity debate their own identity — their character and fundamental values. Under the influence of a robust constitutional discourse, the contours of the constitution thus come to define not merely a body of positive law but the identity and character of the polity itself.

4. *Local Variations in Character*

State constitutionalism, then, holds that a state constitution is the creation of the sovereign people of the state and reflects the fundamental values, and indirectly the character, of that people. An important corollary of this proposition is that the fundamental values and character of the people of the various states actually differ, both from state to state and as between the state and national polities. One can confirm this corollary by simple observation: no two state constitutions are identical, and no state constitution is identical to the federal Constitution. These variations, because they occur in constitutions, are by definition of constitutional dimension; the people who adopted the constitutions could have made them identical but deliberately chose different language and provisions. It follows that these differences reflect differences in the fundamental value choices and character of the people who made the constitutions.

This type of argument appears frequently in New Federalism literature. We are told, for example, that a state constitution must be viewed as "a declaration of certain values held by the citizens of that state" and that the constitution "reflects the geography, history, culture and uniqueness" of the state.[237] Courts, it is said, have a responsi-

236. Certainly the most notable example of this technique is Ravin v. State, 537 P.2d 494 (Alaska 1975). There, the Alaska Supreme Court held that the right to privacy guaranteed by the state constitution required the invalidation of a law criminalizing the possession of small amounts of marijuana in the home. In reaching this conclusion, the court relied explicitly on what it viewed as the unique character of Alaskans:

> The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska. Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

537 P.2d at 503-04. The result in Ravin has since been overturned by passage of a ballot measure. *See infra* note 283.

237. Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 17, 19 (1988); *see also* Abrahamson, *supra* note 29, at 965

bility "to create for each state a jurisprudence uniquely expressive of that state's own constitutional culture and faithful to its own particular traditions."[238] Professor A.E. Dick Howard has summed up this view of state constitutionalism succinctly:

> [N]o function of a constitution, especially in the American states, is more important than its use in defining a people's aspirations and fundamental values. . . .
>
> . . . A state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life.[239]

If the people of the states have unique cultures, traditions, or values — if they have chosen different ways of life — how might these differences translate into constitutional terms? Consider the following comparison:

> The founders of a populist frontier state with a tradition of ferocious individualism, like Washington or Oregon, probably intended to carve out a larger sphere of rights, a larger arena of activity into which the government could not intrude, at least with respect to such matters as bearing arms and avoiding scrutiny, than a more communitarian, homogeneous state like Massachusetts or one with sectarian roots like Maryland. Those latter states, on the other hand, might be assumed to have cared more deeply about matters of religion.[240]

This narrative is a powerful one, for it contemplates potentially different meanings even for constitutions containing identical language. These variations in meaning would stem from variations in the character of the polities, character differences that cause them to embrace as fundamental substantially different values — in this case, the untamed but irresponsible westerner and the domesticated but righteous easterner choose different ways of life.

This type of reasoning seems to hold out the greatest hope for the type of independent state constitutional discourse New Federalism aims for, yet it appears virtually nowhere in the actual discourse of state constitutional law. Why? In the following sections I argue that participants in the legal system do not talk this way for the simple

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(A state's "land, its industry, its people, its history" may be "peculiarities" that will influence interpretation of the state constitution.).

238. Teachout, *supra* note 28, at 19; *accord* NettikSimmons, *supra* note 203.

239. Howard, *supra* note 33, at 14; *see also* Howard, *supra* note 196, at xxiii; Howard, *supra* note 25, at 938-39. Other commentators have taken a similar view. *See, e.g.*, Kaye, *supra* note 237, at 19; Linde, *supra* note 30, at 395; Teachout, *supra* note 28, at 19.

240. David Schuman, *Advocacy of State Constitutional Law Cases: A Report from the Provinces*, 2 EMERGING ISSUES IN ST. CONST. L. 275, 285 (1989); *cf.* Utter, *supra* note 35, at 244 (drawing inferences based on "the vast differences in culture, politics, experience, education and economic status between . . . the Washington framers of 1889 and the Eastern framers of the United States Bill of Rights in 1789 [sic], and the enormous differences of history and local conditions that separated the two conventions").

reason that such talk would make no sense. This is so for three reasons. First, the notion of state constitutions as defining distinctive and coherent ways of life does not accurately describe actual state constitutions and thus cannot furnish a useful way of talking about them. Second, state constitutionalism itself embraces theoretical inconsistencies that impair its usefulness as a framework for state constitutional discourse. Most significantly, state constitutionalism is incompatible with national constitutionalism; indeed, the type of robust state constitutionalism advocated by New Federalism could pose a serious threat to the nationwide stability and sense of community that national constitutionalism provides.

Finally, whatever currency the notion of local variations in character and values might once have had, it is a notion that no longer describes in any realistic way the polities of the present day states. Regardless of what they may once have been, Americans are now a people who are so alike from state to state, and whose identity is so much associated with national values and institutions, that the notion of significant local variations in character and identity is just too implausible to take seriously as the basis for a distinct constitutional discourse.

B. *Conundrums of Character*

Suppose we take seriously the premises of federalism and constitutionalism and apply them to the interpretation of state constitutions — we must never forget, we might say, that it is a state constitution we are expounding. To undertake this task is to encounter significant contradictions and implausibilities in the doctrine of state constitutionalism.

The average state constitution is about four times as long as the U.S. Constitution;[241] the constitutions of Alabama, Oklahoma, and Texas are more than eight times as long.[242] While every state constitution contains a bill of rights and sets out a basic three-branch governmental structure, the additional length of state constitutions is attributable primarily to two factors. First, state constitutions typically cover a much broader scope of subject matter than the federal Constitution. For example, almost every state constitution contains lengthy and explicit provisions about financial matters — how taxes are to be assessed, how revenue bills are to be enacted, how revenues

241. Sturm, *supra* note 69, at 74.

242. *Id.* at 75-76.

are to be collected and spent.[243] Some state constitutions contain detailed provisions relating to aspects of transportation such as highways,[244] railroads,[245] or levee construction and maintenance.[246] Other constitutions contain provisions dealing with corporations,[247] mines,[248] interest rates,[249] lotteries and bingo,[250] and prisons.[251] These are, of course, concerns entirely absent from the U.S. Constitution that are handled on the federal level exclusively as legislative matters.

Second, state constitutions differ from the federal Constitution in the level of detail in which they describe, and therefore the extent to which they constrain, governmental action with respect to subjects covered by the constitution. For example, as Judge Kaye of the New York Court of Appeals is fond of pointing out,[252] the New York Constitution contains a provision specifying the width of ski trails in the Adirondack Park.[253] The California Constitution specifies the way in which taxes are to be assessed on golf courses.[254] The Texas Constitution provides for banks' use of "unmanned teller machines."[255]

If a state constitution reflects the character of the people of a state, what can one say about the character of a people who enshrine these types of provisions in their constitutions — who evidently hold the values expressed in these provisions so dear that they see a need to place them beyond the reach of temporary majorities and transient passions, and to permit their alteration only by future direct action of the people themselves? Can one say of New Yorkers, for example, that they are a people who cherish their liberty to ski? If so, how does such a provision fit in with the other liberties contained in the New York Constitution, such as freedom of speech? Are New Yorkers a people who like to talk and schuss? To ski down a mountain and discuss politics over hot chocolate? If we are to take seriously the notion that the state constitution reveals the character of the people, we may be forced to the unappetizing conclusion that the people of New York,

243. *See, e.g.*, CAL. CONST. art. XIII; N.Y. CONST. arts. 7-8.

244. *See* MINN. CONST. art. 14.

245. *See, e.g.*, OKLA. CONST. art. IX; MO. CONST. art. 11, §§ 9-11.

246. *See* MISS. CONST. art. 11.

247. *See, e.g.*, IDAHO CONST. art. 11; MO. CONST. art. 11; TEX. CONST. art. XII.

248. *See, e.g.*, WY. CONST. art. 9; N.M. CONST. art. 17.

249. *See, e.g.*, CAL. CONST. art. 15.

250. *See, e.g.*, KAN. CONST. art. 15, §§ 3, 3a.

251. *See, e.g.*, MISS. CONST. art. 10.

252. Kaye, *supra* note 237, at 18-19; Kaye, *supra* note 5, at 408.

253. *See* N.Y. CONST. art. 14, § 1.

254. *See* CAL. CONST. art. 13, § 10.

255. *See* TEX. CONST. art. 16, § 16.

or California, or Texas are simply a frivolous people who are unable to distinguish between things that are truly important and things that are not.

In a similar vein, consider that Louisiana has had eleven constitutions since it became a state, and that Georgia has had nine, South Carolina seven, and Virginia, Alabama, and Florida six each.[256] The Alabama Constitution has been amended over five hundred times,[257] the California and South Carolina Constitutions over four hundred times, and the Texas Constitution more than two hundred times.[258] If these histories also reveal the character of the people of the states, they reveal people who are fickle and unreflective — people who do not know what they want, who change their mind frequently, and who are apparently incapable of learning from their mistakes.

Conclusions such as these strike powerfully at the premises of constitutionalism. A people who are frivolous, or fickle, or unreflective, are a people not worthy of respect. And a people whom we cannot respect are not a people to whom we can comfortably attribute an overall constitutional plan, a meaningful history of purposeful debate, or a coherent political theory — the very factors noticeably absent from state constitutional discourse. Moreover, this suspicion of the people and of their constitution severely constrains the way in which it is possible to talk about the meaning of the constitution. To be sure, we will always have the text of individual provisions, and there may be some sort of legislative history associated with each such provision. But we may feel extremely uncomfortable in these circumstances adding political, ethical, historical, or structural considerations to the state constitutional discourse because we may feel unable to construct a coherent story about the meaning of the constitution that includes these elements. Again, these elements are generally missing from state constitutional discourse, and their absence can make state constitutional interpretation seem like ordinary statutory construction.

An objection might be raised at this point. Perhaps, it might be said, the seemingly frivolous nature of some state constitutional provisions and the frequency with which state constitutions are amended merely suggest that we are looking for the wrong kind of constitutional meaning. Of course it is ludicrous to suggest that a provision governing the width of ski trails reflects a fundamental value of the people of New York. It is far more likely that such a provision is

256. Sturm, *supra* note 69, at 75-76.

257. *See* ALA. CONST. (Michie 1991).

258. Sturm, *supra* note 69, at 78-79.

merely the result of a political compromise, perhaps among environmentalists and development interest groups, and it should be treated as such. It is accordingly a mistake to invest the provision with any more portentous meaning.

If such provisions are merely political compromises — and that certainly seems like a plausible explanation — they pose no less a threat to our notions of constitutionalism than does the idea that the people are incompetent. According to the conventions of constitutionalism, a constitution is not supposed to be the outcome of pluralistic political bargaining on matters of everyday concern; that is the role played in our system by statutory law. Rather, constitutionalism assumes that a constitution is the consensual act of a united society; it is viewed as the outcome of a process of deliberation meant to identify matters of fundamental importance to the people and to place those matters in a constitution specifically to protect them from the quotidian predations of pluralistic power struggles.[259]

To the extent that a constitution or a particular provision departs so far from this model that it cannot plausibly be viewed as anything other than the result of pluralistic logrolling, constitutional discourse is correspondingly impoverished. One cannot plausibly claim a meaning rooted in political theory, or justice, or the framers' deliberations on fundamental principles, for a constitutional provision that can only be explained as the result of a political deal among interest groups. Of course, it is not necessarily impossible to create a rich story about a constitutional provision just because it resulted from compromise. Our federal constitutional tradition has done just that by elevating some of the overt compromises appearing in the federal Constitution to near-mythical status, such as the Great Compromise that created popular representation in the House and representation by state in the Senate — a compromise viewed as so historically significant that we have named and capitalized it.[260] But the basis of legislative representation is still very different from the taxation of golf courses or the width of ski trails, and it somehow seems improbable that a similar myth could emerge about a constitutional provision such as California's or New York's.

Robert Cover once wrote: "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.

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259. *See supra* notes 228-36 and accompanying text.

260. Another compromise prevented regulation of the slave trade until 1808, U.S. CONST. art. I, § 9, cl. 1. This feature of the Constitution plays a prominent role in the story of the Civil War and the subsequent Reconstruction Amendments.

For every constitution there is an epic . . . ."[261] Yet state constitutions are hard-pressed to generate epics to give them meaning. When we turn upon state constitutions the narrative devices we use to create constitutional meaning on the federal level, we find state constitutions wanting. The stories to which they lend themselves are not stories of principle and integrity, but stories of expediency and compromise at best, foolishness and inconstancy at worst. And the poverty of state constitutional discourse merely reflects the limited narrative possibilities that state constitutions offer to erstwhile interpreters.[262]

But if this description is accurate, it reveals yet another contradiction. We cannot seriously be willing to accept the conclusion that the people of the states are incapable of competent constitutional self-government. In fact, we know such a proposition to be false because every state citizen is also a citizen of the United States, and therefore, politically speaking, an author of the U.S. Constitution. Yet the U.S. Constitution is not only a vehicle of competent constitutional self-government, but a model emulated throughout the nation and the world. As noted earlier, it is the focus of an extraordinarily rich constitutional discourse — one providing the material for a true epic — that allows U.S. citizens to debate the meaning of the Constitution and, by so doing, to debate their own identity.[263] By taking seriously the premises of state constitutionalism, we seem driven to the position that the people of the United States are simultaneously both competent and incompetent practitioners of constitutional self-government.

What can explain these contradictions? The next section argues that the divergence between the pedestrian reality of state constitutions and the grand predictions of state constitutionalism can be explained in part by two factors: the incompatibility of state and federal constitutionalism, and American society's choice to adopt a national rather than a state identity.

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261. Robert M. Cover, *Foreword: Nomos and Narrative,* 97 HARV. L. REV. 4, 4 (1983).

262. Even Hans Linde himself, one of the guiding forces behind New Federalism, has recognized this aspect of state constitutional law. State constitutions, he has written, "demystify constitutional law. . . . They have drafters, yes, but no 'Founders'; no Federalist Papers; no equivalence of constitution and nationhood; no singularity[;] . . . no sanctified judges; certainly no claim as a 'civil religion' or as the perfect embodiment of justice, when there are forty-nine others." Linde, *supra* note 5, at 197 (footnote omitted). Linde goes on to ask why, if a constitution does not enshrine "strongly held values," we ought to respect it. *Id.* at 198. His answer simply falls back on convention: "Any student of state constitutions knows that some of their provisions deserve very little respect, but they are nonetheless the law . . . ." *Id.*

263. *See supra* notes 19-24 and accompanying text.

C. *The Incompatibility of State and Federal Constitutionalism*

1. *The Framework of Nationhood*

Certainly one of the foundational and indispensable beliefs of American political and social life is that we are a nation, which is to say that we constitute collectively a certain community. To have a sense of community sufficient to sustain such a belief is to have, as Robert Burt has pointed out, "an acknowledged common identity" capable of transcending disputes and differences that arise among us.[264] Under what conditions can such a common identity exist? According to James Boyd White, a community is, on the most basic level, "a group of people who tell a shared story in a shared language."[265] On this view, discourse is a critical element of the communal relationship: The "community talks itself into an historical identity."[266]

One way discourse accomplishes this task is by revealing and maintaining the common values of the members of the community.[267] The existence of such values is a necessary condition for the emergence of a community; as Kenneth Karst has put it, American nationhood rests on a shared culture, national in scope, consisting of, at minimum, "a set of universal norms."[268] Moreover, such a community cannot be forced into existence or declared to exist by fiat;[269] it can arise "only as a by-product of the shared pursuit of more tangible goals and activities."[270]

For Americans, discourse, values, and activities all intersect in the U.S. Constitution: it is a text, and thus a form of discourse; its subject matter is the values of society; and it is used in a real way as part of the activity of self-governance. As a result, the Constitution performs a highly important function in not only symbolizing American nationhood, but in constituting it as well.[271] It serves as a focal point for the creation and perpetuation of a plausible narrative identity for the

264. Robert A. Burt, *Constitutional Law and the Teaching of the Parables,* 93 YALE L.J. 455, 456 (1984).

265. WHITE, HERACLES, *supra* note 14, at 172.

266. Kahn, *supra* note 20, at 3.

267. *Id.*

268. KENNETH L. KARST, BELONGING IN AMERICA 28-31, 31 (1989).

269. *See* Burt, *supra* note 264, at 486; *cf.* Milner S. Ball, *Stories of Origin and Constitutional Possibilities,* 87 MICH. L. REV. 2280, 2315 (1989) (arguing ideas cannot transform the popular will).

270. KARST, *supra* note 268, at 180 (quoting DENNIS H. WRONG, SKEPTICAL SOCIOLOGY 79 (1976)).

271. KARST, *supra* note 268, at 177; WHITE, HERACLES, *supra* note 14, at 41; *see also* KAMMEN, MACHINE, *supra* note 17, at 68-94; Note, *Amendomania, supra* note 26, at 281 (noting that California Constitution is "totally unfit to be a popular ideological rallying point or symbol").

national community and its individual members.[272]

But if the Constitution helps create and define a national identity, it also helps to set limits — both for the community and for its individual members — on what that identity can be.[273] If we as a nation are a community that holds certain values, then it becomes difficult for those who consider themselves to be members of the community to hold different or incompatible values and to act on them. Suppose, for example, that the Constitution embodies "a fundamental value determination of our [national] society that it is far worse to convict an innocent man than to let a guilty man go free."[274] If so, society would be extremely hard-pressed to tolerate behavior by individuals or subgroups based on the notion that the goal of pursuing the guilty justifies inadvertently harming the innocent. If we are a people who value justice, one might say, can we also be a people who value expediency?

It is in this sense of constraining identity — what Robert Cover called the "jurispathic" function of law[275] — that the existence in our system of state constitutions is in tension with the premises of national constitutionalism and may even pose a genuine threat to it. Our constitutional language and culture hold the U.S. Constitution to be the repository of the fundamental values of the national community, a community to which every citizen belongs. When we apply the same conventions to state constitutions, we are led of course to the same conclusion: state constitutions are also the repository of fundamental values, but the values are those of the peoples of the individual states.

This arrangement is workable, although seemingly redundant, as long as the state and federal constitutions are congruent. But if they differ, the conventions of constitutionalism compel the conclusion that the values embodied in the state constitution are fundamental to the people of the state but not to the people of the nation, and vice versa. This, too, would be untroubling were it not for the fact that the members of the state community are also members of the national community. Thus, when a state constitution conflicts with the national Constitution, we can only conclude that the people of that state consider certain values fundamental for themselves, but not for the rest of us.

Even on the most basic level, this type of divergence can be unsettling. If a value is good enough to be fundamental to the people of the

272. *See* Ball, *supra* note 269, at 2282-87 (discussing the American story of national origin).

273. *See* Kahn, *supra* note 20, at 5 ("Individual identity does not exist apart from the discourse that creates and sustains the community.").

274. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

275. Cover, *supra* note 261, at 41-42.

state, one might say, why isn't it good enough for everybody? There is something vaguely selfish and hostile about the people of a state going off to their own corner and making up rules for their own self-governance that they think superior to the ones the rest of the country has decided to use. And even were this not the case, it is difficult to accept the idea that fundamental values on which all Americans agree can really differ significantly from place to place. Can the elements of basic human dignity, for example, really mean something very different to the inhabitants of Ohio and Indiana?[276]

More importantly, though, discrepancies between the state and federal constitutions can also be viewed as unintelligible inconsistencies — the same individuals, it seems, have given two different, and possibly incompatible, accounts of the values they hold fundamental. For example, the national community holds the imposition of cruel punishments to be morally wrong;[277] this belief defines a people whose character is such that they recoil at the idea of using torture for any purpose, no matter how worthy the goal. Suppose the people of a state adopt a constitution lacking such a provision, or repeal a similar provision in the present state constitution. Can we then say that such a decision reveals a character that is untroubled by the use of torture? Such an inference embraces another contradiction: how can the same person simultaneously have both types of character? Constitutionalism itself rejects such a possibility — if a constitution reflects the character of a people then it cannot simultaneously reflect the opposite of their character.[278]

Furthermore, attempting to salvage the character principle as an explanation for constitutional differences tends to reduce the concept of character to triviality. Consider a fairly common instance in which a state's constitutional law may differ from federal constitutional law or from the constitutional law of other states. Until 1983, the U.S. Supreme Court interpreted the Fourth Amendment to preclude the issuance of a search warrant on the tip of an anonymous informant

276. *Cf. Project Report, supra* note 25, at 277 ("If a coerced confession was repugnant to human dignity why should it matter which government happened to be exacting it?").

277. *See* U.S. CONST. amend. VIII.

278. A dedicated postmodernist might say that I have done nothing more here than describe the postmodern condition — this is simply how we live our lives, participating in many inconsistent activities and discourses, and that is just the way it is. The postmodern outlook thus deals with such contradictions not by resolving them but by accepting them as inevitable. For an interesting response to this view, see ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988). In any event, the postmodernist answer does not help here; as a participant in the discourse, a court is obliged to avoid inconsistencies, or at least the appearance of inconsistency. To embrace inconsistency would be to appear to abandon the ideal of the rule of law, an act that could have seriously destabilizing ramifications for society.

unless the warrant application satisfied a two-part test designed to assess the informant's veracity and the basis of the informant's knowledge — the so-called *Aguilar-Spinelli* test.[279] In *Illinois v. Gates*,[280] the Court abandoned the two-prong *Aguilar-Spinelli* test and adopted the so-called "totality of the circumstances" test, a standard more favorable to the state. Inevitably, numerous states were asked to apply parallel provisions of their state constitutions to cases like *Gates*. Prosecutors of course argued that the state provisions called for the totality of the circumstances test, and defendants argued that the earlier *Aguilar-Spinelli* standard better captured the state's constitutional standards. Several states reached this issue as a matter of state constitutional law; some adopted the *Gates* test and others rejected it.[281]

Leaving to one side the contradictions pointed out above, it is simply implausible that these different constitutional doctrines can be attributed to differences in the fundamental character and values of the people of the states. What possible trait of *character* could cause someone to prefer a "totality of the circumstances" test for issuing a search warrant to a two-prong informant reliability test? To say that "we are a people who use the totality of the circumstances test" is to speak gibberish; it is like saying "we are a people who eat our stew with a fork instead of a spoon." Such preferences undoubtedly exist, but they cannot plausibly be traced to any *fundamental* value or character trait.

Of course, on some level every difference in personal preference or behavior must be traceable to some personal trait that differs from the traits of others who behave differently in similar circumstances; if that were not the case then everyone would reason and behave identically. But to call all such variations differences of character would be to reduce the concept of character to triviality: it would account for everything, and thus nothing.

2. *The Dangers of a Robust State Constitutionalism*

At this point, the following objection might be raised. These contradictions and implausibilities are interesting, it might be said, but suppose that the people of a state just do really happen to have a character that differs from the people of other states or of the nation. Sup-

279. *See* Spinelli v. United States, 393 U.S. 410, 415-19 (1969); Aguilar v. Texas, 378 U.S. 108, 113-15 (1964).

280. 462 U.S. 213 (1983).

281. *Compare* State v. Arrington, 319 S.E.2d 254, 260-61 (N.C. 1984) (adopting *Gates*) and State v. Walter, 670 P.2d 1354, 1358 (Kan. 1983) (same) *with* State v. Jackson, 688 P.2d 136, 143 (Wash. 1984) (rejecting *Gates*) and State v. Kimbro, 496 A.2d 498, 507-08 (Conn. 1985) (same) and Commonwealth v. Upton, 476 N.E.2d 548, 556 (Mass. 1985) (same).

pose it happens that the inhabitants of a state disagree collectively with enough aspects of the national Constitution, or disagree so vehemently with a single aspect of the Constitution, that these disagreements can only be understood as reflecting actual differences in character between the people of the state and the people of the nation. Wouldn't their constitution, if it embodied these differences, then reflect fundamental differences of character in the way state constitutionalism predicts?

The answer of course is yes, by definition. However, while nothing makes such a development impossible as a factual matter, it would pose a problem of some seriousness and potential danger to the people of the state and of the nation and is thus an inference to be avoided if possible. Suppose, to return to the previous example, that a refusal to embrace the totality of the circumstances test somehow indicated a character fundamentally different from the character that people must possess in order to be members of the national community. If that were the case, then it is possible that the community would have to redefine and reorganize itself, perhaps by casting out the minority who no longer share the dominant national identity. The world stage today is filled with nations that are breaking apart, sometimes violently, apparently due to the perception among subgroups that the national identity is not one in which they can participate — for example, Croats in Yugoslavia, Lithuanians in the former Soviet Union, Tibetans in China, Kurds in Iraq, Tamils in Sri Lanka, Sikhs in India, Quebecois in Canada.

Indeed, the United States itself went through its bloodiest crisis, the Civil War, as the result of just such a domestic conflict over the shape of the national character. One's attitude toward slavery is something that can quite plausibly be viewed, and was viewed, as reflecting a fundamental aspect of character. Once those on each side of the slavery issue came to view those on the other side as having an identity incompatible with their own, the stage was set for secession and war. It can thus be dangerous for the people of a state to say too vehemently and too often, "We are fundamentally different from the rest of the nation." To talk in that way may be to contribute to conditions making it difficult for the state to consider itself, and to remain, a part of the nation. This danger may well account at least in part for state courts' reluctance to make too much of constitutional differences.

3. *The National Focus on Fundamental Values*

If national and state constitutionalism are incompatible — if only one constitution at a time can ever truly and safely reflect the essential

character and fundamental values of a people — then one form may have to yield to the other. The vigor of federal constitutional discourse and the poverty of state constitutional discourse suggest strongly that this theoretical fault line has shifted in our society, and that national constitutionalism has prevailed over its state cousin. In other words, state constitutional variations simply cannot be understood to reflect local variations in character and fundamental values.

But is this really a justifiable conclusion? Isn't it true that Oregonians have roots in a frontier culture characterized by extreme individualism, and that Massachusetts society has its roots in Puritanism and social homogenization? And aren't such differences properly viewed, notwithstanding any danger, as differences in character? I think not. The tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and the coalescence of a social consensus that fundamental values in this country will be debated and resolved on a national level. Thus, regardless of whether such regional differences existed in the past, they no longer exist and we may for the most part disregard them as viable elements of state constitutional discourse.

First, in the modern world, any serious variations in the character of the people of individual states must have an extremely short half-life. The national Constitution guarantees a right to travel among the several states,[282] and the ease of mobility and the national structure of the economy all but guarantee quick dilution of any truly significant local traits.[283] Indeed, with the help of modern communications technology such dilution can occur without anyone traveling at all. We all watch the same national news and the same prime-time television shows; we listen to the same music on the radio; we shop in malls with the same stores; we eat at the same chain restaurants. It is difficult to see how any truly fundamental character differences could stand up against such a cultural assault.

Some might object that these recent developments are irrelevant to

282. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

283. *Cf.* Pollock, *supra* note 35, at 986 (arguing that the national economy and mobility reduce attention to distinct local traits). Perhaps the most dramatic example of this phenomenon is the popular overturning in Alaska of Ravin v. State, 537 P.2d 494 (Alaska 1975). In that case, the court relied on the "individuality" and desire for "control over their own lifestyles" of Alaskans to strike down a law criminalizing marijuana possession on state constitutional grounds. 537 P.2d at 504. Fifteen years later, the people of the state overturned this decision by ballot initiative. *The 1990 Elections: State by State,* N.Y. TIMES, Nov. 8, 1990, at B8, B9; *see also* Richard Maver, *Alaskans to Vote on Marijuana Use,* N.Y. TIMES, Oct. 25, 1990, at A17, col. 1. This suggests that the Alaskan character of rugged individualism did not hold out for long against the nationwide hardening in attitudes against drug use.

the interpretation of state constitutions that predate such social changes. But even if one were inclined to accept the argument that contemporary attitudes are completely irrelevant to constitutional interpretation,[284] a view held in its strict form by virtually no one,[285] the objection is still unavailing. Most states have adopted their current constitutions, or so significantly amended them, in comparatively recent times that it is difficult to argue that the constitutions cannot be read to incorporate attitudes toward nation and state of relatively recent vintage.

Moreover, I think it is fair to say that at this stage in our national life, Americans tend to focus on and debate issues concerning fundamental values primarily on a national level.[286] In a recent poll, over half of those surveyed did not even know that their state had its own constitution.[287] It is difficult to debate an identity expressed in a constitution you do not know exists. Further, national interest and advocacy groups seem to set the agenda of ethical and political issues that people consider fundamental, and to dominate the ensuing debate. And the national reach of even local media allows people to debate these issues with opponents from all parts of the country, not merely from their own state. The abortion debate illustrates this nicely. A great many people, even some who are well informed, labor under the misconception that if the Supreme Court overrules *Roe v. Wade,* abortion will be illegal; it does not even occur to them that such a ruling would only shift the debate to state forums.

So accustomed have Americans become to debating fundamental moral and policy issues on a national level that, paradoxically, state involvement in such issues can sometimes seem vaguely antidemocratic. For example, you become active in a national issue group, attend rallies, write your congressional representatives, and otherwise slug it out with your opponents. Suppose your side wins. The democratic system has worked, and according to the rules of the

284. Two leading exponents of this view are Raoul Berger and Robert Bork. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Robert Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

285. Judge Vito Titone of the New York Court of Appeals has argued that a noninterpretive method of constitutional interpretation is more appropriate for state constitutions than for the federal Constitution because of the recency and ease of amendment of state documents. Titone, *supra* note 215, at 471.

286. *See* Spaeth, *supra* note 31, at 736 ("[W]hen we think of our natural rights . . . we think of rights protected by the federal Constitution, not by the constitution of the state where we happen to live."); Teachout, *supra* note 28, at 14 ("For most of our history the constitutional law that has been most important in shaping our culture has been a national constitutional law.").

287. Robert F. Williams & Earl M. Maltz, *Introduction,* 20 RUTGERS L.J. 877, 878 n.4 (1989) (citing John Kincaid, *State Court Protections of Individual Rights Under State Constitutions: The New Judicial Federalism,* 61 J. STATE GOVT. 163, 169 (Sept./Oct. 1988)).

game your opponents must take their lumps and abide by the decision of the majority — the issue is settled. But when the state chapter of your group starts sending you urgent notices that your position is under attack on the state level, you may well feel betrayed; this battle has been won, and the other side should just go away. Trying to slide something by on the state level seems like poor sportsmanship, if not some kind of political dirty trick.

Corresponding to the national focus of the debate on values is the general absence of public identification with the polity defined by the state. We have no trappings, no rituals, no conventions that could serve even to keep the state in our thoughts. How many people, for instance, own a state flag, or even know what it looks like? How often do governors make televised addresses to the people of the state? As Professor Karst has pointed out, "Before the small-town basketball game begins, the high school band plays 'The Star-Spangled Banner.' "[288]

D. *The Nature of State Constitutional Differences*

We have seen that attributing differences among the various state and federal constitutions to variations in the character of the relevant polities is contradictory, counterfactual, and potentially dangerous. Yet state constitutions do differ, and those differences can have significant legal effects. If constitutional differences do not result from local variations in the character and values of the people, how can we account for them and what interpretation should we give them? The answer, I suggest, lies in treating character itself as a more complex phenomenon than proponents of New Federalism are wont to do.

Consider our notion of dissent. Many constitutional decisions of the U.S. Supreme Court are not unanimous; different Justices have different views about how the Constitution applies in particular circumstances, which occasionally leads them to dissent. Yet we do not consider a divided Supreme Court opinion to impugn in the least our belief in the reality of our nationhood, nor do we attribute such differences in opinion among the Justices to particularized personal attributes that rise to the level of ontological significance. Indeed, to attribute a dissent to a truly fundamental difference of character between the dissenters and the majority would be to question the extent to which the dissenters can really be a part of the national community — it would be, in essence, to question whether they are real Americans. Of course, questioning the Americanism of those with whom we

288. KARST, *supra* note 268, at 180.

disagree is unfortunately an all too commonly employed rhetorical device. But responsible people avoid such accusations because of the danger they pose to the stability and coherence of the national community — we have no real wish to become a people who cast out those who disagree with the majority.

The idea of dissenting opinions furnishes a useful model for thinking about state constitutional variations. A dissenter in a constitutional case is one who disagrees with the majority about the meaning of the constitution, yet is nonetheless someone we can still consider to be a member of society — someone who shares our fundamental sense of identity and the values that help constitute that identity.[289] That dissenters can exist within a society without significantly disrupting it reveals an important aspect of communal identity: a community is not composed of uniform individuals who share every attitude and value. Rather, society is textured in an irregular, clumpy way; some people embrace society's dominant values more firmly than others, or embrace certain values and not others, or hold idiosyncratic views about what behavior society's values require in certain situations. Yet all these people may nevertheless share essentially in the communal identity.

Of course, there are limits to how far any individual can wander from the mean and still be a person capable of sharing in the communal identity. Those who roam beyond the tolerable boundaries of communal identity might be people so fundamentally different from the members of the community that we may justly describe them as having a different character. But it seems clear that the character of a workable national community must be sufficiently broad to embrace a great deal of individual variation.

This notion of clumpy, irregular variations of a single national character offers a better model of state-to-state differences in the populace than does the notion of fundamental character variations from subgroup to subgroup. Taken together, the views of all members of the national community yield a certain national profile. But because of the irregularity of variations from the national mean, the views of any given subgroup of the community, such as the people of a state, might yield a profile somewhat different from the national one. This does not mean, however, that the people of the state possess a different character from the people of the nation; it means only that they pos-

289. *See* Burt, *supra* note 264, at 456 (stating that adjudication in a democracy depends on "an acknowledged common identity that transcends the divisive implications of the immediate dispute").

sess the various elements of the national character in slightly different proportions than does the nation as a whole.

On this view, differences among state constitutions and between the federal and state constitutions do not reflect the fundamentally distinct choices of fundamentally distinct groups; rather, they reflect the varied outcomes of constitutional bargaining among essentially similar subgroups distributed in slightly different proportions within each state. That is, the subsets of the populace defined by the states, when given the opportunity to draft their own constitutions, come up with documents that differ from the national one to the same extent that views represented on the national level are represented in different proportions within the state. Of course, to take this view is to reject state constitutionalism as New Federalism conceives it; as explained earlier, the idea that state constitutions result from political bargaining and opportunism rather than deliberation and choice is an idea that conflicts with the premises of constitutionalism.

VI. Some Possible Resolutions

If the assumptions and predictions of state constitutionalism do not mesh with the realities of national identity, is there any way to resolve this tension? How, in other words, should we treat state constitutions if the assumptions of constitutionalism do not adequately describe them? In this Part, I touch briefly on three possible ways out of the current impasse.

The first solution, and the one most consistent with the tenets of New Federalism, would be to revise state constitutions to make them the reflections of the fundamental values and character of the state polities that constitutionalism says they ought to be — to conform reality to theory. This would be a task of monumental proportions and probably quite impossible. It would require at a minimum the wholesale amendment of state constitutions to eliminate frivolous, overtly political, and excessively technical provisions that undermine the sense of seriousness that state constitutions convey. But even more, it would require a widespread reorientation of attitudes toward the state. It seems highly unlikely that state constitutions could plausibly be refashioned into true reflections of the character of the people of the state so long as the people continue to identify so little with the community that the state polity theoretically defines.

The only way out of this dilemma is to convince the people of the states that they really do constitute unique communities that differ in fundamental ways from the communities defined by neighboring states and by the nation. But it is doubtful that such an effort could succeed

at this point. Americans' identities have drifted so far from association with the states and are so closely woven into a national identity that the trend seems all but irreversible. Moreover, it is not at all clear that reorienting attitudes in this way would be ultimately beneficial. Convincing the people of the states that they constitute unique communities means convincing them that they differ from one another in significant ways. But convincing them that they are different makes them so — such a belief takes on a reality by its own force. Unfortunately, fostering the cleavage of society in this way threatens the stability of the national community: if the people of a state embrace an identity that makes them different from the national community, they may view themselves as too different to remain part of the national community. As I suggested earlier, this path is potentially dangerous, and the threat to national stability posed by stressing differences at the expense of unity seems to counsel against such an approach to state constitutionalism.

If conforming reality to theory proves unworkable, a second approach might be to conform theory to reality by abandoning the strongest claims of state constitutionalism and recognizing that state constitutions simply do not and perhaps cannot reflect the fundamental values and character of distinct state polities. Such an approach might require, for example, that a state constitution be treated as a unique type of document without analogue in our universe of legal documents; a state constitution might thus be viewed as something less than a "real" constitution such as the U.S. Constitution, but something more than a statute. Perhaps state constitutional provisions might be viewed, like statutes, as outcomes of frankly pluralistic power struggles, but concerning subjects that the polity wants for some reason to remove from the political agenda for some period of time. Indeed, this seems to be the direction in which state supreme courts have moved; they are generally unwilling to invoke the grandest interpretive strategies of constitutionalism, but are nevertheless forced to treat constitutional positive law as somehow different from ordinary statutory law. This waffling helps account for the unsettled and unsettling status of state constitutional discourse.

The problem with such an approach, however, lies in justifying its place in a legal system dominated by the conventions of constitutionalism. We seem to lack conventions capable of explaining convincingly why state constitutions serve any particularly valuable function. Why, for example, would the people of a state want to elevate some political decision to constitutional status, thereby placing it beyond the easy reach of the legislature to alter, if the decision expressed in the provi-

sion is not one that the members of the polity consider particularly fundamental? Seen from the perspective of the conventions of constitutionalism, such a decision seems odd and perhaps inexplicable. These conventions tell us, for example, that fundamental things belong in a constitution and everything else should be a matter of statutory law. There is nothing wrong with resolving highly important social issues by statute, nor is a legislature ever forced to tinker with a political compromise worked out in statutory form. The only reason a legislature might want to disturb a politically sensitive compromise would be some felt need to adjust it; and the materialization of such a need would only validate the initial decision to deal with the matter by statute, since the original solution could be easily reformulated by subsequent legislation rather than by constitutional amendment. Indeed, the conventions of constitutionalism can make this type of state constitutional law seem downright antidemocratic — a constitutional amendment becomes a cheap trick pulled by the legislative majority to elevate a temporary political victory to semipermanent status.[290]

What this discussion shows, I think, is that we currently lack a set of conventions justifying an intermediate place for state constitutional law and guiding us in its use and interpretation. If we are to clarify the role of state constitutions enough to make them useful, we need to develop such conventions. It is quite possible, moreover, that no such conventions can be developed without amending the political theories of federalism and constitutionalism from which the extant conventions are derived. This in turn raises the possibility that the development of new conventions for the interpretation of state constitutions might threaten the conventions governing national constitutionalism. Routinely treating state constitutions as reflecting anything less than the fundamental values and character of the people of the state could gradually erode the respect — some say reverence — for constitutions that underlies the significant place of the federal Constitution in our political system.[291] The threat of such loss of respect may well be what prevents state supreme courts from frankly abandoning the view that state constitutions express fundamental values,[292] and leaves them floundering in the no-man's land of current state constitutional discourse.

290. *See* Williams, *supra* note 34, at 175 (questioning whether state constitutions are "expressions of what is thought to be the best structure of government and statement of people's rights," or "instruments of lawmaking through which interest groups . . . seek the grand prize of lawmaking, striving to achieve constitutional status for the policy they advocate").

291. *See, e.g.*, Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS 33, 35 (1988); KAMMEN, MACHINE, *supra* note 17; Linde, *supra* note 5, at 197.

292. *See supra* note 233 and accompanying text.

A final way to resolve the conflicts between the theory and practice of state constitutionalism is sufficiently radical that I will offer it here not as a serious proposal, but as a guidepost against which other solutions can be judged. The resolution is this: if Americans really do not identify in any meaningful way with their state polities, perhaps the concept of statehood has outlived its usefulness and should be abolished. We might therefore restructure our political institutions to correspond to the communities with which we actually identify. With what communities do we identify? Clearly Americans identify strongly with a national community, and a vital role remains for a constitution national in scope.

But what about identity on a more local level? While I believe that few Americans identify themselves with a community purporting to embrace an entire state, I think that most Americans identify themselves rather strongly with a community embracing their hometown and the immediately surrounding area. The thought "we are a people who . . ." seems to have far greater currency when applied to the people of a local community or county than to the people of a state; it seems more plausible to claim that the people of a major metropolitan center have a different character from and hold different values than the people of a rural farming community, even when both communities are in the same state. Yet localities in our system have political control over comparatively few aspects of daily life.[293]

Perhaps what needs to be done is to greatly reduce the role of the states in our political life by redistributing the bulk of state powers between the national government and some level of local government, such as the municipal or county level. This could potentially maintain the significant degree of local control over political decisions that state government offers, while at the same time adjusting the level at which political power is exercised to correspond to the communities with which ordinary people actually identify.

Of course, the actual distribution of powers between national and local government might make a tremendous difference in the workability of such a plan. In addition, it is always possible that a new variety of county or local constitutionalism could lead to a degree of balkanization even less compatible with nationhood than whatever threat a revitalized state constitutionalism might pose. On the other hand, such a redistribution, if it worked, could offer substantial social benefits; perhaps, for example, citizen participation in the political life of the community might increase if citizens identified more readily and

293. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

personally with the government making the decisions that affected them.

CONCLUSION

Oscar Wilde once wrote: "There is only one thing in the world worse than being talked about, and that is not being talked about."[294] Wilde's observation has proved true for state constitutions — they are generally not talked about, but even when they are talked about the talk is usually garbled or unintelligible. I have argued in this article that the silence and uneasy confusion surrounding state constitutions results from our lack of a language in which to speak about them, our lack of a language in which we can comprehensibly debate their meaning.

This is indeed a strange state of affairs. State constitutions seem like important artifacts of our legal system; they are uniformly viewed by participants in the legal system as authoritative sources of positive law that state governmental actors must unfailingly obey. How is it possible that we could lack a useful language in which to speak about such a prominent feature of the legal landscape? The truth, I suggest, is that this question is based on false premises.

People develop the languages they need to develop. They do so when they require a language to help them accomplish some purpose or goal they have set for themselves. When speaking a language fails to accomplish a purpose thought to be worth accomplishing, there is no need to speak it and the language will either disappear or will fail to emerge in the first place. The absence of a language suitable for debating the meaning of state constitutions — a state constitutional discourse — thus suggests that society has no particular need for such a language; debating the meaning of a state constitution is not thought to be an activity particularly worth pursuing. How can this be?

We understand a constitution to be a document that defines a community by identifying its members and by setting out many of their fundamental choices about the way they want to live their lives. A language that allows members of a community to debate the meaning of their constitution allows them to debate their own choices and values, and ultimately their own identity. For a community to lack a language in which to debate the meaning of its constitution can therefore mean only one of two things: either the community has no need to debate its identity, or the community that the constitution supposedly defines does not really exist. Human nature itself precludes the

294. OSCAR WILDE, THE PICTURE OF DORIAN GRAY 2 (John Lane 1925).

first possibility; if discourse creates identity, then no community could exist for long without developing a need for a language in which to debate the nature of its identity.[295] That leaves the second possibility — the communities in theory defined by state constitutions simply do not exist, and debating the meaning of a state constitution does not involve defining an identity that any group would recognize as its own.

I have argued that this is indeed the case. Americans have a communal identity, but it is a national and not a state identity. We debate our fundamental values and our identity through constitutional discourse, but we do so on a national level, as a national community. Residency in one state rather than another is not viewed as an aspect of individual or group identity, or if it is, it has come to represent aspects of identity that are not bound up with the types of decisions that make us who we are in any kind of essential way. As long as this continues to be the case, state constitutional law is likely to remain marginal to legal life, and future battles over the nature of the American character and communal identity will have to be fought, like their predecessors, on a national level in the forum of federal constitutional law.

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295. *See* WHITE, HERACLES, *supra* note 14, at 140 ("[T]elling stories about the world and claiming meanings for them" is "as universal and deeply rooted in human nature" as any "intellectual activity" can be.).

Addendum R

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Textualist Canons: Cabining Rules or Predilective Tools

Stephen M. Durden

Textualist Canons: Cabining Rules or Predilective Tools

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INTRODUCTION

Justice Scalia proclaims homage to the "dead" Constitution.[1] Justice Brennan honors the "living" Constitution.[2] Others believe in "a partially living and partially dead Constitution."[3] But, whichever moniker selected, constitutional analysis remains (to the interpreter) personal; however, personal does not necessarily mean irrational or even singular (i.e., that no one else agrees with the interpretation). Rather, personal means that no matter how narrow the interpretational method, an interpreter of the Constitution inevitably makes personal choices when using any interpretational method - choices not required by, or perhaps even inconsistent with, the chosen interpretational method.

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* Professor of Law, Florida Coastal School of Law. I can never thank my family and friends enough.

1. *See generally* Sanford Levinson, *Our Schizoid Approach to the United States Constitution: Competing Narrative of Constitutional Dynamism and Stasis*, 84 IND. L.J. 1337, 1346 (2009) (describing Antonin Scalia as "the proud devotee of a 'dead' Constitution"); Reva B. Siegel, *Heller and Originalism's Dead Hand-In Theory and Practice*, 56 UCLA L. REV 1399, 1408 (noting that in "many speeches" Justice Scalia has called for a "dead constitution"); Roy L. Brooks, *Toward a Post-Atonement America: The Supreme Court's Atonement for Slavery and Jim Crow*, 57 U. KAN. L. REV. 739, 747 (2009) (describing Justice Scalia's "dead constitution"); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976) (discussing a "dead" Constitution nearly 35 years ago).

2. *See generally* James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J.L. & PUB. POL'Y 189, 199 (2000) (recognizing the sophisticated arguments in support of Justice Brennan's "living" Constitution); Bernard Schwartz, *"Brennan vs. Rehnquist" – Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213, 239 (1994) (discussing the interpretational approaches used by Brennan and Rehnquist); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 263 (2009) (describing Justice Brennan as "a leading proponent of the theory of the living constitution").

3. *See generally* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559 (2006) (discussing the author's opinion that "we have a partially living and partially dead Constitution").

This Article uses canons of construction to demonstrate that textualism,[4] particularly plain language or plain meaning textualism,[5] cannot be applied without the use of non-textual personal choices. But, this Article does not seek to demonstrate that interpreting the Constitution requires ignoring the text of the Constitution; nor does this Article seek to demonstrate that textualist approaches lack relevance or value. Rather, this Article seeks to demonstrate that textualism cannot create rules that avoid personal predilections[6] and does not create neutral principles[7] or eliminate predilective interpretation.[8] In order to accomplish this

4. *See generally* Stephen M. Durden, *Animal Farm Jurisprudence: Hiding Personal Predilections Behind the "Plain Language" of the Takings Clause*, 25 PACE ENVTL. L. REV 355 (2008) (discussing the failures of textualism based on plain meaning).

5. *See generally* Stephen M. Durden, *Plain Language Textualism: Some Personal Predilections Are More Equal Than Others*, 26 QUINNIPIAC L. REV. 337 (2008) (discussing the use and meaning of plain language or plain meaning textualism).

6. *See* Durden, *supra* note 4; Durden, *supra* note 5; *see also* Larry Cata` Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 710 (2009) (arguing that constitutionalism seeks to "avoid judicial despotism by forcing judicial discourse to privilege forms of analysis that reduce the ability of judges to substitute their personal predilections for that of the community"); Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 470 (2006) (discussing Justice Scalia's view that a judge's duty requires textualism, or at least some form of textualism, in order to "avoid importing [the judge's] own personal predilections into the text").

7. *But see* J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 264 (2009) (declaring, without discussion, that textualism is a neutral principle); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 494 (2007) ("Modern textualists embrace an approach that, at its core, involves a popularly enacted document (the Constitution) using a methodology that reflects neutral principles (the principles of close-reading textualism) rather than the constitutional ideology of the interpreter."); Todd J. Zywicki, *The Rule of Law, Freedom and Prosperity*, 10 SUP. CT. ECON. REV. 1, 4 (2003) ("T[he] core and traditional definition of the rule of law contains three basic values or concepts: (1) constitutionalism; (2) rule-based decision-making; and (3) a commitment to neutral principles, such as federalism, separation of powers, and textualism.").

8. *See* Ofer Raban, *The Supreme Court's Endorsement of a Politicized Judiciary: A Philosophic Critique*, 8 J L. SOC'Y 114, 124 (2007) (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 863, 849–65 (1989)) (explaining that "textualism comes as a solution to the danger of moral or ideological judicial decision-making"); Daniel S. Goldberg, *I Do Not Think It Means What You Think It Means: How Kripke and Wittgenstein's Analysis on Rule Following Undermines Justice Scalia's Textualism and Originalism*, 54 CLEV. ST. L. REV. 273, 274 n.4 (2006) ("The *raison d'etre* of textualism is judicial minimalism – to prevent judges from deciding cases according to their own predilections rather than on the law.").

goal, this Article reviews a variety of canons of construction and applies them to the Takings Clause.[9]

II. PLAIN MEANING OF THE TAKINGS CLAUSE

This Article assumes, for discussion purposes, that the Takings Clause contains plain language,[10] thereby limiting its reach to claims arising from a government either taking possession of,[11] or title to,[12] property. Accordingly, this Article assumes that the plain language of the Takings Clause precludes all claims not arising from the government taking possession or title[13] (i.e., regulatory takings claims). Ideally, this

9. U.S. CONST. amend. V.

10. Numerous commentators write about and suggest the existence of a "plain meaning" to the Takings Clause. *See, e.g.*, Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J. L. 432, 443 n.74 (2005); Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 206, 221 (2004); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1564, 1665 (2003); Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 588 (2003); Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 96, 102 n.373 (2003); Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 VAL. U. L. REV. 413, 420 n.42 (2002); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 771 n.245 (2002); John D. Echeverria, *Does a Regulation That Fails To Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853, 875 (1999).

11. *See, e.g.*, Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 897 (2001) ("There is some evidence that until the end of the nineteenth century, courts regarded the Takings Clause as protecting possession only, not value."); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1134 (2000) (explaining that early courts used "a conventional, plain meaning" to the Takings Clause, limiting its application to government action that took "title or possession"); Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 881–82 (2000) ("The term 'take' most naturally refers to an actual expropriation of property . . . .").

12. Hart, *supra* note 11, at 1134 (defining "appropriating private property" as "depriving the owner of title or possession" and noting that "[r]eading the phrase 'property . . . taken' to indicate appropriation was a conventional, plain meaning").

13. *See, e.g.*, Tunick, *supra* note 11, at 893–94 ("The words of the Takings Clause are clear: [the] government may not take--that is, confiscate, appropriate, seize, remove, force one to relinquish or transfer title of--one's property, without providing just compensation. . . . The [Supreme] Court should limit the applicability of the Takings Clause to appropriations, seizures, and confiscations . . . ."); William Michael Treanor, *Takings Law and the Regulatory State: A Response to R.S. Radford*, 22 FORDHAM URB. L.J. 453, 457–58 (1995) (opining that the original understanding of the Takings Clause and its state

interpretational method prevents judges from allowing their personal predilections to control their interpretation of the Takings Clause.[14]

As noted, this Article applies a number of canons of constitutional interpretation in the context of the plain meaning of the Takings Clause. The canons chosen align with the ideals that plain language textualism implicitly, or sometimes explicitly, seeks to embrace. Ultimately, this review of interpretational canons aims to demonstrate that reliance on these canons undercuts textualists' claims of greater objectivity.[15]

III. TEXTUALIST CANONS

Constitutional interpreters often use tools known as canons of construction.[16] These canons have been grouped or labeled as descriptive canons,[17] traditional canons,[18] generic canons,[19] linguistic canons,[20] gen-

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counterparts is consistent with the clause's plain meaning). Dean Treanor argued that the Takings Clause and similar state constitutional provisions were originally understood to apply only when the government physically took property. Treanor, *supra* at 457–58. Further, regulations, no matter how drastically they affected the price of property, did not trigger a compensation requirement. *Id.*

14. Tunick, *supra* note 13, at 897 ("The words of the Takings Clause themselves offer no guidance for anyone averse to relying on the plain meaning of "do not take property" and wanting to invoke the legal conception of property as a "bundle of rights" in order to decide how many sticks in this bundle must be relinquished for a regulation to amount to a taking."). *See generally* Durden, *supra* note 5.

15. One of the points this Article seeks to make is that textualists must necessarily be selective in their use of canons of construction. *But see* Daniel K. Brough, *Breaking Down the Misprision Walls: Looking Back on the Federal Sentencing Guidelines, After Booker, Through a Bloomian Lens*, 82 N.D. L. REV. 413, 433 n.80 (2006) (suggesting that the claim to objectivity is lost when textualists selectively use canons of constitutional construction).

16. *See generally* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Stop*, 95 VA. L. REV. 597, 607 (2009) (referring to "tools of statutory construction, such as canons of construction"); Kenneth A. Bamberger & Peter L. Strauss, *Schevron's Two Steps*, 95 VA. L. REV. 611, 623 (2009) (recognizing that normative canons of construction are interpretive tools); Andrew S. Oldham, *Sherman's March (In)to the Sea*, 74 TENN. L. REV. 319, 362 (2007) (describing canons of construction as "traditional tools of interpretation"); Caleb Nelson, *Statutory Interpretation and Decision Theory: An Institutional Theory of Legal Interpretation, Adrian Vermule*, 74 U. CHI. L. REV. 329, 348–49 (2007) (characterizing descriptive canons as traditional tools of statutory construction).

17. *See, e.g.*, Nelson, *supra* note 16, at 349.

18. *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 89 (2006).

19. *See, e.g.*, Nelson *supra* note 16, at 352.

20. *See, e.g.*, Nicole M. Quallen, *Damages Under the Privacy Act: Is Emotional Harm "Actual"?*, 88 N. C. L. REV. 334, 349 (2009); Daniel B. Rodriguez, *The Presumption of Re-*

eral canons,[21] substantive canons,[22] language canons,[23] normative canons,[24] extrinsic source canons,[25] and most importantly (at least for this Article) textualist[26] or textual[27] canons.

The number of such canons probably depends on who is counting and who is defining. One set of authors identified thirteen textual canons,[28] while another article identified at least six textual canons.[29]

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viewability: A Study in Canonical Construction and its Consequences, 45 VAND. L. REV. 743, 749 (1992).

21. *See, e.g.*, David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 230 (2008); Frederick M. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 COLUM. L. REV. 584, 588 (1959).

22. *See, e.g.*, Richard L. Hansen, *The Democracy Canon*, 62 STAN. L. REV. 69, 74 (2009); William N. Eskeridge, Jr., *Public Values in Statutory Interpretation*,137 U. PA. L. REV. 1007, 1011 (1989).

23. *See, e.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 5 (2005).

24. *See, e.g.*, Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L. J. 64, 64 (2008).

25. *See, e.g.*, Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 352 (2010); William N. Eskridge, Jr. & Phillip P. Frickey, *Forward: Law As Equilibrium*, 108 HARV. L. REV. 26, 99 (1994).

26. *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1101 (2001).

27. *See, e.g.*, Anita Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1097 (2009).

28. Nancy Staudt, et. al., *Judging Statutes: Interpretive Regimes*, 38 Loy. L.A. L. Rev. 1909, 1932–34 (2005) (footnotes omitted). The thirteen textual canons or rationales listed by Staudt are:

> Avoid rendering language superfluous.
>
> Ejusdem generis: where general words follow specific words, the general words are construed to embrace only objects similar in nature to those enumerated by the pre-ceding specific words. Where the opposite sequence is found (i.e., specific words following general ones) the doctrine is equally applicable and restricts application of the general term to things that are similar to those enumer-ated.
>
> Expressio unius: the enumeration of certain things in a statute suggests that the legislators did not intend to include things not listed.
>
> Legislative drafting mistakes should be ignored.
>
> Nosciture a sociis: the meaning of one term is "known by its associates" (i.e., understood in the context of other words in the list).
>
> Placement of a section has no relevance.
>
> Placement of a section has relevance.
>
> Plain, ordinary meaning of the law: adherence to the common usage or common understanding of the words.

However categorized, "[t]extual canons focus on the language of the statute itself and the relationships between statutory provisions."[30] "[B]ased on logic and the use of language,[31] these "canons include rules of syntax"[32] and "seek to gage the most likely meaning of statutory language."[33] Courts use these canons to "determin[e] ordinary meaning."[34] But, the relationship between plain meaning and textual canons is, admittedly, murky. Some have suggested that plain meaning is a textual canon;[35] others have suggested that judges use textual canons to determine the "plain meaning."[36]

The next section of this Article will explore the interrelationship between canons of construction and plain meaning. Ultimately, this Article will suggest a few canons of construction that seem intertwined

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Punctuation, grammar, syntax: the act of looking to punctuation, grammar, or syntax to decide meaning of the law.

Statutory headings have no relevance.

Statutory headings have relevance.

Technical meaning: interpret words in accordance with some background legal concept (like the category of employee) or in line with a judicially developed term of art.

Whole act rule: look to the context of the word or provision by looking to the other parts of the statute to ensure that the will of the legislature is executed.

Id. at 1933–34.

29. Lee Epstein, et. al., *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J. L. & POL'Y 305, 329 n.50 (2003) ("The textual canons . . . include the plain meaning rule, noscitur a sociis, ejusdem generis, expressio unius est exclusio alterius, the whole act rule, and the effects of punctuation, headings, and the placement of the section within the statute.").

30. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L. J. 341, 352 (2010).

31. Scott Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 74 (2008).

32. *Id.* at 74 n.139.

33. Anita S. Krishakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1097 (2009).

34. Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 665 (2008); *see also* Philip P. Frickey, *Interpretive Regime Change*, 30 LOY. L.A. L. REV. 1971, 1987 (2005).

35. *See, e.g.*, Staudt, *supra* note 28, at 1933.

36. James R. Barney, *In Search of Ordinary Meaning*, 85 J. PAT & TRADEMARK OFF. SOC'Y 101, 130 (2003); *see also* Lars Noah, *Diving Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 292 (2000) ("In searching for the plain meaning of a regulation, courts sometimes deploy textualist conventions such as canons of construction.").

with the idea of plain meaning and will apply these canons to the Takings Clause and related constitutional provisions.

IV. (SOMETIMES USED) CANONS OF PLAIN MEANING TEXTUALISM

A. *Superfluity Canon*

The first difficulty that the plain language textualist confronts when applying plain language textualism to the Takings Clause arises in regards to regulatory takings claims made by property owners against states and municipalities (as opposed to the United States). The problem begins with the understanding that the Takings Clause does not apply to the states or any of their subdivisions (at least not directly) because the Fifth Amendment does not apply to the states.[37]

Since the time of *Barron v. Baltimore*,[38] most have accepted the conclusion that the Bill of Rights does not apply to the states.[39] Like the rest of the Bill of Rights, the Takings Clause applies against the states (if at all) through incorporation into the Due Process Clause of the Fourteenth Amendment.[40] However, this incorporation creates an interpretational conundrum for the plain language textualist, requiring the plain

37. *See, e.g.*, Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 415 ("The Takings Clause - which is found in the Fifth Amendment - does not directly apply to the states . . . ."); Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 660 n.242 (2006).

38. Barron v. Baltimore, 32 U.S. 243 (1833). In the time surrounding the adoption of the Bill of Rights, not all state courts to consider the application of the Bill of Rights to the states agreed with the United States Supreme Court's holding in *Barron*. *See* People v. Goodwin, 18 Johns. 187 (N.Y. Sup. Ct. 1820). As explained by Chief Justice Spencer, "I am, however, inclined to the opinion, that the [Fifth Amendment to the United States Constitution] does extend to all judicial tribunals in the U.S., whether constituted by the Congress of the U.S., or the states individually." *Id.*

39. *See, e.g.*, Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 55 (2007) ("[I]n Barron the United States Supreme Court held that states were not subject to the Takings Clause of the Fifth Amendment . . . .").

40. *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 860 n.369 (1995) (discussing the differing opinions of when the Takings Clause was first incorporated); Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 BROOK. J. INT'L L. 343 (2007) (recognizing that regulatory takings claims "did not become common . . . until the 1970s").

language textualist to contravene one of the textualist canons, often known as the "superfluity canon."[41]

In interpreting any legal text, the textualist often turns to the "superfluity canon," which was founded on the "conclusion that we shall not presume the legislature to waste words when enacting laws."[42] Also referred to as the "textual integrity canon," this maxim urges the interpreter of a text to "[a]void interpreting a provision in a way that would render other provision[s] of the [text] superfluous."[43] Essentially, this "surplusage canon[]"[44] presumes that a statute will not contain "linguistic surplusage."[45] This canon will apply with particular force in a textualist interpretation of the Constitution, "[s]ince a textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage."[46]

At this point, this Article assumes[47] that any one demanding that the Takings Clause be limited to "plain meaning" would subscribe to the

41. Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1087 n.37 (2007) ("The 'superfluity' canon is another window to purposefulness that the textualist will look through upon occasion."); *see also* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 355 (2005) ("[T]extualists (like all other interpreters) embrace the presumption against surplusage . . . .").

42. Schiff, *supra* note 41, at 1087 n.37.

43. Brian M. Saxe, *When a Rigid Textualism Fails: Damages for ADA Employment Retaliation*, 2006 MICH. ST. L. REV. 555, 578 n.145 (2006).

44. Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 642 (2005).

45. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 98 (2006).

46. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 532 (2007); *see also* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2235 (1996) (noting that even as applied to the Constitution "ordinary rules of textual construction suggest that interpretations that produce surplusage should be avoided").

47. Making arguments for others, or making assumptions about agreements others would make, has inherent unfairness. Given the number of authors who accept the tie between textualism and the superfluity canon, the assumption seems fair. *See, e.g.*, Jonathan R. Siegal, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 127–28 (2009) ("[T]extualists employ . . . the presumption against statutory redundancy . . . on the ground that a legislature probably did not intend to include superfluous provisions."); Treanor, *supra* note 46, at 532 ("[A] textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage."); *see also* William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 998 (2009); Ilya Somin, *Gonzalez v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J. L. & PUB POL'Y 507, 533 (2006).

canons of textualist interpretation, such as the superfluity or surplusage canon.[48] Professor Gerhardt puts it in these terms: "For anyone who claims to be a textualist (and that ought to be all of us!), each word of the constitutional text is supposed to have meaning."[49] Perhaps not all textualists agree, but at least some textualists urge that textualism requires[50] those who interpret the Constitution to follow the surplusage or superfluity canon whenever possible, as it is consistent with, or even required by, textualism.[51] According to one commentator, a constitutional interpretation that leads to surplusages "should be untenable to textualists."[52] Put another way, "[t]extualists presume that each word has an ordinary, natural meaning."[53] Not all agree that plain meaning requires using textualist canons; however, many suggest the link and tie the canons to plain meaning, explicitly or implicitly.[54] Thus, this Article presumes that a person relying on plain meaning would embrace (or per-

48. *See, e.g.*, Laura Michelle Stewart, Comment, *Take Flight by Cyber-Sight: The Failure of Courts to Require the Americans With Disabilities Act Title III Public Accommodations Provision to Govern Public Places Such as an Airline's Website*, 30 U. DAYTON L. REV. 275, 281 n.33 (2004) ("Textualists will usually allow these types of canons to be used in order to determine the plain and ordinary meaning of a term or phrase within a statute."); Manning, *supra* note 45, at 98; Robert C. Power, *The Fourth Revolution*, 52 WASH. & LEE L. REV. 1699, 1712 n.75 (1995).

49. Michael J. Gerhardt, *Prelude to Armageddon*, 8 GREEN BAG 2D 399, 401 (2005).

50. *But see* Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court's Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL'Y REV. 1, 36 (2007) ("Although not strictly speaking part of a textualist analysis, the use of canons [(e.g., the superfluity canon)] often goes hand in hand with a plain meaning interpretation, and a judge's adherence to textualism frequently accompanies an acceptance of canons in legal interpretation.").

51. *See, e.g.*, Robert J. Delahunty & John Yoo, Response, *Making War*, 93 CORNELL L. REV. 123, 124 (2007) (endeavoring to "supplement [their] textualist reading by exploring constitutional structure, which should not tolerate the redundancies"); *see also* Treanor, *supra* note 46, at 532 ("[A] textualist strongly presumes that each word in the Constitution has meaning rather than being surplusage.").

52. Power, *supra* note 47, at 1712 n.75.

53. Heidi A. Sorenson, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2108 (1993); *see also* Treanor, *supra* note 46, at 532; Michael J. Gerhardt, *Prelude to Armageddon*, 8 GREEN BAG 2D 399, 401 (2007); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI. KENT L. REV. 103, 124 (2000) ("[T]extualism, as practiced by someone like Akhil Amar, seems to presuppose that each word has been exquisitely chosen to fit a completely consistent constitutional vision.").

54. *See* discussion *supra* Part III.

haps should be found to embrace) the surplusage canon inasmuch as the canon seems to rely on the notion that each word has meaning.[55]

Commentators and Supreme Court Justices use the superfluity canon to point out that one or more constitutional provisions become surplusage when other provisions of the Constitution are interpreted using a methodology other than (some form of) textualism.[56] Implicitly, this argument suggests that an interpretation of one constitutional provision must be incorrect if it causes another provision to become surplusage.[57] For example, Justice Thomas has argued that the current understanding of the Commerce Clause renders "superfluous" the Article I, Section Eight clauses "permitting Congress to enact bankruptcy laws, coin money, fix weight and measure standards, punish counterfeiters, establish post offices, or grant patents or copyrights."[58] Despite the fact that the pertinent words of the Constitution have not changed since 1789, reliance on the superfluity canon, as used by Justice Thomas in his concurrence in *United States v. Lopez*,[59] had little support in journals and law reviews prior to that opinion.[60] After Justice Thomas' *Lopez* concurrence,

55. In the end, the author recognizes that he seeks to put up a plain meaning "straw man" in order to knock it down. The author hopes, of course, that this conclusion is sufficiently justified by the argument made.

56. *See, e.g.*, Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 256 (2004) (Necessary and Proper Clause); Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 66 (2001) (Removal Clause); Robert C. Power, *The Fourth Revolution*, 52 WASH. & LEE L. REV. 1699, 1712 n.75 (1995) (Taxing and Spending Clause).

57. *See* A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1365 (1994) (suggesting a similarity between "reducing several clauses of the Constitution to surplusage" and "making textual analysis of . . . clauses of the Constitution irrelevant")

58. *See, e.g.*, Hovenkamp, *supra* note 46, at 2235; Tom Stacy, *What's Wrong with Lopez*, 44 U. KAN. L. REV. 243, 247 n.19 (1995).

59. United States v. Lopez, 514 U. S. 549, 588–89 (1995) (Thomas, J., concurring).

60. While computerized databases of law review articles do not reflect all available scholarship, in general searches of these databases provide a fairly comprehensive overview. Here, searches of the "Journals and Law Reviews" database in Westlaw, using the search terms "superfluity," "superfluous," or "surplusage" along with "/s 'commerce clause,'" reveal that Justice Thomas generally led the commentators, rather than the other way around. *But see*, Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L. Q. 901, 906–07 (1987). Interestingly, of the approximately 150 articles (including student notes and comments) to mention "superfluous," "superfluity," or "surplusage" in the same paragraph with "commerce clause" only two even mention the Cirillo and Eisenhofer article. Russell L. Weaver, *Lopez and the Federalization of Criminal Law*, 98 W. VA. L. REV. 815, 818 n.17 (1996) and Michael J. Trapp, Casenote, *A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal*

commentators published at least four dozen articles discussing the textualist superfluity canon, as related to the Commerce Clause.[61] But, Commerce Clause interpretation may also create surplusage as related to the Foreign Commerce Clause[62] and others have found surplusage in the Supreme Court's interpretation of the Fourteenth Amendment's grant of power to Congress.[63]

Quite plainly, the incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment and the reverse incorporation of the Equal Protection Clause into the Due Process Clause of the Fifth Amendment violates the superfluity canon, at least in the opinion of many authors.[64] At the same time, those who write about textualism suggest that textualism must abide by the superfluity canon when inter-

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Power Under the Commerce Clause, 64 U. CIN. L. REV. 1471, 1477 n.38 (1996). However, Justice Thomas did not cite to the Cirillo and Eisenhofer article either, which raises another question commentators may ask themselves, "If I publish a law review article and no one reads it, is it still an article?" Undeniably, commentators pay attention to the writings of Supreme Court Justices (note the number of post-*Lopez* commerce clause/superfluity articles). But, do Supreme Court Justices read articles by commentators, and should they?

61. *See, e.g.*, Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1755 (2003); Stephen M. Durden, *Plain Language Textualism: Some Personal Predilections are More Equal Than Others*, 26 QUINNIPIAC L. REV. 337, 344 n.38 (2008); Michael Landau, *What if the Anti-Bootlegging Statutes are Upheld Under the Commerce Clause?*, 2008 MICH. ST. L. REV. 153, 170 (2008); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 349-50 (2004); Aaron K. Perzanowski, *The Penumbral Public Domain: Constitutional Limits on Quasi-Copyright Legislation*, 10 U. PA. J. CONST. L. 1081, 1101–02 n.108 (2008); Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1191–92 (2002).

62. Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay*, 56 U. MIAMI L. REV. 25, 33 (2001); *see also* Somin, *supra* note 47, at 509–10.

63. Christine E. Enemark, *Adarand Constructors, Inc. v. Pena: Forcing the Federal Communications Commission into a New Constitutional Regime*, 30 COLUM. J.L. & SOC. PROBS. 215, 253–56 (1997).

64. Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1306 n.59 (2009); Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 692 (2006); Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and The Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1883 (2006); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 193 n.353 (1999).

preting the Constitution.[65] However, as noted, incorporation and reverse incorporation violate the textualist surplusage canon.[66]

Dean Treanor notes that when Professor Akhil Amar (a textualist of one variety or another) argues that the Fifth Amendment's Due Process Clause has a "core meaning that simply restates the Fifth Amendment's Grand Jury Clause," Professor Amar creates a constitutional surplusage, which "logically leads to the question, why did the founders include a Due Process Clause?"[67] One of the most significant surplusages is that caused by incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. As explained by one commentator, "[T]he Fifth Amendment's Due Process Clause, once incorporated into the Fourteenth Amendment, makes the Fourteenth Amendment's Due Process Clause surplusage."[68] Going in the other direction, "equat[ing] due process [in the Fifth Amendment] with equal protection renders the latter phrase mere surplusage within section [one] of the Fourteenth Amendment."[69] In fact, the entire Bill of Rights can be viewed as surplusage.[70] Dean Kanter explains as follows:

> Sole reliance on the Due Process Clause for incorporation would seem to imply that due process itself must contain the content of the incorporated Bill of Rights clauses. If so, an objector could claim this would mean that Fifth Amendment due process also contains the content of the other Bill of Rights provisions leaving them technically as "mere surplusage," a presumptively inadmissible interpretation.[71]

For the plain language (or any other) textualist, the incorporation of the Bill of Rights through the Due Process Clause must seem like being trapped in a room of mirrors, with various clauses reflecting, while at the same time containing, each other. The Fourteenth Amendment Due Process Clause incorporates most of the Bill of Rights, suggesting that the Due Process Clause of the Fifth Amendment must have contained

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65. *See, e.g.*, David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 982 (1994); Farber & McDonnell, *supra* note 44, at 642.

66. *See, e.g.*, Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203, 1209–10 (2002); Lawrence Rosenthal, *Does Due Process have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA L. REV. 1, 28 n.113 (2007).

67. Treanor, *supra* note 46, at 532.

68. Rosenthal, *supra* note 66, at 28 n.113; Chen, *supra* note 66, at 1209–10.

69. Chen, *supra* note 66, at 2010.

70. Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 692 (2006).

71. *Id.*; *see also* Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 51 n.118 (1996).

the Bill of Rights; so, when the Due Process Clause of the Fourteenth Amendment incorporated the Fifth Amendment Due Process Clause, it incorporated most of the Bill of Rights, including one clause (the Fifth Amendment Due Process Clause) which already contained most of the Bill of Rights; consequently, the Due Process Clause of the Fourteenth Amendment incorporated the Bill of Rights twice (or something like that). Little wonder that textualists, particularly plain language textualists, often have trouble accepting due process incorporation. The problem lies, however, with plain language textualism.

Once an interpreter of the Constitution demands that a phrase or clause has plain meaning, then that interpreter should be held to answer for the absurd results required by following such a strict rule. The alternative, with regard to the Takings Clause would be to reject incorporation, because the Fourteenth Amendment Due Process Clause did not bring with it a Takings Clause, whereas the Fifth Amendment Due Process Clause has the "tag-along" Takings Clause. Ultimately, the examples above demonstrate that textualists, or at least some textualists, seek to avoid interpretations of one provision of the Constitution, which would make another provision surplusage.

The surplusage difficulty caused by incorporation of the Takings Clause through the Fourteenth Amendment Due Process Clause exists only if a Takings Clause claim is brought against a state or one of its subdivisions. The Due Process Clause surplusage does not exist where the Takings Clause applies against the United States. Likewise, it could be argued that the surplusage concern does not really exist inasmuch as the plain meaning of the Takings Clause can still be applied against the United States.[72] However, as with almost any constitutional right, re-

72. One might justifiably wonder how takings law could have developed if the Supreme Court heard only takings claims against the United States. Hence, a vast majority of the significant regulatory takings claims cases (particularly those regulatory takings claims cases based on regulations of land use) since the 1970's have been against states and their subdivisions. *See generally* Kelo v. City of New London, 545 U.S. 469 (2005) (land use regulatory takings claim); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003); Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (land use regulatory takings claim); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (land use regulatory takings claim); Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (land use regulatory takings claim); Bennis v. Michigan, 516 U.S. 442 (1996); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (land use regulatory takings claim); Duquesne Light Company v. Barosch, 488 U.S. 299 (1989); Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (land use regulatory takings claim); First English Evangelical Lutheran Church Glendale v. County of Los Angeles, 482 U.S. 304 (1987); Keystone Bitumin-

turning to the days of *Baron v. Baltimore*[73] is highly unlikely, so at least as to Takings Clause claims against the states and their subdivisions, the plain language textualist will be confronted with the surplusage created by incorporation of the Bill of Rights through the Fourteenth Amendment Due Process Clause.

Simply put, with regard to Takings Clause claims against a state or local government, the plain meaning textualist self-righteously declares that plain meaning textualism eliminates personal predilections and policy choices. Then, the plain language textualist uses that approach to declare a plain meaning to the Takings Clause, while at the same time ignoring (innocently or intentionally) that the Takings Clause only applies after first creating surplusage in the Constitution, in violation of a generally accepted canon of textualist interpretation.[74]

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ous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) (land use regulatory takings claim); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (arguably a land use regulatory takings claim); Texaco, Inc. v. Short, 454 U.S. 516 (1982); Agins v. City of Tiburon, 447 U.S. 255 (1980) (land use regulatory takings claim); Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) (land use regulatory takings claim). *But see* Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (regulatory taking claim related to funding health benefits); Babbitt v. Youpee, 519 U.S. 234 (1997) (holding that escheat of fractional interest in allotment of Indian lands constitutes a taking); Preseault v. ICC, 494 U.S. 1 (1990) (holding that loss of reversionary right is not a taking); United States v. Sperry, 493 U.S. 52 (1989); Bowen v. Gilliard, 483 U.S. 587 (1987) (holding that regulation of welfare benefits is not a taking); Hodel v. Irving, 481 U.S. 704 (1987) (holding that regulation of Indian devisee rights is a taking); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (holding that cities and states are protected by the Takings Clause); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (holding that a regulation of pesticides was not a taking in light of an available Tucker Act remedy). Of course, state and local government cases dominate the land use regulatory takings cases because state and local governments engage in the most regulation of land. By the same token, plain language textual interpretations of the Takings Clause focus on "taking" physical property. While so many of the federal takings claims revolve around ownership interests or regulation of business, in none of these cases is physical possession of land or taking title involved or relevant. This difference highlights the need for takings jurisprudence to rely on both cases brought to the Supreme Court and to other courts. If the Supreme Court heard only federal takings claims then takings jurisprudence (and academic discussion of takings jurisprudence) might have evolved differently. For example, whereas in state law takings cases the Supreme Court notes that takings claims concern "the parcel as a whole," *see, e.g.*, *Penn Central*, 438 U.S. at 104, in federal law takings cases the Supreme Court has found a taking of very miniscule pieces of property, *see, e.g.*, *Babbitt*, 519 U.S. at 234; *Hodel*, 481 U.S. at 704.

73. Barron v. Baltimore, 32 U.S. 243 (1833).

74. Another difficulty with applying plain language textualism concerns another aspect of incorporating the Bill of Rights. The plain meaning textualist (indeed no textualist) can argue that the actual textual meaning of the Due Process Clause is that no state (or its subdivision) shall violate one of the Bill of Rights. First, if this is the textual

Application of the Takings Clause to the federal government fails to eliminate the surplusage concern for the plain language textualist. When the federal government enacts a law limiting the use of land or other property or over regulates land, property or business, it likely has done so through the Commerce Clause (particularly since a regulatory takings claim concerns a regulation of property, as opposed to physical possession of property). For example, when Congress protects wetlands, it does so through the Commerce Clause.[75] This broad interpretation of the Commerce Clause, to regulate non-navigable wetlands, next to navigable water, strongly suggests the power to prohibit felonies on waters used for trade, including the high seas. Such an interpretation thus renders superfluous[76] the Article I, Section Eight, Clause Ten power to "punish Piracies and Felonies committed on the high seas."[77]

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meaning of the Fourteenth Amendment Due Process Clause, then what would be the textual meaning of the identically worded Fifth Amendment Due Process Clause? Second, if the Fifth Amendment Due Process Clause does carry the same meaning as the Fourteenth Amendment Due Process Clause, then *Barron* was wrongly decided.

75. *See, e.g.*, Lori J. Warner, *The Potential Impact of United States v. Lopez on Environmental Regulation*, 7 DUKE ENVTL. L. & POL'Y F. 321, 341–43 (1997) (discussing Congress's power under the Commerce Clause to regulate wetlands).

76. *See, e.g.*, Steven K. Balman, *Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause*, 41 TULSA L. REV. 125, 160–61 (2005) (quoting United States v. Lopez, 514 U.S. 549, 588 (1995) (Thomas, J., concurring)); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 350 (2004); Brett Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 1030 n.670 (1998). A holding that the Commerce Clause grants Congress power over wetlands virtually demands a holding that the Commerce Clause grants power to Congress to punish piracy and felonies on the high seas, i.e., (1) Congress has Commerce Power over wetlands that adjoin rivers and harbors that flow in to the high seas; (2) This wetland power flows from Congressional Commerce Clause power over rivers and harbors; (3) This power over river and harbors includes power over vessels; (4) This power over vessels includes not only vessels within a harbor but also vessels as they travel the high seas from harbor to harbor. Put another way, power over the wetlands and harbors is far more attenuated than power over vessels on the high seas (vessels that are actually engaged in transport tied to interstate commerce). *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1 (1824). Regulation of wetlands or the use of land in general may also make superfluous Article I, Section Eight, Clause Seventeen of the Constitution, which states, "The Congress shall have power . . . [t]o exercise exclusive Legislation in all cases whatsoever, . . . over all Places purchased by the Consent of the Legislature of the State in which the same shall be for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings." U.S. CONST. art. I, §8, cl. 17. Perhaps this superfluity argument is a bit of a stretch, but the argument would be: assuming that commerce power grants power to regulate use of land, and that the Supremacy Clause makes federal law supreme, then Congress does not need extra power to regulate land, and exclusive power is superfluous when federal power is supreme. Indeed, Article I, Section Eight, Clause Seventeen suggests that Congress should not have

Admittedly, some federal laws regulate without resort to an over-expanded Commerce Clause (i.e., a Commerce Clause interpretation, which makes some of the rest of Article I, Section Eight superfluous). However, when Congress must resort to a superfluity-creating Commerce Clause, Congress should not be permitted to rely on plain meaning textualism to limit the meaning of the Takings Clause. Similarly, a state may rely on plain meaning textualism to urge that the plain meaning of the Constitution requires a holding that the Takings Clause does not apply to the states. However, once the state concedes that the Takings Clause applies to the states via incorporation through the Due Process Clause and (consequently) in violation of the superfluity canon, the state should not be heard to argue that it can now rely on some purported plain meaning of the Takings Clause.

Ultimately, the superfluity canon suggests that a drafter relying on the obviousness (plain existence) of words would not use redundant words, phrases or clauses. Plain meaning textualism suggests that when the author writes, "Do not violate due process," the author means, "Do not violate due process." Once written, the command need not be re-written, as the second writing of the same phrase adds nothing to the meaning of the document. Plain meaning textualism, which is based on the plainness and obviousness of the meaning of words, may not require use of the superfluity canon, which is based on the obviousness and plainness of the existence of the black marks commonly referred to as the Constitution;[78] however, a person who chooses to demand a plain language meaning to the Takings Clause and purports to do so in the name of eliminating personal predilections in constitutional interpretation should, at a minimum, address the application of the superfluity canon.

B. *Expressio Unius Est Exclusio Alterius*

Another "textualist rule[] for interpreting statutes include[s] [the] canon of construction, . . . expressio unius est exclusio alterius."[79] "This

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the power to regulate land and buildings *unless* Congress takes the land with the consent of the states. This interpretation is consistent with the textualist argument (which the Supreme Court rejected in *Kelo*) that the government could not take land, unless it took the land for a public use.

77. U.S. CONST. art. I, § 8, cl. 10.

78. Stephen Durden, *Plain Language Textualism: Some Personal Predilections are More Equal Than Others*, 26 QUINNIPIAC L. REV. 337, 340 (2008).

79. Jonathan Z. Cannon, *Words and Worlds: The Supreme Court in Rapanos and Carabell*, 25 VA. ENVTL. L.J. 277, 293 (2007); *see also* John F. Manning, *The Absurdity Doc-*

Latin maxim can be translated roughly as 'the express mention of one thing excludes anything else not mentioned.'"[80] As applied to legislation, this canon means that "'[w]hen the legislature provide[s] a specific term or a list of specific terms, the implication is that the legislature intended to exclude others.'"[81] This canon, sometimes referred to as a "negative implication canon,"[82] "rests on the familiar idea that the enumeration of specific matters in a statute logically[83] implies the exclusion of others."[84]

Using the expressio unis maxim when interpreting a statute does not, in and of itself, justify using the maxim as a guide to constitutional interpretation. Indeed, many years ago, Myres McDougal and Ashe Lans, relying on the Federalist No. 83 (Hamilton), stated, "The general view has been that the maxim of construction *expressio unius est exclusio alterius* has no validity as a canon of constitutional construction."[85] As McDougal and Florentino explained a few years later, "innocent reliance upon the question-begging latinism inclusio unius est exclusio alterius [sic] . . . is assuredly not a compulsion of logic."[86] As stated by Nicholas

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trine, 116 HARV. L. REV. 2387, 2466 n.285 (2003); Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 23 (2003); Lee Epstein, Nancy Staudt & Peter Wiedenbeck, *Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code*, 13 WASH. U. J.L. & POL'Y 305, 329 n.50 (2003); Adam Milani, *Go Ahead, Make My 90 Days: Should Plaintiffs be Required to Provide Notice to Defendants Before Filing Suit Under Title III of the Americans with Disabilities Act*, 2001 WIS. L. REV. 107, 145, 146 n.216 (2001).

80. Mullins, *supra* note 79, at 23; *see also* Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 458 (2001) ("[T]he expression of one thing implies the exclusion of the other . . . .").

81. Catherine E. Creely, Comment, *Prognosis Negative: Why the Language of the Hatch-Waxman Act Spells Trouble for Reverse Payment Agreements*, 56 CATH. U. L. REV. 155, 178 (2006).

82. Akhil Reed Amar, *Intratextualism*, 112 HARV. L.REV. 747, 790 (1999).

83. However, not all commentators agree that logic requires the canon to be followed. As put by Yale professor Myres S. McDougal and his co-author Yale instructor Florentino P. Feliciano, the "implication" demanded by the canon "is assuredly not a compulsion of logic." Myres S. McDougal & Florentino P. Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057, 1147 n.261 (1959). *See also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990).

84. John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1724 (2004).

85. Myers McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, III. The Constitutional Division of Control Over the Making of International Agreements*, 54 YALE L.J. 211, 237 n.99 (1945).

86. McDougal & Feliciano, *supra* note 83, at 1147 n.261. The careful reader would notice two interesting aspects of the McDougal and Feliciano quotes. The first one is

Quinn Rosenkranz, "[N]owhere does the Constitution suggest anything like an immutable code of interpretive canons, and the Court has never implied that expression unius is a constitutional rule."[87]

Others have suggested that the rule should be applied where appropriate. For instance, Vasan Kesavan, who advocates that the "single, true method of constitutional interpretation is original, objective public meaning textualism,"[88] urges that "[a]rguments from expressio unius est exclusio alterius must be contextually and sensitively applied to avoid wooden readings of the Constitution."[89] Put another way, "expressio unius est exclusio alterius . . . . applies only when a reasonable person would justifiably infer a negative implication from reading the specific

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that their version of the maxim begins with "inclusio unius" rather than "exclusio unius." McDougal and Feliciano are not the only ones to make that choice. Numerous writers choose the "inclusio" version of the maxim. *See, e.g.*, William N. Eskridge, Jr., & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1222 (2008); Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 2004 (2007); Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 484 (2006); Burt Neuborne, *"The House Was Quiet and the World Was Calm The Reader Became the Book": Reading the Bill of Rights as a Poem: An Essay in Honor of the Fifthieth Anniversary of Brown v. Board of Education*, 57 VAND. L. REV. 2007, 2022 (2004); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1490 n.41 (1987); Howard I. Kalodner & Verne W. Vance, Jr., *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079, 1109 (1959); John Marshall Gest, *The Writings Of Sir Edward Coke*, 18 YALE L.J. 504, 530 (1909).

87. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2107 (2002).

88. Colby & Smith, *supra* note 2, at 281 (internal quotation marks omitted) (quoting Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1129 (2003)).

89. Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 12 (2002). Kesavan's personal opposition to a "wooden" interpretation conflicts with the opinion in his article that the text of the Constitution requires the use of textualism as the sole interpretive methodology. Kesavan does not assert that the text of the Constitution somehow forbids "wooden" interpretations. Kesavan's choice may be an outstanding choice, with which many would agree, but it remains personal in that it is not required by, well, anything or anyone, even the Constitution. Avoiding "wooden" constitutional interpretation conflicts with the assertion that constitutional interpretation must follow rules, i.e., Kesavan's "rule" that the Constitution demands textualism. Textualism seeks to avoid personal preferences. Assuming that the words of the Constitution create a "wooden" result, the textualist should explain what other part of the text or what part of textualism permits or requires the interpreter to find a "non-wooden" meaning. As with this entire Article, the point is that all constitutional interpretation is personal, because no method of constitutional interpretation avoids personal choice (choice outside the bounds of the preferred or chosen method).

text in context."[90] In fact, Thomas B. McAfee and Calvin H. Johnson, in separate articles, discuss the "appropriate" use of the canon,[91] while Saikrishna Prakash labels some clauses "poor candidate[s] for the application of the expressio unius est exclusio alterius maxim."[92]

Whatever may be an appropriate or poor candidate for application of the canon, "[t]he [Supreme] Court has embraced this principle of expressio unius,"[93] but only "on a selective basis."[94] Justice Stevens, writing for the Court, in *U.S. Term Limits, Inc. v. Thornton*,[95] expressly relied on the maxim to invalidate the Arkansas constitution's prohibition on a person who had served two terms as a United States Senator or three terms as a United States Representative from running for re-election.[96] In *Mar-*

90. Manning, *supra* note 84, at 1671.

91. *See, e.g.*, Thomas B. McAfee, *The Federal System as a Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 32–33 (1998); Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 28 (2005).

92. Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1802 (2006) (referring to the impeachment provisions of the Constitution).

93. Peter B. Oh, *A Jurisdictional Approach to Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 423 n.146 (2003).

94. *Id.*; *see, e.g.*, Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 522–23 (2006) (applying the canon to the Eleventh Amendment); Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 181–82 (2008) (applying the canon to the resignation of members of the United States House of Representatives); Dan T. Coenen, *A Rhetoric for Ratification: The Argument of the Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 504 n.203 (2006) (concerning debts of the United States); Eugene Kontorovich, 91 VA. L. REV. 1135, 1168 (2005) (applying the canon to the Takings Clause); Thomas H. Lee, *The Supreme Court as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1820–21 (2004) (applying the canon to the Eleventh Amendment); Jason Mazzone, 90 IOWA L. REV. 1747, 1756–57 (2005) (discussing the canon's application to Article V of the Constitution); Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL'Y 1017, 1024 (2008) (considering the canon with the federal authority to issue paper currency); Saikrishna Prakash, 91 CORNELL L. REV. 1021, 1035 (2006) (applying the canon to the removal of officers and to impeachment provisions); Paul E. Salamanca and James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections and Returns of Members*, 95 KY. L.J. 241, 308 (2006-2007) (applying the canon to age and length of citizenship qualifications for Senate); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1089–90 (applying the canon to the Eighth Amendment and punitive damages).

95. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

96. *Id.* at 793 n.9. On the other hand, in that same case, Justice Thomas, dissenting, with Chief Justice Rehnquist and Justices O'Connor and Scalia concurring in dissent, expressly rejected the application of the maxim as inconsistent with federalism. *Id.* at 868–69. Justice Thomas' rejection of the maxim, in deference for an apparently (to Justice

bury v. Madison,[97] Chief Justice Marshall applied the expressio unius principle to declare unconstitutional Congress's grant of original jurisdiction to the Supreme Court in excess of the grant made in Article III of the Constitution.[98] Other Justices who have advocated or used this canon include: Justice Scalia,[99] Justice Barbour,[100] Justice Thomas,[101] and Justice Story.[102] Additionally, the Court has used this principle in construing a number of state constitutions.[103] This occasional reliance on the expressio unius canon does not suggest even regular reliance, inasmuch as members of the Court, who often rely on some version of textualism and this canon,[104] have found this canon superseded by other principles.[105] However, the fact remains that despite how rarely the

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Thomas) superior principle (neither of which is actually in the text of the Constitution), illustrates the general premise of this Article - that neutral (or other principles) of constitutional law neither limit discretion nor personal choice as to how to interpret the Constitution. Only in a world of fantasy would someone argue that Justice Thomas (or any concurring Justice) was unaware that choosing federalism over expressio unius would result in validating the Arkansas provision. The Constitution does not mention either constitutional principle (and, obviously, does not state which principle is superior to the other). Consequently, since no transcript exists of Justice Thomas' ruling process, nor does Justice Thomas state that federalism always trumps expressio unius (or all other canons of construction), it may be that Justice Thomas picked a result and then rationalized it. Justice Thomas thus demonstrates the unprincipled nature of reliance on "neutral" principles.

97. Marbury v. Madison, 5 U.S. 137 (1803).

98. *See, e.g.*, David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1919–21 (1998).

99. *See, e.g.*, J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 68 (2000) (suggesting that Scalia makes a type of expressio unius argument in support of his view that the Constitution does not protect the right to an abortion); David C. Gray, *Why Justice Scalia Should be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249, 1265 (2007) (suggesting that Justice Scalia would use the expressio unius canon when interpreting the Eighth Amendment); Milani, *supra* note 79, at 146 n.216 (noting that Justice Scalia has defended the use of the expressio unius canon); Lawrence Lessig & Cass R. Sunstein, *The President and The Administration*, 94 COLUM. L. REV. 1, 50 n.207 (1994); David Sosa, *The Unintentional Fallacy*, 86 CAL. L. REV. 919, 928 (1998).

100. Spencer, *supra* note 94, at 1133 n.220.

101. *Id.*; *see, e.g.*, James B. Staab, *The Tenth Amendment and Justice Scalia's "Split Personality"*, 16 J.L. & POL. 231, 233 (2000).

102. Laura A. Till, *Justice Clarence Thomas: The Emerging "New Federalist" on the Rehnquist Court*, 12 REGENT U. L. REV. 585, 622 n.279 (1999-2000).

103. *See, e.g.*, United States v. Macon County, 99 U.S. 582, 590 (1878); Pine Grove TP v. Talcott, 86 U.S. 666, 674–75 (1873).

104. *See* Milani, *supra* note 79, at146 n.216.

105. *See* discussion *supra* Part IV.B.

Court uses this canon, the Court has never suggested that this canon should be completely discarded.[106]

While the question of whether to apply the expressio unis canon to constitutional adjudication may be debated among some, a plain language textualist has less room to complain about being saddled with the interpretive rule. Indeed, "[c]losely related to the idea of plain language as [a] primary interpretive device is the maxim "expressio unius est exclusio alterius."[107] Use of the canon clearly comports with textualism, even plain meaning textualism.[108] Consider, for example, whether an ordinance for selling dogs in city parks applies to cats:[109]

> What result? In this situation, the job of a literalist (or even a less narrowly focused textualist) is relatively easy: the text of the statute mentions dogs not cats. Case closed. Expressio unius est exclusio alterius: the mention of only one necessarily excludes others not mentioned.[110]

Charles Trefer describes the expressio unius canon as a "textual canon,"[111] while Eric Eagle explains, "The doctrine of expressio unius reinforces the plain meaning interpretation."[112] Still another commentator, Jeffrey G. Miller, states, "The . . . expressio unius . . . canon[] . . . support[s] a plain reading meaning."[113] This discussion does not prove that a

106. *See* Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 827 n.130 (2005) (applying the canon to suggest that filibusters of judicial nominations are prohibited by the canon and noting that "[t]he Supreme Court applies th[e] canon to constitutional provisions"). *But see* Michael H. Herhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT 445, 456 (2004) (disagreeing with application of the canon to filibusters).

107. Philip R. Principe, *Secret Codes, Military Hospitals, and the Law of Armed Conflict: Could Military Medical Facilities' Use of Encrypted Communications Subject Them to Attack Under International Law?*, 24 U. ARK. LITTLE ROCK L. REV. 727, 741 (2002).

108. Lee, *supra* note 94, at 1820 (characterizing the author's expressio unius application to interpreting the Eleventh Amendment as essentially a plain-language argument); *see also* Dominick Vetri, *Communicating Between Planets: Law Reform for the Twenty-First Century*, 34 WILLAMETTE L. REV. 169, 211–12 (1998).

109. Martin H. Redish & Dennis Murasho, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 46 (2008).

110. *Id.*

111. *See, e.g.*, Charles Trefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 214 n.34, 218 (2000); Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1302 (1995).

112. Eric Eagle, *Alverez-Machain v. United States and Alverez-Machain v. Sosa: The Brooding Omnipresences of Natural Law*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 149, 170 (2005) (emphasis omitted) (footnote omitted).

113. Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens Part Two: Statutory Preclusions on EPA Enforcement*, 29 HARV. ENVTL. L. REV. 1, 34 (2005).

plain language textualist would generally, or even ever, support the exclusio unius canon. Instead, this discussion demonstrates that a person who claims to rely on what is plainly in the text cannot complain when asked to consider the meaning of plainly missing text.

With regard to the Takings Clause's application to the states, the expressio unius canon strongly suggests that the Takings Clause does not apply to the states. The Fifth Amendment contains a Due Process Clause and a Takings Clause.[114] The Fourteenth Amendment contains a Due Process Clause, but plainly omits a Takings Clause.[115] Whatever argument may be made for incorporation of various provisions of the Bill of Rights through the Fourteenth Amendment Due Process Clause, it seems as though a person who asserts the plain meaning of a clause in the Fifth Amendment is hard pressed to assert that the Fourteenth Amendment gives life to that clause when that clause is plainly left out of the Fourteenth Amendment.

The omission of the Takings Clause from the Fourteenth Amendment can be explained in a variety of ways. Some of these explanations seem rational in light of different interpretive methodologies. However, none of them seem rational for a person claiming to rely on the plain meaning of words. One way to explain the absence of the Takings Clause from the Fourteenth Amendment follows: The drafters/framers[116] of the Fourteenth Amendment accidentally (unintentionally) failed to copy the entire Fifth Amendment; the framers/drafters of the Fourteenth Amendment intended to include both the Due Process Clause and the Takings Clause, but failed to do so; but, the failure to include the Takings Clause should not bind the framers/drafters; and, the inclusion of one of the clauses of the Fifth Amendment should be interpreted to mean inclusion of all the clauses of the Fifth Amendment.

However, this approach creates three problems for the plain meaning textualist. First, the inclusion of the Takings Clause within the Fourteenth Amendment Due Process Clause forces the interpreter into the redundancy (superfluity canon) problem referred to previously.[117] Second, this approach forces the plain language textualist to admit that the meaning of words, particularly in the Constitution, is not really

114. U.S. CONST. amend. V.

115. U.S. CONST. amend. XIV.

116. The terms "drafter/framers" and "framer/drafters" encompass the ideas of both "the framers" and "the drafters" (those usually unnamed people given credit for bringing the country and the Constitution into existence). The use of the term is simply a matter of convention, but not necessarily conviction.

117. *See* discussion *supra* Part IV.A.

plain; rather, the meaning of words must be based on the contexts of a variety of words. Third, it forces the plain language textualist to admit that the drafters of various provisions of the Constitution were not such skilled draftsmen after all, and while an interpreter might like to rely on the draftsmen's words, that interpreter certainly cannot claim reliance based on the skill of the draftsmen. The inescapable conclusion from this approach is that not only must the interpreter rely on context, rather than plain meaning, but also that such poor draftsmanship requires a skeptical reading of the words to interpret their meaning.

An "accidental" failure to repeat the Takings Clause in the Fourteenth Amendment, followed by a judicial incorporation, cannot in any way support the idea of reliance on the plain meaning of words.[118] Whether the drafters of the Fourteenth Amendment intentionally or accidentally failed to include the Takings Clause in the Fourteenth Amendment, plain-language textualism leads to interpretational conundrums. Ultimately, in order to achieve their desired interpretation, those who purport to rely on the plain meaning of the Takings Clause must inevitably ignore the plain meaning suggested by the omission of the words from the Fourteenth Amendment – specifically that the Takings Clause does not apply to the states.[119]

Instead, the plain-language textualist can assert that the canon of expressio unius does not apply to constitutional interpretation; rather, the plain meaning of words, whatever they may be, must be given their meaning; and, plainly missing words will be irrelevant to constitutional interpretation. However, this approach cuts across the textualist goal of relying solely on the words (and presumptively the absence of words),[120] and permits the plain language textualist a power far removed from that permitted by the text – namely, the power to pick and choose when to apply what is often referred to as a textualist canon.[121]

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118. Of course, another approach to the omission of the Takings Clause is to apply the exclusio unius canon to demonstrate that the omission was intentional, leading inevitably to the conclusion that the framers/drafters of the Fourteenth Amendment intended to protect states from the burdens of the Takings Clause.

119. *See* Spencer, *supra* note 94, at 1133 (discussing how, of course, the same violation of the expressio unius canon follows from the incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment).

120. *See, e.g.*, William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1414 (2005) (discussing the significance of the absence of the word "unusual").

121. *See, e.g.*, Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 127 (2009); Jonathan Z. Cannon, *Words and Worlds: The Supreme Court in Rapanos and Carabell*, 25 VA. ENVTL. L.J. 277, 293 (2007); Chen, *supra* note 111, at 1302.

C. *Canon of Consistent Meaning*

For purposes of this section, this Article assumes that the meaning of at least some words, phrases or clauses of the Constitution can be plain. But, this raises the question of whether that "plain meaning" changes when the same word, phrase or clause occurs in a different part of the Constitution. At least occasionally (perhaps more often), the Supreme Court interprets words used in different contexts to have the same meaning.[122] According to Professor Turley, "The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional interpretation) that courts should 'assume[] that identical words used in different parts of the same act are intended to have the same meaning.'"[123] Textualists, too, seem to agree with this "same word, same meaning," principal. For example, Professor Amar may not be a plain language textualist, but according to Dean Treanor, "Professor Amar's textualism reflects a series of assumptions" including the assumption "that words used at different places in the document should be construed to mean the same thing."[124] Likewise, the "textualist argument[,] . . . that similar clauses in different parts of the Constitution should be given the same meaning," has been made by others.[125] In fact, "[a]n implication of textualism is that a particular word or phrase retains

122. Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 431 n.11 (2007) (noting that Chief Justice Marshall essentially made this point in *Gibbons v. Ogden* by stating that the word "commerce" "must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it" (quoting *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824)). Professor Balkin also references a debate between Professors Prakash and Vermeule as to whether Chief Justice Marshall correctly concluded that "commerce," used three times in one sentence, would have only one meaning. *Id.* (citing Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003); Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003)). While this debate is tangential to this Article, one thing that the debate clearly shows is that Professor Vermeule avoids claiming allegiance to textualism of any sort. For example, Professor Vermeule concludes that "[t]he scope of the three commerce clauses differ because of alternative constitutional sources authorizing congressional power over foreign commerce and Indian commerce." Vermeule, *supra* at 1177.

123. Jonathan Turley, *Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 319–20 (2008) (quoting Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 860 (1986)).

124. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, MICH. L. REV. 487, 542 (2007).

125. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 779 n.32 (1994) (citing Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992)).

the same meaning in different documents and, more generally, in different contexts."[126] Similarly, Professors Farber and McDonnell urge that according to a classic textualist canon, "identical words in different parts of the same act should be given the same meaning."[127] Explained another way, "[T]extualists, like Justice Scalia, embark on an analysis of statutes which entails examination of [among other things]: (1) how the word or phrase is used elsewhere in the same statute [and] (2) how the word or phrase is used in other statutes . . . ."[128]

Professor Seigel, in discussing statutory construction, explains that courts usually[129] apply the "unitary principle"[130] - the principle "that courts presume that a single term has a single meaning when it recurs multiple times within a statute"[131] and "that a term occurring a single time in a single statutory provision should have a single meaning."[132] Professor Seigel then distinguishes the "weak unitary principle" – where courts often use this principle merely as one important factor of determining meaning[133] – from the "strong unitary principle" – where the unitary principle is treated as an inviolable decree.[134] According to Professor Seigel, the Supreme Court declared the inviolability of the unitary principle in *Clark v. Martinez*.[135] The Court further declared that even the suggestion that a court not follow the unitary principle would be a "'novel' and 'dangerous' . . . affront to the separation of powers."[136]

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126. Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State Constitutional Law*, 26 CONN. L. REV. 635, 650 (1994).

127. Farber & McDonnell, *supra* note 44, at 652.

128. Christopher F. Tate, Note, *Getting out of "Harm's" Way:* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 5 GEO. MASON L. REV. 101, 126 (1996); *see also* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 273 n.115 (1997) (collecting authorities supporting the proposition that textualists view the meaning of words as consistent throughout the text).

129. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 343 (2005).

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.* at 343–46.

134. *Id.* at 346.

135. Clark v. Martinez, 543 U.S. 371 (2005).

136. Siegel, *supra* note 129. Professor Seigel goes on to explain why the Supreme Court erred in its declaration that when a court fails to follow the unitary principle, it engages in a novel and dangerous affront to separation of powers. *Id.* While Professor Seigel clearly does not support the use of the strong unitary principle, he accurately describes it. *See id.*

This separation of powers concern may not exist when interpreting the Constitution, but to the textualist, the canon continues to have tremendous force. Professor Amar[137] suggests that any particular clause of the Constitution should be read "against the backdrop of other clauses in the document that use the same or similar words."[138] According to Dean Treanor, Professor Amar "strong[ly] presum[es] that the meaning of words is constant throughout the [Constitution]."[139] Professor Amar's approach creates, or at least seeks to create, "a more holistic way of interpretation in which recurring words or phrases in the same document - for his purposes, the Constitution - are read as shedding light on meaning."[140]

As noted by Professors Vermeule and Young, "Intratextualism has its roots in the familiar principle of statutory construction that, ordinarily speaking, 'identical words used in different parts of the same act are intended to have the same meaning.'"[141] While the subtleties and complexities of intratextualism go far beyond the concept that the same word or phrase means the same thing in a different location in the Constitution,[142] intratextualism generally strives to achieve the ideals of the same word/same meaning canon.[143] Intratextualism provides an example of how the same word/same meaning canon applies within a single document. However, other textualists have used the same word/same meaning canon to determine the meaning of a state constitution, which has the same words as the United States Constitution. As noted by one commentator, "Presumably, the state constitutional provision that is worded identically to its federal counterpart carries the same meaning,

137. Treanor, *supra* note 46, at 491 (citing Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000); Amar, *supra* note 82, at 747) ("Amar has written more extensively on textualism and has worked out its methodology and implications far more fully than anyone else, including Justice Scalia. His *Harvard Law Review* Foreword *The Document and the Doctrine* and his article *Intratextualism* develop his approach and discuss the various textualist techniques he applies.").

138. Akhil Reed Amar, *An(other) Afterword on the Bill of Rights*, 87 GEO. L.J. 2347, 2354 (1999).

139. Treanor, *supra* note 46, at 518.

140. Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1323 (2005).

141. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 734 (2000).

142. *See, e.g.*, Amar, *Intratextualism*, *supra* note 82.

143. Vermeule & Young, *supra* note 141, at 733 ("The same words, conversely, ought generally to mean the same thing to an intratextualist.").

while differences in wording point to differences in meaning."[144] This conclusion may be based on the traditional notion that a legislative body will be presumed to understand the meaning of a term when it uses that term; so, when a state adopts a constitution in 1970 (for example) with "the phrase search and seizure," that phrase "mean[s], in general, what th[at] same phrase means in the federal [C]onstitution."[145] As explained, by one commentator, a state court may "assume, without deciding, that parallel state and federal constitutional provisions have identical meaning and then decide the case accordingly."[146] When this occurs, "[t]he unexpressed presumption appears to be that a state constitutional provision framed in the same words as a federal provision was intended to apply exactly like its federal model."[147]

This mirroring occurs in many states with regard to a number of provisions. As noted by Adam S. Cohen:

> Even in a day when state constitutionalism is considered to have come of age, this sort of self-imposed limitation is fairly common. The Wisconsin state courts have held that their state constitution's double-jeopardy clause is "identical in scope and purpose" to the [F]ifth [A]mendment's provision and that Supreme Court precedent will therefore govern both state and federal double jeopardy claims. The Connecticut Supreme Court has determined that its state due process clause and the federal clause "have the same meanings and the same limits." The double jeopardy provision of the Maine Constitution "afford[s] protection essentially like that guaranteed by the double jeopardy clause of the Fifth Amendment." And the Washington Supreme Court has held that "where the language of the state and federal constitutions is similar, the interpretation given by the United States Supreme Court to the federal provision will be applied to the state provision."[148]

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144. Richard J. Peltz, *Limited Powers in the Looking-Glass: Otiose Textualism, and an Empirical Analysis of Other Approaches, When Activists in Private Shopping Centers Claim State Constitutional Liberties*, 53 CLEV. ST. L. REV. 399, 400 (2005-2006). While Professor Peltz disagrees with this presumption, his statement accurately reflects a common approach.

145. Michele M. Jochner, *Survey of Illinois Law: Search and Seizure Cases*, 30 S. ILL. U. L.J. 785, 798 (2006) (internal citations omitted).

146. Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 868 (2000).

147. John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 843 (1990).

148. Adam S. Cohen, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 EMORY L.J. 615, 628 (1989) (third alteration in original) (internal quotation marks and footnotes omitted).

Under "lockstep"[149] interpretation, the same words have the same literal and interpreted meaning.[150] Likewise, another commentator, David B. Kopel, declared, "It is simply perverse to suggest that words which from century to century and from state to state have had such a widely-shared meaning in state constitutions, should have an entirely contrary meaning when the same words appear in the federal constitution."[151]

Similarly, Professor Saikrishna Prakash urges "intrasentence uniformity,"[152] (i.e., uniformity "within clauses"[153]). While Professor Prakash recognizes that a word or phrase, in two or more different contexts within a document, may have different meanings, "[a]bsent some very strong reason to the contrary, [Professor Prakash would] conclude that a word or phrase in a particular clause or sentence has the same meaning throughout the clause or sentence."[154] Professor Prakash describes this as an "appealing and intuitive" norm.[155] This narrower form of the uniformity canon indicates that the ideal of uniform meaning appeals to textualists, even if textualists do not always agree with the scope of its application.

Textualists, then, often assume that no matter how many times a word may be used in the Constitution, that word has only one meaning.[156] As with the other two canons, concluding that a plain language

149. Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL L. REV. 1409 (1999).

150. *See, e.g.*, Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1416 n.56 (2005); James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 245 (1996).

151. David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 851 (2002).

152. Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003).

153. *See* Vermeule, *supra* note 122, at 1179.

154. Prakash, *supra* note 152, at 1150. Professor Prakash does not really state that "he would" embrace intrasentence uniformity (although he does so in his article). Instead, Professor Prakash states that "we should" make that embrace. Presumably, "we should" (make that embrace) because he does.

155. *Id.* at 1149. Professor Vermeule finds this norm neither intuitive nor appealing. *See* Vermeule, *supra* note 122, at 1178. Professor Vermeule is also at a loss as to why intrasentence uniformity should have more value than "uniformity of usage across clauses." *Id.* at 1179–80.

156. However, not all who study law agree. As one commentator put it, "[w]hether the exact same language should be given the same meaning is a matter of intense debate." Diehm, *supra* note 150, at 245 n.114. *See, e.g.*, Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 108 (2002) ("The Framers were fallible humans who could very well have had different meanings for the same words in different textual locations."); Thomas

textualist would (or perhaps should) be bound by the consistent meaning canon has some unfairness, because those who claim plain meaning of a word often have no need to look to other provisions of a text with the same word.[157] Consequently, a plain language textualist may not specifically embrace the canon.[158] On the other hand, when an interpreter of the Constitution declares that one word or phrase has a plain meaning - a meaning that apparently is not impacted by its context - concluding that such an interpreter should be bound by that same plain meaning, when that word or phrase is used elsewhere, seems justified.[159]

Returning to the Takings Clause, as noted before,[160] a number of scholars have suggested that the Takings Clause has a plain meaning.[161] In so doing, these scholars often discuss the idea that the word "take" has a plain meaning that does not include the idea or term "over-regulate."[162] As put by Professor Tunick, "The plain meaning of 'do not take property' is not 'do not regulate unfairly' . . . ."[163] These scholars often discuss the

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W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 956 (2000) ("[T]here is precedent for adopting different meanings of the same word for purposes of different clauses of the Constitution."); Golove, *supra* note 98, at 1909 n.360 ("Chief Justice Marshall noted that in construing the Constitution 'the same words have not necessarily the same meaning attached to them, when found in different parts of the same instrument their meaning is controlled by the context.'" (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 19 (1831))).

157. Arguably such a search is inconsistent with a plain meaning. A person who declares a word to have a plain meaning need not look to other provisions of the same document to "prove" what is already plain.

158. Daniel J. Oates, Comment, *HIPPA Hypocrisy And The Case For Enforcing Federal Privacy Standards Under State Law*, 30 SEATTLE U. L. REV. 745, 758 (2007) (noting that it would be "absurd" to conclude that "Congress intended a plain word . . . to have two completely different definitions in the span of a few intervening words").

159. This conclusion seems, to the author, to follow from the meaning of plain language textualism - that a word or phrase has one meaning. It does not seem possible that a word or phrase with more than one meaning could have "a" (as in "a single") plain meaning. Of course, it could be argued that a word has a "plain meaning" in context. However, that argument would create more discussion as to what contexts are relevant - from context within a document to context within history - and that path leads away from a plain meaning.

160. *See* discussion *supra* Part II.

161. *See, e.g.*, Echeverria, *supra* note 10, at 876.

162. *See, e.g.*, Span, *supra* note 10, at 96 n.373.

163. Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 886 & n.10 (2001); *see also* Echeverria, *supra* note 10, at 860–61 & n.66 (noting that "[j]urists and academics of virtually all ideological persuasions recognize that the Takings Clause was originally intended to address only direct appropriations of private property"). Professor Echeverria "borrow[s] Dean Bill Treanor's metaphor to explain the Takings Clause's plain meaning .

plain meaning of "take," but avoid any discussion of the meaning of "property."[164] Some assert that "take" means "physical appropriation[],"[165] or to "grasp, seize, [or] lay hold of."[166] While others state that "[t]o take property connotes to seize, expropriate, or confiscate some thing, that is, a discrete asset."[167] In other words, in order to be "taken" there must be a "thing, that is, a discrete asset."[168] This approach effectively uses the word "take" to define the meaning of "property."[169]

. . ." John D. Echeverria, *From a "Darkling Plain" to What?: The Regulatory Takings Issue in U.S. Law and Policy*, 30 VT. L. REV. 969, 975 (2006). Treanor likens property to a noisy, bouncing ball. *Id.* According to the metaphor, if the ball is removed from the "owner" (a child) it has been taken. *Id.* If the child is told not to bounce it, the use has been regulated and the ball was not taken. *Id.* This metaphor implicitly suggests that all property has a physical shape that can be held and controlled. This is certainly not the only possible meaning for property. Just as important, the metaphor ignores the fact that the possessor of the noisy, bouncy ball (the child) purchased (or at least "owned") a noisy, bouncy sphere, and not a spherical stone of the same size. If the "regulator" had sold the bouncy round sphere, it likely would have sold it for the inherent value of a noisily bouncing ball. If the ball did not noisily bounce, the sale would have been a fraud. If the seller later makes it illegal to noisily bounce the ball, the sale might as well have been a fraud. Certainly, the typical child who possesses the noisy, bouncy ball cannot really distinguish between, "thou shalt not possess the ball" and "thou shalt not bounce the ball." To the child, the result is the same: the ball might as well have been taken. Presumably Dean Treanor (as the parent) would ask the child to find value in the act of silently possessing (holding) the orb. Dean Treanor suggests by his analogy that the parent (the regulator) has not "taken" the ball because he does not possess the ball. Perhaps this is one insight into the "plain meaning" of the Takings Clause. From the perspective of the parent, no possession (by the parent) means no taking (by the parent). From the perspective of the child, the ONLY purpose of the ball was to noisily bounce it. Thus, no noisy bouncing equates to a taking of the noise, the bounce, the fun, and to the child, the ball. From the perspective of the child, why pay a dollar to purchase the orb if the only use is to look at it?

164. *See, e.g.*, David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 541 (2004); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 770–71 & n.245 (2002); Tunick, *supra* note 163, at 900 & nn.47, 61; Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 524 (1998). *But see* Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 96 n.373 (2003).

165. *See* Thomas, *supra* note 164, at 541; *accord* Hart, *supra* note 10, at 1134; Echeverria, *supra* note 10, at 860.

166. Tunick, *supra* note 163, at 886.

167. Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 708 (2008) (quoting Merrill, *supra* note 156, at 983–84).

168. Merrill, *supra* note 156, at 983–84.

169. One acceptable method of determining the meaning of a word includes looking at other words in the same sentence. Indeed, the Oxford English Dictionary, with seven-

Professor Thomas Merrill expressly and openly uses this approach to distinguish between the meaning of the word "property" in the Takings Clause and in the Due Process Clause.[170] Professor Merrill does not purport to be a plain language textualist, but he does demonstrate that the different words surrounding "property" in the two clauses impact the meaning of "property."[171] Professor Merrill openly engages in "contextualism," expressly using the word "take" to define the word "property."[172] He notes that the Fifth Amendment uses both "take" and "deprived" in relation to "property."[173] He argues, reasonably, that using "take" and "deprived" suggest that "property" has different meanings due to different contexts and that one word helps to define the other.[174]

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teen pages of definitions and examples for understanding the word "take," states that "take" "is one of the elemental words of the language, of which the only direct explanation is to show the thing or action to which they are applied." Durden, *supra* note 4, at 382 (internal citations omitted). Perceiving the meaning of words using sentence context may be appropriate for a contextualist, *see* Kent Greenawait, *Propter Honoris Respectum: The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1466 (1997) ("A contextualist maintains that the meaning of any word or sentence cannot be determined apart from context."); *see also* Craig Allen Nard, *Legitimacy and the Useful Arts*, 10 HARV. J.L. & TECH 515, 524 n.43 (1997), but seems out of place for a plain language textualist. *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023 (1988) (discussing the distinction between contextual interpretation and plain meaning textualism); *see also* Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 CONN. L. REV. 451 (2006) (discussing why contextual interpretation rather than insistence on plain meaning will often reduce moral hazard in the negotiation of contracts). Notwithstanding the very strong likelihood that using the word "take" to define "property" suggests an interpretational method inconsistent with plain meaning textualism, this Article posits that the plain language textualist properly limits the meaning of "property" to "things" and "title."

170. Merrill, *supra* note 156, at 983–84 ("[T]he contrast between 'take' and 'deprive' may support the conclusion that the Due Process Clause is concerned with property in a broader sense that includes the protection of wealth against government-imposed liabilities as well as the protection of things from expropriation."). This note is not intended to suggest that Professor Merrill is a textualist. Instead, this note intends to show that some expressly use the word "take" to define "property," while textualists may do so only *sub silentio*. Professor Andrew Gold seems to use the opposite approach. Gold looks at the meaning of the word "property" to help determine the meaning of the word "take." Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 589–90 (2003). As Professor Gold suggests, the word "taken" does not determine the meaning of the word "property," but rather, "property" determines the meaning of the word "taken." *See id.* at 579–80 & nn.53–54.

171. Merrill, *supra* note 156, at 983–84.

172. *Id.*

173. *Id.*

174. *Id.*

However, a plain language textualist interpretation of the Takings Clause would follow Professor Merrill's path in the other direction, declaring that "take" has a plain meaning, and then using that meaning (that context) to define "property," if only implicitly.

Dean Treanor, no advocate of textualism,[175] once argued, based on his use of evidence, that "the original understanding of the Takings Clause . . . was consistent with what [he] ha[s] argued is the clauses' [sic] plain meaning."[176] More recently, Dean Treanor extensively discussed the meaning of "take" as set forth in the Oxford English Dictionary and late eighteenth century dictionaries, concluding that he could not find "a usage of take consistent with diminution of a right."[177] Dean Treanor makes this conclusion in an article that begins with a discussion of the multitude of meanings assigned to the word "property."[178] Notwithstanding the start of the article, Dean Treanor focuses solely on the meaning of "take" to support his understanding of the Takings Clause. Those who proclaim a plain meaning to the Takings Clause consistently use this approach, searching for or declaring a meaning of "take," and then using that meaning to define both the Takings Clause and, effectively, "property."[179] This approach suggests, without clearly stating such, that "property" in the Takings Clause refers to that which has a physical existence or fee simple absolute (subject to eminent domain).[180] Admittedly, a person declaring a plain meaning of the Takings Clause based on the plain meaning of "take" or "taken" may not expressly state a definition of "property," but that definition can, and necessarily must, be inferred. The plain language textualist can easily declare that a regulation neither takes possession nor title and therefore is not a compensable taking under the Takings Clause.[181] In the end, that declaration works

175. *See, e.g.*, William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007).

176. William Michael Treanor, *Takings Law and the Regulatory State: A Response to R.S. Radford*, 22 FORDHAM URB. L. J. 453, 457 (1995).

177. William Michael Treanor, *Take-ings*, 45 SAN DIEGO L. REV. 633, 639 (2008). It is not clear whether Dean Treanor still embraces the idea that the Takings Clause has a plain meaning or whether some (or all) aspects of regulatory takings jurisprudence must be rejected.

178. *Id.* at 633.

179. As noted before, Professor Merrill openly takes this approach. Merrill, *supra* note 156, at 983–84.

180. One of the multitudes of questions raised by this approach concerns the implicit conclusion that the plain meaning of "take" should provide the definition of property.

181. *See, e.g.*, Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B. C. ENVTL. AFF. L. REV. 509, 524 (1998); *see also* Mark Tunick, *Constitutional Protections of Private Property: Decoupling the*

only if "property" is a physical thing or at least something to which title can attach and be passed or condemned.

As with so many constitutional interpreters, the plain meaning textualist now seeks to walk away from the Constitution without any concern as to how the plain meaning interpretation fits into the rest of the Constitution. Because the textualist has declared that the Takings Clause has a plain meaning, the textualist need not confront the possibility that the drafters of the Constitution might have used two words, "deprived" and "taken," to mean essentially the same thing. More importantly, the textualist does not have to deal with the reality of looking at the meaning of the word "property," particularly since its meaning within the Due Process Clauses is very different from that required when the Takings Clause has a plain meaning.[182]

For the plain meaning textualist who follows the canon of consistent meaning, if a word has a plain meaning within the Takings Clause, it must have that same plain meaning when used within other clauses of the Constitution. This should be particularly true with regard to the Fifth Amendment. Undeniably, the Takings Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments contain different words, but they also contain one word in common, "property." Ultimately, the question raised here concerns the application of plain language textualism. Those who have argued for a plain language under-

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Takings and Due Process Clauses, 3 U. PA. J. CONST. L. 885, 886 (2001) ("The plain meaning of 'do not take property' is not 'do not regulate unfairly' . . . ."). Another question not often discussed by plain language textualists concerns the concept of property being akin to a bundle of rights. *But see* Tunick, *supra*, at 893–97. Professor Tunick, as an exception, asks, "[H]ow many sticks in this bundle must be relinquished for a regulation to amount to a taking[?]" *Id.* at 897. The other question might be, why doesn't a taking occur when one stick is taken? In the end, Kendall and Lord, as well as Professor Tunick, approach the regulatory takings problem the same way - if fee simple absolute is not completely destroyed (as opposed to only some sticks being taken or a mere diminution in value), there is no taking. Interestingly, their plain meaning approach would find a compensable taking if the government took title to, or possession of, an easement, but no compensable taking if the government destroyed the easement, because such destruction is only one of many sticks (a mere diminution in value of the fee simple). *See* Treanor, *supra* note 168, at 639 ("[A] government regulation that diminish[es] the value of property [does] not take that property."). For a discussion of applying the Takings Clause to each stick, see, e.g., Kristine Tardiff, *Analyzing Every Stick in the Bundle: Why Examination of a Claimant's Property Interest is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 FED. LAWYER 30, *passim* (2007).

182. The plain meaning approach to the Takings Clause might permit the interpreter to square the meaning of the Takings Clause with the accepted meanings of the Due Process Clauses, but the current meaning of property in one of the two Clauses would need to change.

standing of the Takings Clause have not made significant reference to due process "property" when providing a plain language understanding of takings "property." Given that due process "property" is not limited to physical things or title, the question remains, why limit takings "property" to physical things or title? In particular, if the government must provide Due Process Clause procedures before "depriving" a person of his or her "property," must it also provide compensation when it takes that same "property"? Going further, would the plain language of the Constitution require or permit different meanings of the same word, particularly if the Constitution is to be interpreted via its plain language? It may be that there are reasons why due process "property" and takings "property" should be considered differently, but those reasons cannot possibly be based on the plain language of the Constitution.

V. LESSONS LEARNED FROM TEXTUALIST CANONS

By declaring that a word or phrase has plain meaning, the declarant obviously refers to *an* (as opposed to *the*) "obvious meaning," rather than simply referring to the "simple meaning" of the word or phrase. Such a declarant rarely states the purpose or jurisprudential meaning behind choosing a plain meaning approach to interpretation. This plain meaning declarant does not usually discuss whether all words in the Constitution should be interpreted with a plain meaning approach, and perhaps, never discusses which canons of construction are consistent with taking a plain meaning approach. Consequently, it may not be fair to hold a plain meaning declarant to any particular canon of construction.

That said, this Article demonstrates that at least three canons of construction are consistent with plain meaning interpretation. These three canons are arguably required if a person claims to rely on this approach, which completely rejects any form of context or other principle of interpretation. Indeed, many textualists ascribe to these three canons.

However, these three canons, when used in conjunction with the plain meaning of the Takings Clause, create interpretational conundrums. A person cannot rely on both the plain meaning of the Takings Clause and the three textualist canons discussed. The interpreter must claim plain meaning and reject other plain meanings, or at least reject meanings that would exist with application of the textualist canons. But, the choice of when to declare plain meaning and reject a plain meaning canon of construction is not found within the text of the Constitution. One conclusion follows, that textualists who proclaim adherence to rules have no principles to rely upon when interpreting the Constitution. Rather, and perhaps more fairly, the plain language textualist uses unwrit-

ten, unstated and undeniably personal principles and standards to decide when and whether to apply a plain meaning canon - a canon consistent with, and arguably demanded by, a belief that words and phrases in the Constitution should be given and have plain meanings.

In the end, the plain meaning textualist can cry "foul," asserting that it is one thing to apply plain meaning to words and phrases, and quite another to apply controversial canons of construction. Ultimately, this discussion merely suggests that a plain meaning interpretation of the Takings Clause conflicts with an application of the three canons of construction closely allied with the principles of plain meaning textualism.

VI. CONCLUSION

This Article reviewed three textualist canons of construction, in light of a plain meaning interpretation of the Takings Clause, to demonstrate the ultimate failure of each canon. To recap, plain language textualists assert a plain or obvious meaning to a word or words. The three canons chosen necessarily follow from the obviousness of words or their obvious non-existence. Using these canons creates an interpretational conundrum that a plain language textualist cannot solve using any form of plain meaning textualism. The text alone cannot explain how the two Due Process Clauses, with the exact same language, have vastly different meanings; nor can the text alone be used to explain why the use of the word "property" in the same constitutional amendment has two different meanings; nor can textualism explain how an amendment, whose words exclude the Takings Clause but include the Due Process Clause, still includes the Takings Clause. Ultimately, this Article does not assert that textualism and canons of construction cannot or should not be used to interpret the Constitution. Instead, this Article demonstrates that the purportedly facile interpretational methodology known as plain meaning textualism creates a facade of objectivity, concealing subjective predilections of the interpreter.

Addendum S

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Originalism and Stare Decisis

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ORIGINALISM AND STARE DECISIS

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INTRODUCTION

Justice Scalia was the public face of modern originalism. Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative. This theory stands in contrast to those that treat the Constitution's meaning as susceptible to evolution over time. For an originalist, the meaning of the text is fixed so long as it is discoverable.

The claim that the original public meaning of constitutional text constitutes law is in some tension with the doctrine of stare decisis. Stare decisis is a sensible rule because, among other things, it protects the reliance interests of those who have structured their affairs in accordance with the Court's existing cases. But what happens when precedent conflicts with the original meaning of the text? If Justice Scalia is correct that the original public meaning is authoritative, why is the Court justified in departing from it in the name of a judicial policy like stare decisis? The logic of originalism might lead to some unpalatable results. For example, if the original meaning of the Constitution's Gold Clauses prohibits the use of paper money, is an originalist bound to plunge the economy into ruin? Some constitutional theorists treat precedent as capable of supplementing and even supplanting the text's historical meaning; for them, choosing to follow precedent that diverges from the original meaning is relatively unproblematic. Originalists, in contrast, have difficulty identifying a principled justification for following such precedent, even when the consequences of overruling it would be extraordinarily disruptive.

Faced with this problem, Justice Scalia famously described himself as a "faint-hearted originalist" who would abandon the historical meaning when following it was intolerable.[1] He claimed that "*stare decisis* is not *part of* my

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1 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist."). Justice Scalia

originalist philosophy; it is a pragmatic *exception* to it."[2] That concession left him vulnerable to criticism from both his intellectual opponents and his allies. His opponents argued that Justice Scalia's willingness to make a pragmatic exception revealed that originalism is unprincipled in theory and unworkable in practice. Some of his allies contended that a principled originalist should not be afraid to depart from even well-settled precedent.

The tension between stare decisis and originalism gave stare decisis a newly significant role in debates about constitutional theory. To be sure, judges and scholars had long grappled with the pragmatic considerations that inform the choice between keeping law settled and getting it right. But for an originalist, the decision whether to follow erroneous precedent can be more than a matter of weighing the costs and benefits of change. At least in cases involving the interpretation of constitutional text, originalists arguably face a choice between following and departing from the law embodied in that text. While the debate about stare decisis is old, modern originalism introduced a new issue: the possibility that following precedent might sometimes be unlawful.

This issue was unexplored before Justice Scalia helped propel originalism to prominence. Since then, the question whether stare decisis is compatible with originalism has occupied both originalists and their critics. In this Essay, I explore what light Justice Scalia's approach to precedent casts on that question. I argue that while he did treat stare decisis as a pragmatic exception to originalism, that exception was not nearly so gaping as his "faint-hearted" quip suggests. In fact, a survey of his opinions regarding precedent suggests new lines of inquiry for originalists grappling with the role of stare decisis in constitutional adjudication.

I. The Problem of Precedent

Before addressing the tension between originalism and stare decisis, it is important to emphasize that precedent itself is not only consistent with, but critical to, originalism. Most discussions of originalism's relationship to precedent focus on prior Supreme Court opinions. Yet one cannot paint a complete picture of Justice Scalia's attitude toward precedent without addressing his treatment of nonjudicial precedent. In an important sense, originalism can be understood as a quintessentially precedent-based theory, albeit one that does not look primarily to judicial decisions as its guide.

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recanted this statement insofar as it indicated his willingness to hold laws unconstitutional simply because they were unpalatable. *See* Marcia Coyle, The Roberts Court: The Struggle for the Constitution 165 (2013) (reporting a 2011 interview in which Justice Scalia "recanted" being a "faint-hearted" originalist and asserted that, contrary to his 1989 statement, he would uphold a state law imposing a punishment like "notching of ears" because "it's a stupid idea but it's not unconstitutional"). He never recanted it, however, insofar as it reflected his pragmatic approach to stare decisis.

2 Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 140 (Amy Gutmann ed., 1997).

Originalists maintain that the decisions of prior generations, cast in ratified text, are controlling until lawfully changed. The contours of those decisions are typically discerned by historical sources. For example, the meaning of the original Constitution may be gleaned from sources like the Constitutional Convention, the ratification debates, the Federalist and Anti-Federalist Papers, actions of the early Congresses and Presidents, and early opinions of the federal courts. Originalism thus places a premium on precedent, and to the extent that originalists reject the possibility of deviating from historically-settled meaning, one could say that their view of precedent is particularly strong, not weak as their critics often contend.

Moreover, Justice Scalia framed some of his most vociferous disagreements with Supreme Court precedent as a defense of a competing form of precedent: the history and traditions of the American people. For example, he characterized the standards of scrutiny as "essential" to determining whether laws violated the Equal Protection Clause but insisted that these standards "cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[3] When it came to the Free Speech Clause, the Justice said that he would "take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of 'the freedom of speech,' and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people."[4] Dissenting from the Court's holding that the Establishment Clause prohibits prayer at commencement ceremonies, Justice Scalia argued that "the Court . . . lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."[5] And while Justice Scalia would not have interpreted the Due Process Clause to have a substantive component, he did not insist upon cleaning the slate altogether. Instead, he argued that any substantive content should be determined by history and tradition rather than by modern attitudes.[6] It was what many conceived of as wrong-headed and excessive devotion to this form of precedent—a devotion that made change difficult—that marked the fault line between Justice Scalia and those who take an evolutionary approach to constitutional interpretation.

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3 United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting); *see also id.* at 568–69 (arguing that when a practice is not contradicted by constitutional text and is supported by "a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down" (quoting Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting))).

4 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment).

5 Lee v. Weisman, 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting).

6 *See infra* notes 63–69 and accompanying text.

Thus originalism does not breed contempt for precedent—quite the opposite. That said, originalism prioritizes what we might think of as the original precedent: the contemporaneously expressed understanding of ratified text. When new interpretations deviate from the old, and those deviations become entrenched, this comparatively new precedent and a commitment to the old can be in real tension.[7]

Originalism rests on two basic claims.[8] First, the meaning of constitutional text is fixed at the time of its ratification.[9] Second, the original meaning of the text controls because "it and it alone is law."[10] Nonoriginalists consider the text's historical meaning to be a relevant factor in interpreting the Constitution, but other factors, like value-based judgments, might overcome it. Originalists, by contrast, treat the original meaning as a relatively hard constraint.

Justice Scalia and his contemporaries did not pull originalism from thin air in the 1980s. On the contrary, Keith Whittington explains that

> [a]s a method of constitutional interpretation in the United States, originalism has a long history. It has been prominently advocated from the very first debates over constitutional meaning. At various points in American history, originalism was not a terribly self-conscious theory of constitutional interpretation, in part because it was largely unchallenged as an important component of any viable approach to understanding constitutional meaning. Originalism, in its modern, self-conscious form, emerged only after traditional approaches had been challenged and, to some degree, displaced.[11]

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7 When considered from the perspective of the Supreme Court, precedent provoking this problem is most often judicial. But deeply entrenched, erroneous nonjudicial precedents can also provoke this problem, particularly for political actors committed to originalism. *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 24 (2016) (identifying several decisions, including the admission of the state of West Virginia, that some have characterized as inconsistent with the Constitution's original meaning).

8 *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) ("The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances."); *see also* Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 944–46 (2009) (similarly describing the two core claims of originalism).

9 Whittington, *supra* note 8, at 378.

10 Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (footnote omitted); *see also* Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 193 (2010) ("[O]riginalism insists . . . that what counts as *law*—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be." (footnote omitted)). *But see* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013) (arguing that the original public meaning should control not because it is "the law" but because following it yields the best consequences).

11 Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (footnote omitted).

Justice Scalia was at the forefront of the movement that developed originalism in its "modern, self-conscious form" by defending it as the only democratically legitimate way to interpret and apply the Constitution.

As originalism rose to prominence, its relationship to precedent became an issue.[12] Stare decisis had received scholarly attention throughout the twentieth century. But before originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful—as it might be if the text's original meaning constitutes the law and relevant precedent deviates from it. To be sure, many had contended that stare decisis ought to be relatively weak in constitutional cases, both out of respect for the Constitution and because of the difficulty of correcting mistakes by constitutional amendment.[13] Justice Douglas, for example, famously asserted that "it is the Constitution which [a Justice] swore to support and defend, not the gloss which his predecessors may have put on it."[14] He did not suggest, however, either that the Court lacked the authority to sometimes adhere to its predecessors' erroneous gloss or that it was problematic for the Court to follow precedent that conflicted with the original meaning of the text. The latter would have been inconsistent with Justice Douglas's insistence that "[i]t is better that we make our own history than be governed by the dead. We too must be dynamic components of history if our institutions are to be vital, directive forces in the life of our age."[15] For a living constitutionalist, the point of overruling precedent is to bring the meaning of constitutional law into line with what the Court views as the demands of modernity. It does not involve (and indeed vehemently rejects) a return to the past in ways that could potentially disrupt modernity.

Originalists, in contrast, must grapple with this risk. Although there is dispute about which well-settled precedents depart from the original understanding, many claim that originalism cannot account for important precedents, including the New Deal expansion of federal power, the administrative state, and *Brown v. Board of Education*.[16] Henry Monaghan states the problem

12 Justice Scalia fielded questions about the relationship between originalism and stare decisis during his confirmation hearing before the Senate. *See infra* notes 32–34 and accompanying text. The issue figured even more prominently in the confirmation hearings on the nomination of Robert Bork. THE BORK HEARINGS: HIGHLIGHTS FROM THE MOST CONTROVERSIAL JUDICIAL CONFIRMATION BATTLE IN U.S. HISTORY 54–66 (Ralph E. Shaffer ed., 2005).

13 *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." (footnote omitted)).

14 William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

15 *Id.* at 739; *see also id.* at 749 (suggesting that a willingness to overrule precedent is a necessary means of updating the law to keep it in line with our living Constitution).

16 *See, e.g.*, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 668–69 (2009) ("A committed historicist could easily conclude that the Court's privacy and women's rights decisions are wrong, and that the use of paper money as legal tender, the use of the federal

starkly: the claim that originalism is the "only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order."[17] No serious person would propose to repudiate the constitutional order, yet some suggest that the logic of originalism requires it. As Michael Gerhardt puts it, "Originalists . . . have difficulty in developing a coherent, consistently applied theory of adjudication that allows them to adhere to originalism without producing instability, chaos, and havoc in constitutional law."[18] Consequently, as originalists John McGinnis and Michael Rappaport admit, "Precedent is often seen as an embarrassment for originalists."[19]

Some originalists have tried to reconcile the tension between originalism and stare decisis. For example, Michael McConnell, Michael Paulsen, Steven Calabresi, and Julia Rickert have each tried to blunt the force of the stare decisis critique by making an originalist case for some arguably nonoriginalist precedents.[20] (While it is an imperfect label, I use the term "nonoriginalist" as shorthand for precedents that conflict with the original meaning.) Kurt Lash has argued that a "popular sovereignty-based originalist" can follow at least some erroneous precedents without sacrificing her normative commitment to popular sovereignty.[21] John McGinnis and Michael Rappaport have repudiated the proposition that the original public meaning constitutes the law in favor of the claim that judges and public officials should follow the original public meaning because doing so yields good consequences.[22] Following deeply rooted nonoriginalist precedents is justified, they say, because when departing from the original public meaning would wreak havoc, follow-

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commerce power to establish the welfare state and federal civil rights laws, and the federal administrative state itself are all unconstitutional. Yet all of these doctrinal developments lie beyond any reasonable constitutional objection." (footnote omitted)). I do not address the question whether these cases or any others are in fact inconsistent with the original public meaning.

17 Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727 (1988).

18 Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1224 (2006). This is not to say, of course, that other constitutional theories do not face similar challenges. The concern is especially acute, however, with respect to originalism.

19 MCGINNIS & RAPPAPORT, *supra* note 10, at 195.

20 *See, e.g.*, Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (advancing an originalist argument for the proposition that the Constitution rules out sex discrimination); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that *Brown v. Board of Education* is consistent with the original meaning of the Fourteenth Amendment); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900–07 (2009) (arguing that *Brown*, the *Legal Tender Cases*, and cases validating the administrative state are each consistent with an originalist understanding of the Constitution).

21 *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1473–77, 1480 n.126 (2007).

22 *Id.*

ing precedent yields better consequences than following the original meaning.[23]

Other originalists, by contrast, have concluded that a principled originalist cannot follow nonoriginalist precedent.[24] Consider Gary Lawson's provocative argument that departures from the original public meaning can never be justified.[25] Grounding his argument in *Marbury v. Madison*'s justification for judicial review, Lawson claims that because the Constitution is hierarchically superior to all other sources of law, a statute in conflict with the Constitution is void.[26] The same principle applies, he says, to judicial opinions. Judicial opinions, like statutes, are hierarchically inferior to the Constitution itself, and if they conflict with the Constitution, they are, properly understood, no law at all.[27] "If a statute," Lawson argues, "enacted with all of the majestic formalities for lawmaking prescribed by the Constitution, and stamped with the imprimatur of representative democracy, cannot legiti-

23 *See* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836–38 (2009) (arguing that an originalist should follow nonoriginalist precedent rather than overrule it when, *inter alia*, the costs of overruling would be borderline catastrophic—as they would be with respect to paper money—or when the principles would be supported by constitutional amendment in the absence of the cases—as they would be with respect to race and gender discrimination); *see also* MCGINNIS & RAPPAPORT, *supra* note 10, at 154–74 (arguing that Article III incorporates a minimal notion of precedent and empowers judges to develop it further; because the Constitution itself authorizes precedent, it authorizes judges to adhere to the precedent in preference to the original meaning; the question for the judge is simply how to measure the tradeoff so that he knows when to follow precedent and when to follow the original public meaning).

24 *See, e.g.*, Randy E. Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232, 1233 (2006) (insisting that while "faint-hearted originalists" are willing to make a pragmatic exception to stare decisis to avoid political suicide, "[o]ther originalists like Mike Paulsen, Gary Lawson, and myself—call us 'fearless originalists,' . . .—reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices." (footnotes omitted)); *see also* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005) (arguing that originalism is inconsistent with precedent because "[o]riginalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed," and the Constitution authorizes change only by constitutional amendment).

25 *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). Lawson was the first to argue that enforcing precedent in conflict with the Constitution is unconstitutional. *See id.* at 28 n.16 (noting that "[p]rior critics of precedent have stopped short of actually declaring the practice unconstitutional," and that "I know of no judge who expressly renounced the use of precedent on constitutional grounds" (citations omitted)).

26 *See id.* at 26; *see also id.* at 27 (maintaining that *Marbury*'s rationale for judicial review means that "legislative or executive interpretations of the Constitution are no substitute for the Constitution itself. The court's job is to figure out the true meaning of the Constitution, not the meaning ascribed to the Constitution by the legislative or executive departments." (footnote omitted)).

27 *See id.* at 26–27.

mately be given effect in an adjudication when it conflicts with the Constitution, how can a mere judicial decision possibly have a greater legal status?"[28] Thus, he claims, "If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution."[29]

Justice Scalia took neither tack: he neither articulated a theory attempting to reconcile adherence to nonoriginalist precedent with originalism nor argued that the original public meaning must always control. Instead, he treated stare decisis as a "pragmatic exception to [his originalist theory]."[30] In his well-known essay, *Originalism: The Lesser Evil*, he described his position this way:

> I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of *stare decisis*—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.[31]

This is consistent with the views he expressed at his confirmation hearing. Pressed by Senator Edward Kennedy to describe his position on stare decisis, Justice Scalia responded that "[t]o some extent, Government even at the Supreme Court level is a practical exercise. There are some things that are done, and when they are done, they are done and you move on."[32] While he allowed that there were some mistakes he would be willing to correct,[33] he characterized others as "so woven in the fabric of law" that he would not touch them.[34]

Justice Scalia's pragmatism earned him criticism from both allies and intellectual opponents. Some of the former expressed regret that Justice

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28 *Id.* at 27; *see also id.* at 28 ("[T]he case for judicial review of legislative or executive action is precisely coterminous with the case for judicial review of prior judicial action. What's sauce for the legislative or executive goose is also sauce for the judicial gander.").

29 *See id.* at 27–28. Justice Scalia, by contrast, accepted stare decisis, while admitting that its "whole function . . . is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability." SCALIA, *supra* note 2, at 139.

30 SCALIA, *supra* note 2, at 140 (emphasis omitted).

31 Scalia, *supra* note 1, at 861.

32 13 ROY M. MERSKY & J. MYRON JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1986, at 132 (1989).

33 He stated, "I will not say that I will never overrule prior Supreme Court precedent." *Id.* at 131. He characterized some precedents as weaker and others stronger under the doctrine of stare decisis, *see id.*, and said that the weight a precedent carries "depends on the nature of the precedent, the nature of the issue," *id.*

34 *Id.* at 132. He did not specify, however, where any actual Supreme Court precedent fell. *Id.* ("Now, which of those you think are so woven in the fabric of the law that mistakes made are too late to correct, and which are not, that is a difficult question to answer. It can only be answered in the context of a particular case, and I do not think that I should answer anything in the context of a particular case.").

Scalia was willing to make any sacrifice of principle,[35] and the latter seized upon his willingness to compromise as evidence that originalism is itself unprincipled.[36] In the remainder of this Essay, I will consider whether Justice Scalia's approach to stare decisis was as unprincipled as these criticisms suggest.

II. Originalism in Practice

The thrust of the stare decisis-based critique of originalism is that "if [originalists] were to vote their principles, their preferred approach would produce instability, chaos, and havoc in constitutional law."[37] This threat is vastly overstated, because no originalist Justice will have to choose between his principles and the kind of chaos critics predict. Justice Scalia was never forced to make any of the decisions that critics cast as deal-breakers for originalism. He was never required, for example, to decide whether paper money is constitutional or whether *Brown v. Board of Education* was rightly decided. The validity of these cases—and, for that matter, most of the cases printed in the United States Reports—is never challenged because the rules of adjudication keep the question of their validity off the table.

As I have explained elsewhere, "other features of the federal judicial system, working together, do more than the constraint of horizontal stare decisis to keep the Court's case law stable."[38] A combination of rules—some constitutional, some statutory, and some judicially adopted—keep most challenges to precedent off the Court's agenda. The Justices not only lack any

35 *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism*, 75 U. Cin. L. Rev. 7, 13 (2006) (arguing that Justice Scalia is "unfaithful to the original meaning of the text" because, *inter alia*, "he is willing to avoid objectionable outcomes that would result from originalism by invoking [nonoriginalist] precedents"); Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism* 14 (George Mason Univ. Legal Studies Research Paper Series, Paper No. LS16-36, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880578 (arguing that Justice Thomas's approach to stare decisis, not Justice Scalia's, is "what one would expect from a committed originalist," because Justice Thomas, unlike Justice Scalia, is willing to "repudiate[ ]" constitutional doctrine inconsistent with the Constitution).

36 Laurence Tribe's critique of Justice Scalia's position is representative: "That Justice Scalia, despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of *stare decisis*." Laurence H. Tribe, *Comment*, *in* Scalia, *supra* note 2, at 65, 82. Justice Scalia resented the suggestion that originalists were uniquely unprincipled, because, as he put it, stare decisis is a "compromise of all philosophies of interpretation." Scalia, *supra* note 2, at 139.

> The demand that originalists alone "be true to their lights" and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.

Id.

37 Michael J. Gerhardt, The Power of Precedent 192 (2008).

38 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1730 (2013). For a fuller discussion of the relationship between originalism, stare decisis, and agenda control, see *id.* at 1730–37; *see also* Barrett & Nagle, *supra* note 7.

obligation to work systematically through the United States Reports looking for errors; the "case or controversy" requirement prevents them from doing so. Not only are they limited to answering questions presented by litigants seeking resolution of a live dispute, the Court's discretionary jurisdiction generally permits it to choose which questions it wants to answer. This in and of itself keeps the most potentially disruptive challenges to precedent off the Court's docket. Even if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.[39]

To be sure, erroneous precedents may lie in the background of cases that the Court has agreed to decide. Assume that a Justice has doubts about whether *Marbury v. Madison* was wrongly decided. The Justice will implicitly rely upon *Marbury* in every exercise of judicial review. But the Justice, whatever her theoretical doubts, has no obligation to open an inquiry into whether *Marbury* (and, for that matter, every other decision lying in the background of the case before her) is right. Indeed, the rule that the Court will decide only those questions presented in the petition for certiorari constrains Justices from deciding the merits of every legal issue that lurks in a case.[40] That rule is not hard and fast, and the Justices sometimes raise additional issues, like the matter of precedent's validity, on their own.[41] But doing so happens when a Justice *wants* to address the merits of precedent. If a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject the precedent to scrutiny.

Taken together, these features of the judicial system function like a hidden avoidance mechanism: they keep the question whether precedent should be overruled off the table altogether.[42] The doctrine of stare decisis is often credited with keeping precedent stable, but the force of that doctrine only kicks in when the question whether to overrule precedent is called. The

39 *See* Helvering v. Davis, 301 U.S. 619 (1937) (holding that the Social Security Act is constitutional).

40 *See* SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

41 *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 792, 797 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625 (1986), after calling for supplemental briefing on the question whether it should be overruled); Payne v. Tennessee, 498 U.S. 1076 (1991) (ordering supplemental briefing on the question whether two controlling precedents should be overruled). This practice has been sharply criticized. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 396 (2010) (Stevens, J., dissenting) (asserting that ordering the parties to address whether precedent should be overruled is "unusual and inadvisable for a court" (footnote omitted)). The Court has also occasionally reconsidered precedent without even asking the parties to argue the point, a practice that is also criticized. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 673–74 (1961) (Harlan, J., dissenting) (criticizing the Court for having "reached out" to decide whether to overrule precedent when the issue was neither raised nor briefed by the parties).

42 *Cf.* GERHARDT, *supra* note 37, at 45 ("The justices' respect for the Court's precedents is evident in their choices of which matters not to hear. Thus, in the certiorari process, the justices often demonstrate their desire to adhere to or accept precedents they might not have decided the same way in the first place.").

overwhelming majority of Supreme Court cases remain stable because the Court never faces the question. Stability, therefore, is less attributable to the doctrine of stare decisis than to the fact that the Constitution does not require the Court to identify, much less rectify, every constitutional mistake. Justices focus their attention on the contested question in front of them and are permitted to operate on the assumption that surrounding but unchallenged law is correct. The system could not operate otherwise; it would grind to a halt if the Justices were obliged to identify and address every single legal issue contained within a case.

Justice Scalia operated within this system. Stephen Sachs jokes that originalists are often viewed as "followers, allegedly, of a nefarious 'Constitution in Exile,' waiting in their subterranean lairs to subdue the populace and abolish the New Deal."[43] But Justice Scalia had no desire to exhume all errors from the United States Reports. On the contrary, he observed:

> Originalism, like any theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew. It is of no more consequence at this point whether the Alien and Sedition Acts of 1798 were in accord with the original understanding of the First Amendment than it is whether *Marbury v. Madison* was decided correctly. . . . [O]riginalism will make a difference . . . not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.[44]

And that, indeed, is the field on which Justice Scalia played. He faced some conflicts between the Constitution's original meaning and contrary precedent, but his commitment to originalism did not put him at continual risk of upending settled law. Originalism does not obligate a justice to reconsider nonoriginalist precedent *sua sponte*, and if reversal would cause harm, a Justice would be foolhardy to go looking for trouble. Justice Scalia didn't. As he once quipped, "I am a textualist. I am an originalist. I am not a nut."[45]

The precedents that Justice Scalia voted to overrule were not in the category that constitutional scholars sometimes call "super precedent"—cases so deeply embedded that their overruling is off the table.[46] For example, Justice Scalia rejected precedent asserting the power to give newly decided civil cases only prospective application on the ground that this is not a feature of the "judicial Power"[47] as it was understood at the Founding,[48] and he argued

43 Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2254 (2014).

44 SCALIA, *supra* note 2, at 138–39.

45 COYLE, *supra* note 1, at 163 (quoting Justice Antonin Scalia) (emphasis omitted).

46 *See* Gerhardt, *supra* note 18, at 1207–17 (identifying several "constitutional decisions whose correctness is no longer a viable issue for courts to decide," including *Marbury v. Madison*, *Mapp v. Ohio*, the *Legal Tender Cases*, *Brown v. Board of Education*, and the *Civil Rights Cases*); *see also* Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180–82 (2006) (identifying the constitutionality of social security, paper money, school segregation, independent agencies, federal economic regulation, and the incorporation of the Bill of Rights as "bedrock precedents" that "cannot be undone").

47 U.S. CONST. art. III, § 1.

that *Miranda v. Arizona* should be discarded for its lack of support in "history, precedent, or common sense."[49] He was persistent in his view that "the Double Jeopardy Clause prohibits successive prosecution, not successive punishment,"[50] and he refused to join opinions using the *Lemon* test to enforce the Establishment Clause.[51] He repeatedly argued that the Court should overrule its cases holding that a woman has a substantive due process right to terminate her pregnancy,[52] and he consistently declined to apply the cases

48 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment); Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 200–05 (1990) (Scalia, J., concurring in the judgment) (similar). He also maintained, despite contrary precedent, that the separation-of-powers principle prohibits Congress from assigning cases to an Article I court on the theory that they involve "public rights" if the federal government is not a party to the suit. *See* Stern v. Marshall, 564 U.S. 462, 503 (2011) (Scalia, J., concurring) ("I adhere to my view . . . that—our contrary precedents notwithstanding—'a matter of public rights . . . must at a minimum arise between the government and others.'" (second alteration in original) (citations omitted)); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 68–69 (1989) (Scalia, J., concurring in part and concurring in the judgment) (arguing that the traditional "public rights" exception was grounded in the original understanding of the concepts of sovereign immunity and "the judicial power," but the modern, pragmatic balancing test extending that exception was unmoored from both text and history (emphasis omitted)).

49 Dickerson v. United States, 530 U.S. 428, 450, 461–65 (2000) (Scalia, J., dissenting).

50 Witte v. United States, 515 U.S. 389, 407 (1994) (Scalia, J., concurring in the judgment) (internal quotation marks omitted) (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 804–05 (1994) (Scalia, J., dissenting)); *see also id.* at 406 ("This is one of those areas in which I believe our jurisprudence is not only wrong but unworkable as well, and so persist in my refusal to give that jurisprudence *stare decisis* effect.").

51 Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399–400 (1993) (Scalia, J., concurring in the judgment) ("I will decline to apply *Lemon*—whether it validates or invalidates the government action in question—and therefore cannot join the opinion of the Court today.").

52 He repeatedly urged the overruling of *Roe v. Wade*. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment) (urging an explicit overruling of *Roe*). Once *Casey* superseded *Roe*, he urged its overruling as well. *See* Stenberg v. Carhart, 530 U.S. 914, 955 (2000) (insisting that "*Casey* must be overruled"). While some have characterized *Roe v. Wade* as a "superprecedent[ ]," *see* Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES (July 24, 2005), http://www.nytimes.com/2005/07/24/opinion/24specter.html, scholars do not put *Roe* on the super precedent list because the public controversy about *Roe* has never abated. *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1116 (2008) ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."); Gerhardt, *supra* note 18, at 1220 (asserting that *Roe* cannot be considered a super precedent in part because calls for its demise by national political leaders have never retreated).

holding that the Due Process Clause imposes a "fairness" cap on punitive damages.[53]

He was willing to overrule precedent outright in the above cases because he thought that the error was clear and that traditional stare decisis factors like reliance or workability counseled it. There were other cases, however, in which he thought that precedent was wrong but did not advocate outright overruling. The following four areas illustrate Justice Scalia's pragmatism in handling conflicts between his commitment to the original public meaning and the pull of settled precedent: (1) the dormant Commerce Clause; (2) substantive due process; (3) the Eighth Amendment; and (4) Congress's power under Section 5 of the Fourteenth Amendment.

A. Dormant Commerce Clause

Justice Scalia attacked the Court's dormant Commerce Clause jurisprudence in his very first term. In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, he concluded a lengthy explanation of his disagreement with those cases with the assertion that

> the Court for over a century has engaged in an enterprise that it has been unable to justify by textual support or even coherent nontextual theory, that it was almost certainly not intended to undertake, and that it has not undertaken very well. It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.[54]

Tyler Pipe, however, did not require him to decide whether he would vote to overrule the dormant Commerce Clause doctrine; he could decide the case by refusing to extend it. When he faced the former question in his second term, Justice Scalia articulated the following approach: he would adhere to the line of cases invalidating state laws that discriminated against interstate commerce despite his belief that those cases were wrong,[55] but he refused to apply the line of cases that required the Court to balance the state law's burden on interstate commerce against its benefit unless the challenged law was

53 *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) ("[T]he punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting) ("When, however, a constitutional doctrine adopted by the Court is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so.").

54 483 U.S. 232, 265 (1987) (Scalia, J., dissenting). In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), a case handed down the very same day, Justice Scalia asserted, "For the reasons given in my dissent in [*Tyler Pipe*], I do not believe that test can be derived from the Constitution or is compelled by our past decisions." *Id.* at 304 (Scalia, J., dissenting) (citation omitted).

55 *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring in the judgment) ("In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose.").

indistinguishable from a law previously held unconstitutional by the Court.[56] In that event, he "would normally suppress [his] earlier view of the matter and acquiesce in the Court's opinion that it is unconstitutional."[57] He thus drew a line between "decisional theory," which he felt free to reject, and application of that theory to particular facts, which he felt constrained to follow.[58] He remained constant in this approach to dormant Commerce Clause cases throughout his entire tenure on the Court.[59]

It is worth paying attention to the careful distinction that Justice Scalia drew between "decisional theory" and results. In some circumstances, he felt obligated to adhere to nonoriginalist *decisional theory*. He adhered to the "discrimination" test in dormant Commerce Clause doctrine because it established a clear line that was relatively easy for courts to apply. By contrast, he thought the "balancing" test was unpredictable and that it therefore did not offend reliance or stability interests to abandon it.[60] His judgment about

56 *Id.* at 897 ("I would therefore abandon the 'balancing' approach to these negative Commerce Clause cases, first explicitly adopted 18 years ago in *Pike v. Bruce Church, Inc.*, and leave essentially legislative judgments to the Congress." (citation omitted)); *see also id.* ("Issues already decided I would leave untouched.").

57 Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 204 (1990) (Scalia, J., concurring in the judgment). He refused to do so, however, if the law at issue predated the Court's decision holding unconstitutional a similar law and would have been consistent with the Court's then-existing jurisprudence. *Id.* at 204–05. In that event, protecting settled expectations cut the opposite way. *See id.*

58 *See id.* at 204 ("Although I will not apply 'negative' Commerce Clause decisional theories to new matters coming before us, *stare decisis*—that is to say, a respect for the needs of stability in our legal system—would normally cause me to adhere to a decision of this Court already rendered as to the unconstitutionality of a particular type of state law."). *Crawford v. Washington* also illustrates this commitment to the preservation of results, albeit from a different angle. 541 U.S. 36 (2004). There, Justice Scalia wrote the opinion for the Court rejecting the decisional theory of *Ohio v. Roberts* in favor of what he believed to be the original meaning of the Confrontation Clause. *Id.* at 60. The Justice was at pains to emphasize, however, that the new theory left the past results, if not their methodology, intact. *Id.* ("Although the results of our decisions have generally been faithful to the original meaning of the Confrontation Clause, the same cannot be said of our rationales.").

59 *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1809–10 (2015) (Scalia, J., dissenting) (reiterating the illegitimacy of the Court's negative Commerce Clause jurisprudence and identifying the two circumstances in which he would nonetheless adhere to it); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 359 (2008) (Scalia, J., concurring in part) (same); United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (same); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (same); Healy v. Beer Inst., 491 U.S. 324, 344 (1989) (Scalia, J., concurring in part and concurring in the judgment) (joining the Court's opinion insofar as it held a Connecticut statute facially discriminatory).

60 In *Bendix Autolite*, 486 U.S. at 897–98, he asserted that abandoning the "balancing" prong of negative Commerce Clause analysis does not upset reliance interests because "the outcome of any particular still-undecided issue under the current methodology is in my view not predictable . . . no expectations can possibly be upset." At the same time, "[b]ecause the outcome of the [discrimination] test I would apply is considerably more clear, confident expectations will more readily be able to be entertained." *Id.* at 898.

when to challenge and when to acquiesce in decisional theory thus reflected a traditional application of stare decisis.[61]

Even when he rejected a nonoriginalist decisional theory, however, he considered whether to treat the nonoriginalist *results* reached under that theory differently. Because reliance interests in the Court's view about specific laws (as opposed to the Court's view about more general doctrines) are particularly high, he stuck with those results even in the "balancing" cases whose decisional theory he rejected. He felt particularly strongly about the reliance interests at stake in that situation. While he did not think that specific dispositions were set in stone, he thought that the Court should "retain [its] ability . . . sometimes to adopt new principles for the resolution of new issues without abandoning clear holdings of the past that those principles contradict."[62]

B. Substantive Due Process

Justice Scalia had "misgivings about Substantive Due Process as an original matter."[63] Nonetheless, he acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights "because it is both long established and narrowly limited."[64] He refused, however, to accept the body of precedent standing for the "proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty."[65] Despite this belief, he did occasionally acquiesce in the line of due process opinions maintaining that the liberty interest in the Due Process Clause protected those rights deemed fundamental by history and tradition.[66] He thus did not entirely distance

61 *See* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78–79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (describing his approach to negative Commerce Clause cases as "serv[ing] the principal purposes of *stare decisis*, which are to protect reliance interests and to foster stability in the law").

62 Quill Corp. v. North Dakota, 504 U.S. 298, 320–21 (1992) (Scalia, J., concurring in part and concurring in the judgment).

63 McDonald v. City of Chi., 561 U.S. 742, 791 (2010) (Scalia, J., concurring).

64 *Id.* (internal quotation marks omitted) (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

65 *Albright*, 510 U.S. at 275 (Scalia, J., concurring); *see also* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 470–71 (1993) (Scalia, J., concurring) (asserting that while he was willing to accept incorporation, he was unwilling to accept that the Due Process Clause "is the secret repository of all sorts of other, unenumerated, substantive rights"); SCALIA, *supra* note 2, at 24 ("[I]t may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process.").

66 In *Michael H. v. Gerald D.*, Justice Scalia wrote for the Court that "[i]n an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." 491 U.S. 110, 122 (1989) (footnote omitted). He joined the Court's opinion in *Washington v. Glucksberg*, which described substantive due process analysis as recognizing "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"

himself from a decisional theory he thought unsupported by the Constitution. At the same time, he found that history and tradition were reason to refuse rather than to recognize the existence of the urged right; the result in these cases, if not the analysis, was the same as it would have been under his preferred approach.[67]

Like the dormant Commerce Clause cases, the substantive due process cases draw a line between "decisional theory" and "results." In *Troxel v. Granville*, Justice Scalia dissented from the Court's holding that a Washington statute permitting the children's paternal grandparents to gain court-ordered visitation against the mother's wishes violated the Due Process Clause. He conceded that older opinions of the Court had recognized a substantive due process right of parents to direct the upbringing of their children, but he characterized their "claim to *stare decisis* protection" as "small" given that their application did not yield predictable results.[68] Consistent with his approach in dormant Commerce Clause cases, he did not propose disturbing the results of the two cases on which the Court relied (especially because that had not been urged), but he did propose abandoning the theory of decision upon which they rested by refusing to apply it in new contexts.[69]

C. Eighth Amendment

Justice Scalia thought that the Court's Eighth Amendment cases were flawed in at least two respects. First, he thought that the Court should look

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and requiring that the right at stake be carefully described. 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)). He joined Chief Justice Robert's dissent in *Obergefell v. Hodges* acknowledging the validity of substantive due process so long as the rights it found implied were rooted in history and tradition. 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting); *see also* United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("It is my position that the term 'fundamental rights' should be limited to 'interest[s] traditionally protected by our society.'" (alteration in original) (quoting *Michael H.*, 491 U.S. at 122)).

67 *See also* Nat'l Aeronautics & Space Admin. v. Nelson, 562 U.S. 134, 161 (2011) (Scalia, J., concurring in the judgment) (insisting that the Due Process Clause had no substantive component but that even under the history-and-tradition formula applied to identify these "faux" rights, respondent's claim to a right to informational privacy would fail). As he once put it in an extrajudicial context, "[t]he vast majority of my dissents from nonoriginalist thinking . . . will, I am sure, be able to be framed in the terms that, *even if* the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred." Scalia, *supra* note 1, at 864 (emphasis added) (footnote omitted).

68 Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) ("The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying [Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)] has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance.").

69 *See id.* ("While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.").

to the original application of the Eighth Amendment, not evolving standards of decency, to determine whether a punishment was "cruel and unusual."[70] Second, he rejected the proposition that the Eighth Amendment requires that a punishment be proportionate to the offense.[71] He applied the former decision theory, but not the latter, on grounds of stare decisis.[72] He justified the latter departure on the ground that the precedent was not only inconsistent with the Eighth Amendment, but one he could not "intelligently apply."[73]

His concession to "evolving standards of decency" might be taken as some evidence of faint-hearted originalism because, as in the substantive due process context, he acceded to a decisional theory that he thought at odds with the original public meaning of the Constitution's text. As in the case of substantive due process, however, the results in the cases were the same as those he would have reached under his preferred reasoning.[74]

Two other death penalty cases are revealing of Justice Scalia's approach to potential conflicts between original meaning and erroneous precedent. He expressed doubts about *Furman v. Georgia*'s holding that it was "cruel and unusual" to give the sentencer unfettered discretion to decide whether to impose the death penalty because it rendered the penalty a "random and infrequent event."[75] But because *Furman* did not clearly contradict the text, he was willing to adhere to it on grounds of stare decisis. Indeed, because of stare decisis, he explicitly refrained from even undertaking to examine

70 In *Stanford v. Kentucky*, Justice Scalia described the "evolving standards" test as "cast loose from the historical moorings consisting of the original application of the Eighth Amendment." 492 U.S. 361, 378–79 (1989) (opinion of Scalia, J.), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005). He nonetheless applied it on behalf of a plurality of Justices to conclude that the execution of minors does not violate the Eighth or Fourteenth Amendments. *Id.* at 369–73 (opinion of Scalia, J.) (plurality opinion).

71 He thought that the text squarely foreclosed the proportionality requirement because, while it forbids "excessive" bail, it says nothing about "excessive" punishment. Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment). On the contrary, the only express limitation on punishment is that it not be "cruel and unusual." *Id.*; *see also* Penry v. Lynaugh, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part) (arguing that the proportionality rule "has no place in our Eighth Amendment jurisprudence" and that "[t]he punishment is either 'cruel *and* unusual' (*i.e.*, society has set its face against it) or it is not" (alteration in original) (quoting *Stanford*, 492 U.S. at 378 (internal quotation marks omitted)), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002)).

72 *See supra* note 60.

73 *See* Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) (asserting that he would not apply the proportionality requirement on grounds of stare decisis because the requirement was not one he could "intelligently apply").

74 *See Stanford*, 492 U.S. at 368 (noting that the execution of minors was permitted when the Bill of Rights was adopted); *see also Roper*, 543 U.S. at 608–15 (Scalia, J., dissenting) (describing the "evolving standards" test as in accordance with our modern (though I think mistaken) jurisprudence and demonstrating why that test did not justify the majority's conclusion); *Atkins*, 536 U.S. at 341–48 (Scalia, J., dissenting) (similar).

75 *Walton*, 497 U.S. at 670 (Scalia, J., concurring in part and concurring in the judgment).

whether *Furman*'s interpretation was consistent with the historical meaning of "unusual punishment."[76]

He was not willing, however, to follow a line of cases holding that the mandatory imposition of death (i.e., a scheme that gives the sentencer no discretion) was cruel and unusual punishment.[77] In contrast to *Furman*, which rested on the ground that the randomness and infrequency of capital punishment in discretionary capital sentencing rendered that punishment "cruel and unusual," Justice Scalia thought that mandatory capital sentencing "cannot possibly violate the Eighth Amendment, because it will not be 'cruel' (neither absolutely nor for the particular crime) and it will not be 'unusual' (neither in the sense of being a type of penalty that is not traditional nor in the sense of being rarely or 'freakishly' imposed)."[78] He refused to follow these cases on grounds of stare decisis not only because they had "no proper basis in the Constitution," but also because he found them in irreconcilable tension with *Furman*.[79] He announced, moreover, that he had no intention of acquiescing in those cases in the future: "I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."[80]

D. Section 5

Despite "misgiving[s]," Justice Scalia joined *City of Boerne v. Flores*,[81] which announced that Congress's exercise of its power under Section 5 of the Fourteenth Amendment must be "congruen[t] and proportional[ ]" to the constitutional violation it was designed to remedy.[82] By the time *Tennessee v. Lane* arrived at the Court, the Justice had reconsidered his view. He concluded that the limit on Congress's power was set by the language of Section 5: Congress had the power "to enforce" the Fourteenth Amendment but not to enact prophylactic measures going beyond what the Constitution itself requires.[83] Yet as he acknowledged, "The major impediment to the approach I have suggested is *stare decisis*."[84] Major statutes like the Voting

76 *Id.* at 671.

77 *Id.*

78 *Id.*

79 *Id.* at 672–73.

80 *Id.* at 673.

81 521 U.S. 507 (1997).

82 Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) (describing *City of Boerne* and listing its progeny, which he had joined).

83 *Id.* at 560 ("[W]hat § 5 does not authorize is so-called 'prophylactic' measures, prohibiting primary conduct that is itself not forbidden by the Fourteenth Amendment." (emphasis omitted)).

84 *Id.*; *see also id.* ("Literally, 'to enforce' means to compel performance of the obligations imposed; but the linguistic argument lost much of its force once the *South Carolina* and *Morgan* cases decided that the power to enforce embraces any measure appropriate to effectuating the performance of the state's constitutional duty." (quoting Archibald Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 110–11 (1966) (internal quotation marks omitted))).

Rights Act assumed the validity of the Court's earliest Section 5 cases, which held that Section 5 conferred prophylactic power on Congress.[85] The long-standing cases endorsing prophylactic power were almost exclusively in the area of racial discrimination, which was the principal concern of the Fourteenth Amendment. He decided, therefore, to preserve both the results and the decisional theory of the Section 5 cases in the context of racial discrimination. "[P]rincipally for reasons of *stare decisis*, I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States."[86] Outside the context of race, he would not accept assertions of prophylactic power, and if the legislation truly "enforced" the amendment, he would give it full effect without considering whether it was congruent and proportional.[87]

III. Pragmatism and Principle

Justice Scalia's opinions in the cases are consistent with the approach he described in extrajudicial writing: he was willing to treat stare decisis as a limited, pragmatic exception to originalism. The careful explanations he gave, however, open up potential lines of inquiry for those exploring whether the tension between originalism and stare decisis can be resolved as a matter of principle.

First, it is worth paying attention to Justice Scalia's distinction between decisional theory and results. Discussions of stare decisis tend not to differentiate between the two. Adhering to a nonoriginalist decisional theory poses a different and more theoretically difficult issue for the originalist than does simply leaving the result of a decision in place. Perpetuating a decisional theory might function as a "virtual amendment" of the Constitution's text, substituting a new legal standard for the one originally imposed by the text. For example, Laurence Tribe levies this charge: "That Justice Scalia, despite his protestations, implicitly accepts some notion of evolving constitutional principles is apparent from his application of the doctrine of *stare decisis*."[88] But there is a difference between leaving the result of precedent in place (for instance, the holding that certain state laws violate the dormant Commerce Clause) and accepting its decisional theory as governing new contexts (as he would have done had he applied the dormant Commerce Clause "balancing test" to new state laws).[89] Originalist scholars have raised the pos-

85 *Id.*

86 *Id.* at 564.

87 *Id.* at 565.

88 Tribe, *supra* note 36, at 82 (footnote omitted).

89 *See supra* notes 54–62 and accompanying text. He also drew a distinction between results and decisional theory in the context of substantive due process. *See supra* notes 68–69 and accompanying text. And *Mitchell v. United States* provides yet another example. 526 U.S. 314 (1999). There, he expressed doubt about the soundness of precedent holding that prosecutorial or judicial comment on the defendant's refusal to testify violates the Fifth Amendment. *Id.* at 332 (Scalia, J., dissenting). Because he thought that this rule may well have "become 'an essential feature of our legal tradition,'" he did not propose overrul-

sibility that a principle of equity might be able to justify giving stare decisis effect to nonoriginalist decisions.[90] If that theory were developed, it might be better suited to holding results, rather than decisional theories, in place.

Second, Justice Scalia's "no harm, no foul" approach to the decisional theories of "evolving standards of decency" in the Eighth Amendment and substantive due process contexts prompts reflection on what fidelity to the Constitution requires. In both contexts, he accepted nonoriginalist decisional theories that led to the same result as the originalist approach he preferred.[91] Is a Justice unfaithful to the Constitution because he joins a poorly reasoned opinion that gets to the right place? Put differently, is fidelity to the Constitution measured by the Court's judgment or its opinion, by its result or by its reasoning?[92]

Third, stability is fostered by what we might call an "avoidance canon" for stare decisis—avoiding the reexamination of precedent by assuming arguendo that it is correct. This technique of assuming, and therefore not investigating, a precedent's validity to avoid the possibility of overruling it is a critical means of keeping law stable. As Part II explained, every judicial decision makes this implicit assumption with respect to a large swath of the law that surrounds the issue contested in court. Sometimes, however, an opinion makes that assumption explicit with respect to specific "neighboring" precedent. Such a move does not endorse the correctness of the prior decision; rather, it avoids inquiry into the decision's merits. Thus, for example, Justice Scalia did not "reconsider" the view that the Fourteenth Amendment incorporated the Bill of Rights against the states, when "straightforward applica-

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ing it. *Id.* He did, however, refuse "to extend these cases into areas where they do not yet apply, since neither logic nor history can be marshaled in defense of them." *Id.*

90 *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 858–64 (2015) (raising the possibility that stare decisis is a "domesticating doctrine" permitting courts to treat mistaken precedents "as if" they are the law).

91 Justice Scalia took a similar tack in *Hudson v. United States*. 522 U.S. 93 (1997). The Justice believed that the Double Jeopardy Clause prohibited successive prosecution, not multiple punishment, and he had dissented to the Court's prior cases holding otherwise. *Id.* at 106 (Scalia, J., concurring in the judgment). In *Hudson*, the Court backtracked from its position, although not as completely as Justice Scalia would have liked; it continued to maintain that the Double Jeopardy Clause prohibited multiple punishments, but it required successive criminal prosecutions as well. *Id.* Even though this was not the decisional theory that Justice Scalia thought correct, he concurred because the presence of the requirement for successive prosecutions "essentially duplicates what I believe to be the correct double jeopardy law, and will be . . . harmless in the future." *Id.*

92 *Cf.* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–27 (1999) ("As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that 'settle[s] authoritatively what is to be done.'" (alteration in original) (footnote omitted) (quoting Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997))).

tion of settled doctrine suffice[d] to decide it."[93] Despite doubts, he did not "explore the subject" whether *Furman v. Georgia*'s interpretation of "cruel and unusual" was consistent with the Eighth Amendment's historical meaning because the text could bear its meaning. And in several cases, he declined to decide whether precedent should be overruled when the parties did not urge overruling.[94] To be sure, explicitly stating that one is refraining from considering whether precedent is right signals that one thinks the precedent is probably wrong. That may be an invitation to parties to argue that point in the future, or a Justice may feel compelled to acknowledge obvious tension between relevant precedent and his otherwise stated views. Whatever the motivation, it preserves the precedent without having to address either its merits or the stare decisis question. Justice Scalia once said that the "whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."[95] The avoidance technique for stare decisis says "I am not deciding whether this is false or, if it is, whether stare decisis would compel me to say that it is true."

The practice of assuming—without deciding—that all surrounding, unchallenged law is correct operates invisibly. It is thus hardly noticed, and the way in which it contributes to the law's stability is underappreciated. The attention comes when the presumption is set aside. For example, the Court sometimes calls for supplemental briefing to address the issue whether a precedent that the parties did not challenge should be overruled.[96] Or, Justices

93 *See* McDonald v. City of Chi., 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (asserting that the case did not require him to "reconsider" the view that the Fourteenth Amendment incorporates the Bill of Rights against the States, because "straightforward application of settled doctrine suffices to decide it").

94 *See also* Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) ("While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context."). In *44 Liquormart v. Rhode Island*, he expressed "discomfort" with *Central Hudson*, a case counseling "special care" in the review of blanket bans on commercial speech that were not deceptive or otherwise flawed. 517 U.S. 484, 517 (1996) (Scalia, J., concurring). At the same time, the parties did not raise or brief the question whether the precedent should be overruled, and Justice Scalia did not want to reach the question with inadequate information:

> Since I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it—I must resolve this case in accord with our existing jurisprudence, which all except Justice Thomas agree would prohibit the challenged regulation. I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.

Id. at 518.

95 SCALIA, *supra* note 2, at 139; *see supra* note 28.

96 For example, in *Montejo v. Louisiana*, Justice Scalia was part of the majority who sought supplemental briefing on the question whether a precedent key to resolving that case should be overruled. 556 U.S. 778, 792 (2009) ("Accordingly, we called for supplemental briefing addressed to the question whether *Michigan v. Jackson* should be overruled."). The Court ultimately overruled *Michigan v. Jackson*. *Id.* at 797.

sometimes urge the overruling of a case where the merits of the precedent were neither raised nor briefed by the parties.[97] The Court also decides how much precedent to unsettle when it decides how broadly to write an opinion: there are sometimes disputes about whether the Court should overrule a precedent outright or merely narrow it and leave the question whether it should be overruled for another day (or never).[98] These choices are not best understood as choices about the strength of stare decisis. They are better understood as choices about whether to put the merits of precedent on the agenda, thereby forcing the Court to consider whether stare decisis should hold the precedent in place.

Students of stare decisis focus primarily on how stare decisis should play out once the validity of a precedent is on the table, but agenda control is equally if not more important. It also poses a distinct set of questions. For example, it is worth considering whether principle ever obligates a justice to put the question of precedent's validity on the table *sua sponte*; whether duty strongly counsels a minimalist approach that avoids questioning precedent wherever possible; whether it is a matter left to the prudential judgment of each Justice; and, if it is a prudential judgment, what factors should guide the decision.

Conclusion

Justice Scalia admitted that "in a crunch I may prove a faint-hearted originalist."[99] Stare decisis, however, rarely put him in a crunch, mostly because of the underappreciated features of our system that keep the law stable without need for resort to the doctrine of stare decisis. To the extent he was occasionally faint hearted, however, who could blame him for being human? As the Justice himself put it:

> As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace

97 For example, in *Randall v. Sorrell*, Justices Thomas and Scalia urged the overruling of *Buckley v. Valeo* even though the respondents asked only as an "afterthought" and did not brief the stare decisis issue. *See* 548 U.S. 230, 263–64 (2006) (Alito, J., concurring in part and concurring in the judgment) (insisting that it was "unnecessary" to reach the issue whether *Buckley v. Valeo* should be overruled when respondents asked only as an "afterthought" and did not brief the stare decisis issue); *id.* at 264 (Kennedy, J., concurring) (similar); *cf. id.* at 265–73 (Thomas, J., concurring).

98 *See* Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) (holding that an Establishment Clause challenge to the executive expenditure of funds did not fall within *Flast v. Cohen*'s narrow exception to the prohibition on "taxpayer standing"). Justice Scalia concurred only in the judgment, because he would have overruled *Flast* altogether rather than distinguish it as the majority did. *See id.* at 636 (Scalia, J., concurring in the judgment) ("Overruling prior precedents, even precedents as disreputable as *Flast*, is nevertheless a serious undertaking, and I understand the impulse to take a minimalist approach."); *see also id.* at 633 ("Minimalism is an admirable judicial trait, but not when it comes at the cost of meaningless and disingenuous distinctions that hold the sure promise of engendering further meaningless and disingenuous distinctions in the future.").

99 *See* Scalia, *supra* note 1, at 864; *supra* note 1 and accompanying text.

> of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G.K. Chesterton's observation that a thing worth doing is worth doing badly.[100]

Nothing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly.

100 Scalia, *supra* note 1, at 863.

Addendum T

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The seal of the Northwestern University School of Law was adopted in 1925. At its center is the figure of St. Ives, the patron saint of the legal profession, doing equal justice for the rich and the poor. In the middle circle are the words "bon droit et raison"—"good law and justice."

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RECONCILING ORIGINALISM AND PRECEDENT

John O. McGinnis[*] *& Michael B. Rappaport*[**]

INTRODUCTION

Originalism is often thought, by both its advocates and its critics, to be inconsistent with precedent. But if originalism cannot employ precedent, it would appear to be a seriously defective theory because it would ignore precedent even when doing so has enormous costs.

This Article challenges this common view of originalism and argues that nothing in the Constitution forbids judges from following precedent. Rather, the Constitution allows for precedent in two ways. First, the Constitution as a matter of judicial power incorporates a minimal notion of precedent. While this minimal incorporation has important theoretical implications—because it indicates a "no precedent position" is unconstitutional—it is so minimal that it does not have significant practical

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consequences for current judicial disputes about precedent. Second, the Constitution treats precedent as a matter of federal common law that it is revisable by congressional statute. Thus, the courts in the first instance and Congress ultimately have significant discretion over what precedent rules should be adopted. The Constitution thereby allows either extremely weak or extremely strong precedent.

Although the argument that precedent violates the Constitution's original meaning has largely been based on the constitutional text, the view of precedent offered in this Article is consistent with the constitutional text. The key ground, however, for preferring the compatibility of originalism and precedent is historical. Precedent was an important part of Anglo-American law for centuries before the enactment of the Constitution, and the Founding generation expected precedent to apply to, and continue after, the Constitution. Therefore, there is a strong presumption against any constitutional interpretation that condemns precedent.

While historical arguments have previously been made to justify precedent, they have been used to prove a different point—to justify a relatively strong modern approach to precedent as deriving from the grant of judicial power. This is a hard argument to make. By contrast, this Article's argument is easier, since it is more closely tied to the historical practice regarding precedent. We show that judges consistently accepted at least a weak view of precedent from the time of Coke until after the ratification of the Constitution. This evidence strongly suggests that the Constitution does not reject precedent and that it authorizes precedent in the two ways we describe.

Having established that the original meaning of the Constitution does not forbid precedent, the next question is: what is the normatively best approach to precedent under originalism? Employing a consequentialist perspective, we argue that an intermediate approach to precedent is best. A precedent doctrine should consist of rules that require precedent to be followed when doing so would produce net benefits and that require original meaning to be applied instead of precedent in other cases.

In developing this consequentialist approach, we employ a normative theory of originalism that we have advanced in several other articles.[1] This supermajoritarian theory of originalism argues that the Constitution and its amendments are likely desirable because they were enacted in accordance with a supermajoritarian process that generally produces beneficial provi-

[1] *See* John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism*, 98 Geo. L.J. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1109247; John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67 (2008) [hereinafter McGinnis & Rappaport, *The Condorcet Case*]; John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) [hereinafter McGinnis & Rappaport, *A Pragmatic Defense*]; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007) [hereinafter McGinnis & Rappaport, *Three Views*].

sions. This theory suggests that following the Constitution's original meaning is desirable because it is only that meaning that passed through the beneficial supermajoritarian process.

We then balance these benefits of following the original meaning with the benefits of following precedent—in particular, predictability, judicial constraint, and protection of reliance interests. Examining these relative benefits, we begin the task of developing a doctrine of precedent. This Article, while not offering a full precedent doctrine, does recommend three specific precedent rules. First, precedent should be followed when it is necessary to avoid imposing enormous costs. For example, even if one believed that Social Security violated the original meaning of the Constitution, one should still follow the precedents holding it constitutional to avoid the enormous costs and disruption that invalidating that program would cause. Second, precedent should be followed when it is entrenched—when the precedent enjoys strong support that is comparable to that enjoyed by a constitutional amendment. Third, precedent should be followed when it corrects a supermajoritarian failure. Unfortunately, the original supermajoritarian process for enacting the Constitution had some serious defects, such as the exclusion of blacks and women. Where a precedent operates to correct the results of these defects, a strong argument exists for following it. In addition to proposing these three precedent rules, the Article discusses several factors that are relevant to determining when precedent would be desirable. These factors are helpful in designing additional precedent rules.

We thus hold a position on precedent intermediate between scholars like Michael Paulsen[2] and Gary Lawson[3] who believe that precedent is illegitimate and scholars like Thomas Merrill[4] and Henry Monaghan[5] who believe that precedent has a strong presumption in favor of being followed. Against the first group of scholars, we argue that it is constitutional to follow precedent and wise to do so under rules that attempt to capture the circumstances when abandoning a prior decision would more likely be costly than beneficial. Against the second group of scholars we observe that precedent is not as presumptively beneficial as the original meaning of the Constitution, because the judicial process is not as well suited to creating constitutional entrenchments as the supermajoritarian constitution-making process. It is therefore a mistake to generally privilege precedent over the original meaning and substitute a general presumption in its favor for the more carefully circumscribed precedent rules we recommend.

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[2] Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

[3] Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007) [hereinafter Lawson, *Mostly Unconstitutional*].

[4] Thomas Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005).

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

Our intermediate position then would protect the precedents that are most likely to produce net benefits but would allow substantial leeway for the overruling of other precedents. It would insulate certain important precedents, like those permitting the federal government plenary power over economic affairs[6] as well as *Griswold*,[7] because these precedents, even if wrong, either represent a current consensus or would impose substantial costs if overturned. But our theory would also permit challenges to a wide of variety of precedents that might otherwise be regarded as settled. For instance, under our theory, the Supreme Court could appropriately discard a substantial portion of current constitutional criminal procedure, such as the exclusionary rule, and interstitial doctrines of the administrative state, such as Congress's authority to establish independent agencies (assuming that these do not comport with original meaning). These prior cases do not appear to be protected by any precedent rule that would produce net benefits.

This Article is divided into two parts. The first Part argues that the original meaning of the Constitution is compatible with precedent. We initially explore the history of precedent to show that history strongly suggests that the Constitution does not forbid the use of precedent. We then offer a constitutional interpretation that, consistent with history, authorizes precedent.

The second Part of this Article develops the normative argument in favor of an intermediate approach to precedent. Initially, we briefly describe the supermajoritarian theory of originalism. Part II then discusses the benefits of following the original meaning as well as the benefits of following precedent. Finally, this Part recommends the three precedent rules enumerated above and illustrates how these rules would apply to some important Supreme Court decisions involving precedent.

I. PRECEDENT, ORIGINALISM, AND THE CONSTITUTION

Precedent has often been thought to conflict with originalism. This Part challenges and rejects this claim, arguing that precedent is consistent with the Constitution's original meaning. The Constitution allows for precedent in two ways. First, there is a strong case for concluding that the Constitution incorporates a minimal degree of precedent within the judicial power. Second, the Constitution otherwise treats precedent law as a matter of federal common law (or general law) that is revisable by congressional statute. Consequently, the Constitution allows a great range of different precedent rules.

Part I.A examines Gary Lawson's widely discussed theory, which argues that following precedent is inconsistent with the original meaning of the Constitution, and shows that Lawson's argument largely depends on an

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[6] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

[7] Griswold v. Connecticut, 381 U.S. 479 (1965).

account of the history of precedent. Part I.B therefore turns to the history of precedent in England and America and shows that some form of precedent had been a consistent part of Anglo-American law from at least the time of Coke. This history strongly suggests that precedent is not unconstitutional. Part I.C concludes by offering an interpretation of the constitutional text that is supported by the historical account set out in Part I.B.

A. The Supposed Conflict Between Originalism and Precedent

While many scholars believe that originalism is inconsistent with precedent, Gary Lawson's argument was one of the first in the modern era to this effect, and it remains the most arresting, powerful, and persuasive. In two articles published over a fifteen-year period, Lawson eloquently argues that the original meaning of the Constitution prohibits precedent in constitutional cases.[8] Lawson's argument is both simple and elegant. He notes that the Supremacy Clause makes the Constitution, federal statutes, and federal treaties the supreme law of the land. It does not include prior judicial decisions. Thus, if a judge believes that a prior judicial opinion misconstrued the original meaning of the Constitution, the judge is obligated to follow the Constitution, not the precedent. The use of precedent is therefore unconstitutional in constitutional cases.[9]

The simplicity of this argument should not lead us to ignore its radical implications. First, this interpretation does not merely allow judges to disregard precedent; rather, it actually *forbids* them from following precedent.[10] Thus, following mistaken precedent is unconstitutional, irrespective of the consequences.[11] Second, this interpretation would also appear to pro-

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[8] *See* Lawson, *Mostly Unconstitutional*, *supra* note 3, at 1; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) [hereinafter Lawson, *Constitutional Case*].

[9] *See* Lawson, *Mostly Unconstitutional*, *supra* note 3, at 6; Lawson, *Constitutional Case*, *supra* note 8, at 32.

[10] It might be thought that this argument would forbid not only horizontal but vertical precedent. Lawson, however, argues that lower federal courts would still be obliged to follow Supreme Court precedent because they are "inferior" to the Supreme Court. *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1994). While it raises fascinating questions, we leave aside the question whether, and if so, to what extent, this conclusion is compatible with Lawson's overall approach.

[11] This interpretation would also have implications outside of the Judiciary. Presumably, the Executive would be forbidden from following judicial precedents under this view. While Lawson argues that the Executive would be required to follow judicial judgments on the ground that the term "judicial *power*" implies binding decisions, the Executive would be forbidden from following judicial precedents that it believes are mistaken. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1290–92 (1996). While Paulsen also appears to argue that Presidents are required to not follow judicial precedents (and even judgments), he nonetheless takes much of it back, arguing that three principles require the President to moderate his decisions. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 332 (1994); *see also* Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 WM. & MARY BILL RTS. J. 113, 118 n.18 (2007) (raising questions about the constitutionality and legitimacy of Paulsen's principle of accomodation).

hibit following precedent in statutory cases. If federal statutes are the supreme law of the land, then they should be applied rather than a mistaken precedent.[12]

Although Lawson's interpretation strongly conflicts with modern practices, that does not mean it also conflicts with the original meaning. Much more important is that his interpretation conflicts with traditional Anglo-American practices. In particular, our historical review indicates that precedent was a consistent and valued part of Anglo-American law at least for nearly two centuries before the Constitution. The review also provides evidence that the Founders' generation expected precedent to apply to the Constitution. Given this history, a strong presumption exists against any constitutional interpretation that would prohibit following such a valued and consistently employed practice. Before finding a prohibition on such a practice, one would ideally want an express provision doing so, or, at least, the absence of any plausible reading of the text that would allow the practice. As shown below, neither of these conditions holds.

Lawson is aware, as he puts it, that "the doctrine of precedent was certainly familiar in the Founding era," but he does not believe this fact has significant force.[13] This is in part due to Lawson's belief in the strength of his textual argument, but it is also due to the weakness of the claim that he seems to mistakenly believe is the sole alternative to his interpretation—that the judicial power establishes "a general obligation to prefer judicial decisions to the Constitution in at least some cases."[14] To support such a claim, one would have to find evidence for a relatively strong view of precedent under the judicial power. This claim would thus require both evidence of a relatively strong kind of precedent and evidence that that view was so consistently adhered to that it became bound up with the concept of judicial power itself. Our historical review does not reveal evidence for this claim. Thus, it is no surprise that Lawson concluded that precedent at the time of the Founding was "not so well established and developed to be a part of the 'judicial Power' in the super-strong sense that would be necessary to give judicial decisions preference over the Constitution."[15]

But the view that the judicial power incorporates a relatively strong notion of precedent is not the sole alternative to Lawson's no-precedent interpretation. We argue that the Constitution treats precedent rules as a matter of common law that is revisable by congressional statute. We also argue that the Constitution incorporates a very weak notion of precedent as judi-

[12] While it would be unconstitutional for courts to follow precedent in statutory cases under ordinary circumstances, it is possible that Congress could pass a law allowing for Supreme Court precedent in statutory cases. Congress might enact a statute providing that a Supreme Court statutory interpretation decision should be understood as having the effect of amending the statute. It is by no means clear that such a statute would conform to the original meaning of the Constitution.

[13] Lawson, *Mostly Unconstitutional*, *supra* note 3, at 12–13.

[14] *Id.* at 12.

[15] *Id.* at 13.

cial power. As we show below, precedent rules had been employed since at least the time of Coke. While the rules for precedent varied at different times and in different courts, judges at the very least consistently applied and valued a weak version of precedent during this period. This history cuts against Lawson's view that the Constitution does not permit precedent, and supports our interpretation of the Constitution.[16]

B. A Short History of Precedent

Our historical discussion begins with a focus on the English legal system. We then turn to the American experience, first in the colonies, then in the independent states and during the ratification debates, and finally in the Supreme Court under the new Constitution. In all of these periods, we find evidence for three general claims. First, precedent existed in all of these periods.[17] Although precedent was generally weaker than in modern times, the precedent rules varied over time and in different courts. In some courts, significant weight was conferred on an individual decision, whereas other courts placed significant weight only on a series of decisions. Second, precedent rules conferred greater weight on a series of decisions than on a single decision. Third, precedent rules placed more weight on decisions involving property rights because they involved greater reliance interests.

1. Precedent in England.—In England, support for precedent goes back many centuries, with one prominent statement by Bracton endorsing precedent in the thirteenth century.[18] For present purposes, it is necessary to go back only to the time of Coke, when there were many statements supporting precedent.[19] Coke himself wrote that "our book-cases are the best

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[16] In contrast to Lawson's textual arguments against precedent, other originalists rely on conceptual or normative arguments. For example, Randy Barnett argues that originalism is logically inconsistent with precedent because "[o]riginalism amounts to the claim that the meaning of the Constitution should remain the same until it is properly changed," and only a constitutional amendment is capable of changing its meaning. *See* Randy Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59 (2005). Whatever the merits of Barnett's normative argument, we believe that it is missing a key ingredient, namely, it does not purport to show that the Constitution itself precludes precedent. If the Constitution expressly told judges to follow precedent in certain circumstances, an originalist would not argue that judges should decline to follow the constitutional text because originalism precludes it. Instead, he would concede that the original meaning requires the following of precedent. Our argument is of the same form, since we believe the Constitution implicitly allows for precedent.

[17] For a view of the history of precedent that is similar in many respects with ours, see Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1085–1101 (2003).

[18] *See* HENRICI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 9 (Sir Travers Twiss ed., 1990) ("If, however, any new and unaccustomed cases shall emerge, and such as have not been usual in the realm, if, indeed any like cases should have occurred, let them be judged after a similar case, for it is a good occasion to proceed from like to like.").

[19] *See* SIR CARLETON KEMP ALLEN, LAW IN THE MAKING 205–07 (7th ed. 1964) (discussing sixteenth- and seventeenth-century emphasis on precedents in both procedural and substantive matters).

proofs what the law is."[20] Coke's support for precedent is no surprise because the artificial reason of judges, which Coke emphasized, consisted largely of knowledge of precedent.[21] Coke's emphasis on precedent as an essential ingredient of the common law[22] was continued by the next English legal giant, Mathew Hale, who in 1713 announced:

> The Decisions of Courts of Justice, tho' by Vertue of the Law . . . do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times . . . .[23]

Hale's view was then developed further by William Blackstone in the 1760s. Blackstone, who was the most widely read English legal commentator in America at the time of the Constitution, wrote:

> [I]t is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the law; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined . . . . The doctrine of the law then is this: *that precedents and rules must be followed, unless flatly absurd or unjust*: for though there reason be not obvious at first view, yet we owe

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[20] SIR EDWARD COKE, COKE UPON LITTLETON, bk. 3, ch. 7, § 420 (Philadelphia, Robert H. Small 1853).

[21] *See* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 64 (2001).

[22] Judge Michael McConnell highlights Coke's reliance on custom and precedent. McConnell writes that even in cases of first impression, Coke would not fill the gap with abstract reason, but instead would "cast the net of his antiquarian research farther afield," and in the famous *Calvin's Case*, came "up with a 200-year-old precedent." See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 179–80.

[23] SIR MATHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 68 (Legal Classics Library 1987) (1713).

such a deference to former times as not to suppose they acted wholly without consideration.[24]

Several aspects of Blackstone's discussion deserve emphasis. First, Blackstone's discussion provides further evidence that precedent had an important role to play in the English legal system. Second, his discussion reveals that there were various reasons for following precedent, including that it promoted judicial consistency and constraint as well as clear and predictable law. Third, while Blackstone makes clear that precedent is important, he also indicates that it is not an absolute rule, as there is an exception for decisions that are "flatly absurd or unjust," or, as Blackstone alternatively puts it, "most evidently contrary to reason" or divine law.

This exception, however, is not one that can swallow the precedent rule by allowing judges to ignore precedents by finding them unreasonable. Many precedents will not implicate matters of reason. For example, there may be several ways to resolve a matter within the limits of reason. While the resolution selected by a prior decision may not be the next judge's preferred method, it still may not fairly be characterized as contrary to reason.[25] Moreover, even if the resolution does seem to be unreasonable, Blackstone states that it must be "flatly absurd or unjust" or "most evidently contrary to reason." Thus, earlier decisions are seen as being presumptively correct as a matter of reason, "because we owe . . . a deference to former times as not to suppose they acted wholly without consideration."[26]

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[24] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69–70 (Univ. of Chicago Press 1979) (1765) (last emphasis added).

[25] *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 32 (2001).

[26] *See* 1 BLACKSTONE, *supra* note 24, at 70. In the passage quoted *supra* on page 8, Blackstone adopted a declaratory view of law, writing that when a decision is overruled or not followed, "the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*." *Id.* Some commentators have viewed Blackstone's view as being largely inconsistent with the notion of precedent because it adopts the declaratory view of the law. For example, Thomas Lee argues that the declaratory theory "presupposes a relatively weak (if not nonexistent) doctrine of stare decisis." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999). According to Lee, "the classic declaratory theory left ample room for departing from precedent under the fiction that prior decisions were not law in and of themselves but were merely evidence of it." *Id.*

While it is possible that most practitioners of the declaratory theory held a "relatively weak" view of precedent, Lee's argument that there is a strong connection between the declaratory theory and weak precedent does not necessarily hold. There is a basic distinction between the effect of a mistaken decision and the discretion of a court to refuse to follow earlier decisions. While the declaratory theory holds that the effect of a mistaken decision is that it is treated as if it was never the law, this does not mean that it also has a weak standard for recognizing that a precedent was mistaken. As Blackstone's own position seems to suggest, one could believe that prior judicial decisions should usually be followed while also believing that that when an old decision is not followed, it had never been law and the new decision applies retroactively. In fact, some contemporary judges, such as Justice Scalia, argue for ap-

While Blackstone, following Coke and Hale, obviously had an influential view, that does not mean that every judge followed precedent to the same degree. While some judges emphasized precedent less (or more), no evidence exists that judges rejected precedent entirely. Blackstone's contemporary, Lord Mansfield, is sometimes characterized as eschewing precedent, but that is not correct. While Mansfield may have placed less value on precedent, he still recognized its force.[27] As noted legal historian C. K. Allen wrote: "Many dicta might be quoted to illustrate Mansfield's insistence, even against some of his own contemporaries, on the necessity of adhering to settled principles, provided that they were established by clear evidence . . . in the form of reliable precedents or well-known practice."[28]

Although the precedential approach applied by English judges may seem relatively weak, English judges applied precedent more strongly in two situations. First, English judges gave much greater weight to a series of decisions than to a single decision.[29] Second, English law also placed greater weight on decisions involving property rights. In these cases, reliance interests were deemed to be especially important and therefore the courts placed even greater value on precedent.[30] Thus, while precedent existed in all areas to some extent, it was stronger in certain circumstances.[31]

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plying judicial decisions retroactively precisely because it will discourage judges from overruling precedents. *See* James Beam Distilling Co. v. Ga., 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

[27] Mansfield certainly was aggressive in overturning various decisions, but he "never entirely ignored precedents." Healy, *supra* note 21, at 71 (quoting DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 126 (1989)). In the same vein, he sometimes followed rules he did not agree with because "the authorities are too strong" or "the cases cannot be got over." ALLEN, *supra* note 19, at 212.

[28] ALLEN, *supra* note 19, at 211–12 (emphasis omitted).

[29] Theodore Plucknett writes that during the Year Book period of the Middle Ages, a single case would have only limited authority, but a series of cases was "a well established custom" and was entitled to significant weight. THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 347 (5th ed. 1956). The authority of a series of decisions continued to be recognized as the strength of precedent grew over time. Still, Plucknett writes, "under a developed system of precedents one case is as good as a dozen if it clearly covers the point, and at the present day citations are consequently few and to the point. The eighteenth century, however, still seems tempted to find safety in numbers, and to regard the function of citations to be merely that of proving a settled policy or practice." *Id.* at 349; *see also* Healy, *supra* note 21, at 68 (greater weight given to a series of decisions).

In 1612, John Davies wrote in his *Irish Reports* that "a custom doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience." J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 32 (1990) (quoting John Davies). Coke also noted that "wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of light and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto . . . . [N]o man ought to take it on himself to be wiser than the laws." *Id.* at 35 (quoting Sir Edward Coke in *Calvin's Case*).

[30] *See, e.g.*, Morecock v. Dickins, (1768) 27 Eng. Rep. 440, 441 (Ch.); *see also* Healy, *supra* note 21, at 69 ("[M]ost judges agreed [in 1760] that precedent should be followed in cases involving property

Although this brief review of English law indicates that judges gave precedential weight to decisions from at least the time of Coke, it is sometimes said that historians cannot agree on when precedent became established in England, with some dating it to the nineteenth century and others to an earlier period.[32] If that were true, one might then argue that precedent was not a clearly established part of English law when the Constitution was written at the end of the eighteenth century. This argument has been made by numerous opponents of precedent.[33]

But this argument rests on a confusion. While historians do differ about when precedent emerged, their disagreement relates to the question of the emergence of the *modern* English view of precedent, under which a single judicial decision established an absolute (or at least very strong) obligation for future courts to follow.[34] But our question is not whether a single judicial decision had absolute or significant weight, but whether prior judicial decisions could lead judges to decide cases differently than they otherwise would have. If a series of prior judicial decisions had significant precedential weight, then such cases would influence judicial decisions, even though the modern theory of precedent had not been adopted. While it may be unclear when the modern view of precedent emerged, it *is* clear that a significant precedent practice existed since at least the early seventeenth century, and probably for centuries before that.

2. Precedent in Colonial America.—The English approach to precedent was transplanted to America when the English established colonies there. Of course, the Anglo-American approach changed over time as the Americans developed from colonies to a confederation of republican states and finally to a nation under the Constitution. But within the American legal system, precedent continued throughout this period, exhibiting significant similarities to its English counterpart.

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or contracts, where certainty was essential."); Lee, *supra* note 26, at 688 (noting that, by the time the *Morecock* decision was handed down, a "distinction had already taken hold in the English courts" between "commercial cases and other decisions"); Lee J. Strang, *An Originalist Theory of Precedent, Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 451–52 (2006) ("Stare decisis was applied more vigorously in cases involving property or contract.").

[31] For a similar view of the use of precedent in England, see PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 228–29 (2008).

[32] *See* ALLEN, *supra* note 19, at 219 n.1 (arguing that the modern theory developed in the nineteenth century); PLUCKNETT, *supra* note 29, at 349–50 (same); William Holdsworth, *Case Law*, 50 L. Q. REV. 180, 180 (1934) (arguing that the modern theory "was reached substantially by the end of the eighteenth century").

[33] *See* Healy, *supra* note 21, at 55–56, 66–73; Lawson, *Mostly Unconstitutional*, *supra* note 3, at 12–13; Lee, *supra* note 26, at 659–62; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1576–77 (2000) (endorsing Lee's argument).

[34] *See* sources cited *supra* note 32.

During the colonial period, the American colonies developed from informal outposts to the political communities that would successfully rebel against the English. As English subjects, the colonists were largely governed by the English system of law.[35] Their judiciaries were filled with persons selected by the English governors and their councils, with the governor himself serving in the Judiciary.[36] Colonial judicial decisions were sometimes subject to judicial review in England.[37] Thus, it is no surprise that English rules of precedent were applied in American courts.

As the colonies developed into mature political communities, they increasingly employed the English common law.[38] By the eighteenth century, commentators suggest that a practice of giving respect to precedent was generally followed in America.[39] Legal historian Morton Horwitz believes that the colonists held a strong view of precedent: "[T]he overwhelming fact about American law through most of the eighteenth century is the extent to which lawyers believed that English authority settled virtually all questions for which there was no legislative rule."[40] Consequently, there was "a strict conception of precedent."[41] Legal historian William Nelson has a similar view.[42] Even if one disagrees with these historians and believes that a weaker view of precedent prevailed in the colonies, that would still allow a significant role for precedent, similar to that in England at the time.

Statements supporting precedent came from the bar as well as the courts. John Adams wrote during the colonial period that "every possible

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[35] LEONARD LABAREE, ROYAL GOVERNMENT IN AMERICA 4–5 (1930).

[36] EVARTS GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 113, 140–44 (1898).

[37] LABAREE, *supra* note 35, at 5.

[38] Healy states that during the seventeenth century, the colonists were "struggling to survive on a strange continent," and therefore employed a legal system that relied on adaptability rather than restraint. Healy, *supra* note 21, at 73–74. He suggests—without actually asserting—that precedent was not followed. *Id. But cf.* Strang, *supra* note 30, at 457 ("During the seventeenth century such a doctrine was weak, but in the eighteenth century, as the colonial legal system became increasingly complex, the doctrine of precedent came to resemble its English counterpart."). But even if precedents were not followed at this early date, this fact would have little relevance for the meaning of the Constitution. In the undeveloped colonies of the seventeenth century, the colonists displayed a "strong dislike of lawyers," and therefore may not have followed accepted legal forms such as precedent. Healy, *supra* note 21, at 74. But as time progressed, the colonies developed and came to embrace the Anglo-American legal system. *See* Healy, *supra* note 21, at 74–75; Strang, *supra* note 30, at 456. The Americans, who were writing the Constitution in developed political communities, would no doubt have relied on the ordinary legal forms that had developed in England and in the colonies for the last several generations. They would not have assumed that the forms employed by new undeveloped colonial outposts would govern or be relevant.

[39] *See, e.g.*, Strang, *supra* note 30, at 457.

[40] MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 8 (1977).

[41] *Id.*

[42] *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 18–20 (1975).

Case [should be] settled in a Precedent, leav[ing] nothing to the arbitrary Will or uniformed Reason of Prince or Judge."[43] Similarly, judges emphasized that the courts were not free to depart from "the known rules of the common law."[44] In the Maryland case of *Somerville v. Johnson*, for example, the court followed precedent, stating that it otherwise would have reached the opposite result.[45]

There is also evidence that colonial courts followed the two additional aspects of the English precedent doctrine.[46] First, the courts recognized that a series of decisions was entitled to greater weight than a single decision. The Massachusetts Supreme Court stated that when a "Usage had been uninterrupted . . . the Construction of the Law [is] thereby established" and the court "therefore would make no Innovation."[47] Second, the courts acknowledged that precedents were entitled to greater weight in cases involving property, because of the reliance interests involved.[48]

3. Precedent in the Independent States.—After independence, the colonies became states. While they were no longer formally subject to the English legal system, the American states in the period before the Constitution and in the early years afterward largely continued to employ the Anglo-American legal system, including the precedent rules. First, the courts used precedent, with some courts applying stronger precedent rules and other courts applying weaker ones. The courts also followed the two additional

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[43] 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 167 (L.H. Butterfield ed., 1961). As Chief Justice of the Massachusetts Supreme Court, Thomas Hutchinson had expressed similar views, emphasizing the need for known and certain law and arguing that the common law provided the rule of decision and prevented judicial legislation. HORWITZ, *supra* note 40, at 5.

[44] *See* HORWITZ, *supra* note 40, at 8.

[45] Somerville v. Johnson, 1 H. & McH. 348, 353–54 (Md. 1770), *cited in* Strang, *supra* note 30, at 457.

[46] Healy questions the claim that colonial courts generally followed the English precedent doctrine. Healy, *supra* note 21, at 75–76. But Healy's arguments focus on the modern notion of strong precedent. Thus, many examples he proposes, while inconsistent with strong precedent, are entirely consistent with the weaker view of precedent. For example, Healy cites as evidence against precedent that James Otis had "argued in a 1761 case that it is '[b]etter to observe the known Principles of Law than any one Precedent.'" Healy, *supra* note 21, at 76. This statement, however, is not inconsistent with the English conception of precedent that conferred limited weight to single decisions. Where a single case is inconsistent with known principles of law, which were derived from previous cases, courts would often not follow the single decision. But that did not imply that precedent was not given weight and that a series of decisions was not given significant weight. A similar analysis applies to Healy's discussion of *Belt v. Belt*, a Maryland decision from 1771, in which the Court "disregarded the decision in a previous case and instead followed the teachings of Mansfield." Healy, *supra* note 21, at 76 (discussing Belt v. Belt, 1 H. & McH. 409, 418 (Md. 1771), 1771 WL 13, at *6). But, again, it was entirely consistent with the accepted system for the court to not follow a single decision that was inconsistent with "the authorities in the books" that had been derived from other cases. *See Belt*, 1 H. & McH. At 418, 1771 WL 13, at *6.

[47] HORWITZ, *supra* note 40, at 8 (quoting Watts v. Hasey, Quincy's Mass. Rep. 194 (1765)).

[48] *See Somerville*, 1 H. & McH. at 353–54, *quoted in* Strang, *supra* note 30, at 457.

precedent rules: they gave greater weight both to a series of decisions than to a single precedent and to decisions concerning property.[49]

Statements from important judges and commentators from this period illustrate the use of precedent. James Wilson, a leading participant at the Constitutional Convention and in the ratification debate, as well as a Supreme Court Justice and author of a legal treatise, wrote:

> Judicial decisions are the principal and most authentick evidence, which can be given, of the existence of such a custom as is entitled to form a part of the common law. Those who gave such decisions, were selected for that employment, on account of their learning and experience in the common law. As to the parties, and those who represent the parties to them, their judgments continue themselves to be effective laws, while they are unreversed. They should, in the cases of others, be considered as strong evidence of the law. As such, every prudent and cautious judge will appreciate them. He remember, that his duty and his business is, not to make the law, but to interpret and apply it."[50]

Wilson, here, seems to follow the Blackstonian approach, which treats precedent as entitled to strong, but not absolute, weight.

Thomas Jefferson also appears to have expected and approved of the use of precedent. In 1776, the Virginia legislature set up a committee, chaired by Jefferson, to codify the laws. Jefferson, supported by a committee majority, tried not to change the language of certain "ancient statutes" in part because "the meaning of every word [had been] so well settled by decisions."[51] Moreover, Jefferson and the majority did not try to reduce the entire common law to statutes because "every word and phrase in [the new statutes] would become a new subject of criticism and litigation, until its sense should have been settled by numerous decisions."[52] Clearly, then, Jefferson and the committee majority expected precedent to apply to statutory interpretation, and they appeared to believe it had desirable qualities in terms of clarity and predictability.

Chancellor Kent also approved of precedent. In his widely regarded treatise, Kent wrote:

> A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favour of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and their con-

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[49] *See* NELSON, *supra* note 42, at 18 n.62.

[50] 2 THE WORKS OF JAMES WILSON 160–61 (James DeWitt Andrews ed., 1896).

[51] Letter from Thomas Jefferson to Skelton Jones (July 28, 1809), *in* 12 THE WRITINGS OF THOMAS JEFFERSON 297, 299 (Albert Ellery Bergh ed., 1907).

[52] *Id.*

> tracts by it. It would therefore be extremely inconvenient to the public, if precedents were not duly regarded and pretty implicitly followed . . . . If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. . . . [W]hen a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law.[53]

Chancellor Kent also seemed to follow the Blackstonian approach[54] of treating precedent as strong evidence of the law.[55]

The evidence from this period is also important because it reveals that the dominant approach to precedent was not limited to the common law but was also applied to decisions construing written laws. Many decisions invoked what were regarded as the ordinary rules of precedent when construing written laws.[56] Moreover, judicial opinions did not state that different

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[53] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 442–43 (1826).

[54] Because Kent's treatise was written in 1826—nearly forty years after the Framing—its ability to shed light on the Constitution's original meaning is limited. Nonetheless, the treatise's adoption of the Blackstonian-Wilsonian approach suggests the continuity of that view.

[55] While Kent did not have a strong or modern conception of precedent, he certainly believed that precedent can change the results that judges would otherwise reach. Kent's writings certainly recognize that precedents can be overruled:

> But I wish not to be understood to press too strongly the doctrine of *stare decisis*. . . . It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance. . . . Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it.

KENT, *supra* note 53, at 444. But as the quotation in the text makes clear, Kent also strongly affirmed precedent. Clearly, Kent had a nuanced view that noted that overrulings are a matter of tradeoffs—in particular, tradeoffs between reliance and accuracy. Kent also recognized that a series of decisions is of greater weight than a single decision, and while not impregnable, are entitled to substantial weight.

[56] *See, e.g.*, Goodell v. Jackson, 20 Johns. 693, 720 (N.Y. 1823) (Kent, C.); Packard v. Richardson, 17 Mass. (17 Tyng) 122, 143 (1821); Kerlin's Lessee v. Bull, 1 Dall. 175, 178 (Pa. 1786); Bush v. Bradley, 4 Day 298, 309–10 (Conn. 1810) (opinion of Smith, J.); Minnis v. Echols, 12 Va. (2 Hen. & M.) 31 (Va. 1808) (opinion of Roane, J.); Respublica v. Roberts, 1 Yeates 6, 7 (Pa. 1791). For an extended discussion of several of these cases, see Nelson, *supra* note 25, at 14–17 and accompanying footnotes. *See also* Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 391 (Marvin Meyers ed., rev. ed. 1981) ("Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it."). *But see* Commonwealth v. Posey, 8 Va. (4 Call) 109, 116 (1787) (opinion of Tazewall, J.) (writing that "the uniformity of decisions" about the correct interpretation of a statute "does not weigh much with me," because "although I venerate precedents, I venerate the written law more").

Thomas Jefferson and the Virginia committee on law revision also expected precedent to apply to written laws. *See* Letter from Thomas Jefferson, *supra* note 51, at 299. Zephaniah Swift expected the same. *See* ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 46 (John

precedent rules should apply to written laws. This is important because it might otherwise be thought that the precedent rules were special to the common law. Under that view, judicial decisions might be thought to be entitled to weight, not because that is how judicial decisionmaking operates, but because the common law consists of precedents or judicial custom. That precedent was applied to written law strongly indicates that this latter view of precedent as part of the common law was not the full understanding of precedent. Even if precedent first originated on the understanding that judicial custom was part of the law, the precedent practice became so deeply entrenched that it came to be understood as an aspect of judicial decisionmaking that also applied to written laws.

One factor that complicates the experience within American states after the revolution is that of English precedents. While the Americans were operating within an English common law framework that was often deemed to exceed national boundaries, they had declared independence and therefore were no longer subject to English law. Consequently, some of the states adopted a two-level approach to precedent, giving English precedents less weight than American state precedents. Because the states treated American precedents with greater respect, the treatment of English precedents does not indicate a change in precedent rules generally, but only a reduced authority for English law in an independent nation.[57]

Byrne, Windham, Conn.) ("[The Connecticut courts] have by a series of decisions ascertained the construction of the statutes, by which many very important points, and principles have been settled.").

[57] Some of the judges during this period followed what appeared to be a weak (but nonetheless genuine) view of precedent. For example, in a treatise written in 1795, Connecticut lawyer and later Chief Justice Zephaniah Swift discussed the role of English and Connecticut precedents under Connecticut law. Swift both seemed to endorse precedent (precedent "is founded in the highest wisdom, and produces the best effects") and to dismiss or limit it ("the institution [of precedent], is a principle established which corrects all errors and rectifies all mistakes"). *See* SWIFT, *supra* note 56, at 40, 41. One way to reconcile Swift's apparently conflicting views is to interpret him as following Blackstone's notion that only clear errors can be reversed and that precedent should otherwise be followed.

However one interprets Swift's meaning, it seems clear that he believed that Connecticut decisions were entitled to at least a moderate amount of precedential weight, because Swift drew a distinction between English and Connecticut decisions. Swift wrote "[t]hat part of the English common law, *which has been thus approved by the [Connecticut] courts*, may be considered as our common law by adoption." *Id.* at 44 (emphasis added). By contrast, "that part which has not been thus adopted, may . . . be considered obligatory, so far as it is consistent with reason, adapted to our local circumstances, and conformable to the policy of our jurisprudence." *Id.* Because Connecticut decisions are entitled to greater precedential weight than English decisions, Swift views Connecticut decisions as having real, significant precedential weight.

A similar view is expressed by Vermont Chief Justice Nathaniel Chipman. Chipman wrote that "[i]f no reason can be assigned, in support of [English] rules or precedents, not already adopted in practice [in Vermont]," then they should not be adopted. NATHANIEL CHIPMAN, REPORTS AND DISSERTATIONS IN TWO PARTS 65 (Anthony Haswell, Rutland, Vt. 1871). Clearly, when Vermont courts had actually adopted such English rules, which might be relied on, even precedents that seemed unreasonable might have been followed. Similar views of relatively weak precedent were held by other judges. *See* Nelson, *supra* note 25, at 31 (discussing Jacob Radcliff of the Supreme Court of New York, who agreed that "common law decisions could be erroneous" and should not be followed unless overruling them would

4. Precedent During the Ratification Debates.—This Anglo-American tradition of precedent was also recognized during the constitutional ratification debate. The question of precedent arose in several different criticisms of the proposed Constitution by Anti-Federalists. Yet defenders of the Constitution did not deny that precedent would be employed. As we show in this section, the comments about precedent and the Constitution suggest that commentators believed that the Constitution did not prohibit precedent.

The Federal Farmer, an Anti-Federalist critic of the Constitution, both expected and approved of the development of precedent. The Federal Farmer was concerned about the lack of precedents to guide the federal courts concerning equity: "[W]e have no precedents in this country, *as yet*, to regulate the divisons in equity as in Great Britain; equity, therefore, in the supreme court *for many years* will be mere discretion."[58] While the Federal Farmer was thus critical of the absence of precedent, he clearly believed that precedent would emerge over time.

Another Anti-Federalist critic of the Constitution who expected precedent to be employed was Brutus. Brutus wrote that the federal Judiciary

> will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them.[59]

This analysis shows that while he was displeased about how it would operate, Brutus believed that precedent would be applied to constitutional adjudications.

In *The Federalist No. 78*, Alexander Hamilton responded in part to Brutus's criticisms of the judicial power under the proposed Constitution. Hamilton defended the Judiciary, not by denying that precedent would apply, but by asserting it:

> It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes be-

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have retrospective influence or affect preexisting rights); *see also id.* (discussing the similar view of Edmund Pendleton).

[58] *Letters from The Federal Farmer No. 3* (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 234, 244 (Herbert J. Storing ed., 1981) (emphasis added).

[59] *Essays of Brutus No. 15* (Mar. 20, 1788), *in* THE COMPLETE ANTI-FEDERALIST, *supra* note 58, at 441.

fore them.[60]

Thus, Hamilton defended precedent, and the context suggests that such precedent would apply as to written laws.

James Madison also expected and approved of precedent. Madison wrote in *The Federalist No. 37* that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications."[61] During the ratification period, Madison wrote in a letter, "[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[62] This evidence demonstrates that Madison believed precedent would apply to constitutional decisions. Moreover, Madison adopted the traditional view that a series of decisions was entitled to greater weight than a single decision.[63]

5. Precedent in the Supreme Court.—The early Supreme Court also followed precedent.[64] While it is less clear whether it followed a weak or strong form of precedent, our major interest is not in establishing the kind of precedent it followed, but that its actions suggest that following precedent is legitimate. To that end, we first present evidence that it followed a relatively strong form of precedent, then evidence that it followed a weaker form, and finally reject suggestions that the early Court opposed the use of precedent.

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[60] THE FEDERALIST NO. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[61] THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003).

[62] Letter from James Madison to Samuel Johnston (June 21, 1789), *in* 12 STATE RECORDS OF NORTH CAROLINA 634 (Walter Clark ed., 1907).

[63] Madison adhered to this idea throughout his life. Later examples involve his decision to sign the bill reauthorizing the bank of the United States because precedent supported its constitutionality, although he had a contrary view. *See* Ira Lupu, *Time, the Supreme Court, and* The Federalist, 66 GEO. WASH. L. REV. 1324, 1334 (1998). Many years later, Madison returned to this subject, articulating a view that was consistent with his earlier ideas but more elaborate. He wrote:

> Yet, has it ever been supposed that [the judge] was required or at liberty to disregard all precedents, however solemnly repeated and regularly observed, and, by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community? . . . There is, in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law, and there is a like necessity of considering it a constitutional rule of interpreting a Constitution.

Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 392 (Marvin Meyers ed., rev. ed. 1981).

[64] We are indebted for the cases we discuss here to Lee, *supra* note 26, and Strang, *supra* note 30, who have provided very useful pictures of precedent in the Marshall Court.

On the one hand, the early Court took many actions consistent with a strong adherence to precedent.[65] First, the Marshall Court overruled almost no decisions, and its few overrulings had special justification.[66] Second, the Justices sometimes made clear they felt confined by precedent: in *Ex Parte Bollman*, Chief Justice Marshall relied on two prior decisions to conclude that an issue was no longer open, even though the issue had not been raised by counsel or addressed by the Court in those two decisions.[67] Third, the Justices sometimes announced they were following a precedent, even though they disagreed with it.[68]

On the other hand, in *Ex Parte Bollman*,[69] Justice Johnson contested Marshall's reliance on prior cases, taking a weaker view of precedent. While Johnson rejected a strong view of precedent,[70] he adopted a weaker view. Johnson wrote that

> this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of

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[65] In addition to the Supreme Court, the lower federal courts also appear to have followed precedent. *See* Strang, *supra* note 30, at 468. ("There are countless similar examples showing that stare decisis was a ubiquitous feature of early federal court legal practice as employed by litigants, the courts, and even the reporters."). A notable example involves Judge Chase's decision for the federal Circuit Court concerning the constitutional definition of treason, where the judge relied on two previously federal court interpretations. According to Chase, "[t]hese decisions, according to the best established principles of our jurisprudence, became a precedent for all courts of equal or inferior jurisdiction; a precedent which, though not altogether obligatory, ought to be viewed with great respect, especially by the court in which it was made, and ought never to be departed from, but on the fullest and clearest conviction of its incorrectness." Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5127) (discussed in Strang, *supra* note 24, at 470). Chase also "considered the law as settled by those decisions." *Id.* at 936.

[66] The two decisions where the Court actually overruled prior cases involved situations in which a contrary practice had evolved after the overruled decision, *see* Gordon v. Ogden, 28 U.S. 33, 34 (1830) (overruling Wilson v. Daniel, 3 U.S. 401 (1798), on the basis of the fact that "a contrary practice" to the decision had "since prevailed"), and where the full record had not been before the Court in the previous decision. *See* United States v. Percheman, 32 U.S. 51, 88–89 (1833) (overruling Foster v. Neilson, 27 U.S. 253 (1829)). Thus, there were special circumstances that justified these overrulings. *See also* Lee, *supra* note 26, at 679–81.

Two decisions are normally mentioned as overrulings, but they were not true overrulings. In Hudson v. Guestier, 10 U.S. 281 (1810), Marshall himself recognized that he had counted votes incorrectly in the previous case of *Rose v. Himely*, 8 U.S. 241 (1808). 10 U.S. at 285 (Marshall, J., dissenting). The majority thus did not overrule *Rose* on the issue before it. *See* Lee, *supra* note 26, at 677–78. *Green v. Neal's Lessee*, 31 U.S. 291 (1832), also does not provide an example of overruling precedent that had any claim to binding effect, despite its failure to follow the previous cases of *Patton's Lessee v. Easton*, 14 U.S. 476 (1816), and *Powell's Lessee v. Harman*, 27 U.S. 241 (1829). *Neal's Lessee* merely held that when Tennessee law had changed on the decisive question at issue, the new Tennessee law should have been followed. 31 U.S. at 295, 299–301; *see also* Lee, *supra* note 26, at 678.

[67] 8 U.S. 75, 100–01 (1807).

[68] In *Ogden v. Saunders*, 25 U.S. 213, 266 (1827), Bushrod Washington notably said that he would follow the conclusion of *Sturges v. Crowninshield*, 17 U.S. 122 (1819), that permitted states to pass bankruptcy laws to discharge debts, despite his continued disagreement with its holding.

[69] 8 U.S. 75, 101 (Johnson, J., dissenting).

[70] *See* Lee, *supra* note 26, at 669.

> adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions, or those of any other tribunal. . . . Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error.[71]

Johnson is here merely denying that two individual cases that did not even address an issue constitute precedent sufficiently powerful to resolve the matter. He is thus not rejecting the concept of precedent generally, but arguing for circumscribing its principal force to a series of decisions.[72]

We also disagree that Marshall's failure on occasion to cite a prior case suggests that precedent had no place in his jurisprudence. Indeed, it seems that Marshall sometimes neglected precedent because of the poor digest system available to the court. In *McCulloch v. Maryland*,[73] for example, Marshall did not cite to *United States v. Fisher*,[74] which had also construed the Necessary and Proper Clause fourteen years previously.[75] But none of the attorneys in the case mentioned it either, suggesting that the precedent was simply overlooked.[76] Moreover, in *McCulloch*, Marshall himself suggested that legal precedent and practice from the all three branches—legislative, executive, and judicial—were important determinants of his decision.[77] Thus, Marshall's occasional neglect of precedent should not be understood as a rejection of that concept.[78]

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[71] *Bollman*, 8 U.S. at 103–04.

[72] In another part of the opinion, Justice Johnson indicated that it is only a single decision that must be addressed, since the second decision merely cited the first. *Id.* at 104.

[73] 17 U.S. 316 (1819).

[74] 6 U.S. 358, 396 (1805).

[75] We also do not believe Marshall's occasional decision not to prominently cite a precedent in an opinion reflected his rejection of precedent. In *Cohens v. Virginia*, 19 U.S. 264, 290-310 (1821), Marshall engaged in a lengthy analytical discussion to conclude that the Supreme Court had appellate authority to review state court judgments. Only after justifying the conclusion did Marshall cite *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), which had decided the question previously. *See Cohens*, 19 U.S. at 310. While this practice seems inconsistent with modern practice, it is not necessarily inconsistent with the weaker theory of precedent. By answering the question again with a slightly different theory and without significantly relying on the previous decision, the Court lent independent authority to its conclusion regarding one of the most significant issues in constitutional law at the time. Under the weaker version of precedent, a single decision may not be entitled to great weight, but a series of decisions was entitled to more weight, and therefore the manner in which *Cohens* was decided helped to solidify the law in this area.

[76] *See* Lee, *supra* note 26, at 668.

[77] *McCulloch*, 17 U.S. at 401 Similarly, in *Stuart v. Laird*, 5 U.S. 299 (1803), Justice Patterson upheld circuit riding in large part because the practice had been used in case after case. *Id.* at 309 ("[T]he practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.").

[78] One possible objection to our reliance on the history of precedent is that it is consistent with what Lawson describes as the epistemological case for precedent. *See* Lawson, *Mostly Unconstitutional*, *supra* note 8, at 18–22. Under the epistemological view of precedent, one can rely on precedent if it is the

6. Conclusion.—Precedent was supported by the leading founders of the country, including James Madison, Alexander Hamilton, Thomas Jefferson, James Wilson, and John Adams, as well as by leading legal giants, including Coke, Hale, Blackstone, and Kent. This is a veritable who's who of Founders and legal giants. Perhaps equally powerful is the absence of writers who explicitly or even implicitly rejected the use of precedent. Therefore, we can conclude that precedent was a longstanding, important, and valued part of Anglo-American law. It is thus extremely unlikely that the enactors would have prohibited precedent in the Constitution,[79] and one should not conclude that they did absent either an explicit provision saying so or no alternative way to read the text. Fortunately, there are two ways to find precedent recognized under the Constitution.

C. The Consistency of Originalism and Precedent

The powerful history of the use of precedent raises the question of whether the constitutional text can accommodate it. This section argues that the Constitution allows for precedent in two distinct ways. First, the Constitution incorporates a minimal degree of precedent under the judicial power. Second, apart from this minimal degree of precedent, the Constitution treats precedent as a matter of common law that is revisable by congressional statute.

1. Judicial Power as a Basis for Precedent.—Article III vests the judicial power of the United States in the federal courts.[80] The judicial power can be understood as requiring judges to deploy a minimal concept of precedent—a concept of precedent that was followed widely and consistently from at least the time of Coke until the Constitution. This minimal

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"best evidence of the right answer." *Id.* at 19. Thus, one might argue that the weak version of precedent we discuss might be justified on epistemological grounds because prior decisions could be evidence of the correctness of these decisions, and a series of decisions would be strong evidence of their correctness. In this way, one might attempt to make Lawson's view consistent with at least some of the history.

This argument, however, will not work. Lawson argues that the circumstances in which an epistemological version of precedent should hold sway are very narrow indeed and are much narrower than the tradition of precedent we discuss. First, these precedent rules regularly held that precedents about property rights were entitled to greater weight because the reliance interest was larger. Since it is reliance, not accuracy, that is the main value, it is clear that epistemology cannot account for this rule. Second, even if one puts to the side the property-right precedent rule, the leading authorities on precedent, such as Blackstone and Kent, argued that precedent was also based on values other than accuracy, like predictability and judicial constraint. The weak precedent rules are hard to understand as simply being about accuracy. Finally, it should not be surprising that there is some connection between precedent and accuracy. Desirable precedent rules promote a variety of benefits, including accuracy. Real world precedent rules—both today and historically—cannot be understood as being solely about accuracy, as Lawson himself recognizes. *Id.* at 21.

[79] *See* Murphy, *supra* note 17, at 1084 ("[I]t seems quite clear that the Framers expected the new federal courts to treat their past decisions as evidence of law and to adhere to them absent a strong justification to the contrary.").

[80] U. S. CONST. art. III, § 1.

concept of precedent requires that judges give some weight to a string of judicial decisions on an issue over a substantial period. Under this view, the Constitution allows the common law or Congress to establish stronger precedent rules, but establishes a floor below which precedent cannot be eliminated.

The term "judicial power" in Article III is, at least on its face, ambiguous. It might be understood narrowly to mean the power to say what the law is in a judicial proceeding. But it might also be understood more broadly to include certain traditional aspects of the judicial office that were widely and consistently exercised. Such core aspects of an office often come to be identified with the power that the officer exercises. One prominent example is the view of many originalists that executive power is not simply the narrow power to execute the law but also includes many of the traditional powers of executives, such as the foreign affairs power.[81]

There are strong reasons for concluding that the Framers' generation would have understood the judicial power to include the minimal concept of precedent, which requires that some weight be given to a series of decisions. The concept of precedent that we would attribute to "judicial power" is, to be sure, a very narrow one. Indeed, this concept is actually slightly weaker than the weakest one that was followed historically. While we have found evidence of judges placing *substantial* weight on a series of decisions, the minimal precedent concept requires only that *some* weight be given. The narrowness of this definition makes it more likely that the concept was universal and would be regarded as part of the core of judicial power. Consequently, it is likely that when the Constitution was enacted, a judge refusing to give any weight to a series of cases all decided in the same way would have been deemed not merely to have been mistaken, *but to have improperly exercised judicial authority.*

This incorporation of minimal precedent under the judicial power would also have promoted the important values associated with precedent, such as predictability and judicial constraint. Even more significantly, the incorporation of minimal precedent helps assure the beneficence of Congress's power to establish precedent rules. Congress's power is potentially sweeping, but the minimal degree of precedent contained in the Constitution restrains Congress by preventing it from eliminating precedent.

It is, of course, true that the fact that judges deployed a legal concept at the time of the Framing does not necessarily make it a requisite element of

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[81] *See* Saikrishna Prakash & Michael D. Ramsey, *The Executive Power of Foreign Affairs*, 111 YALE L.J. 231, 252 (2001). For another example, see our argument that the members of Congress possess as constitutional powers some of the authority traditionally enjoyed by members of Parliament. *See* John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 332–36 (1997).

Article III's judicial power.[82] Judges employed many legal rules, but the federal courts are not required to deploy them now to properly exercise judicial power.[83] Widely followed precedent rules differed from particular common law rules, however, in that they were more centrally connected with judicial decisionmaking. The minimal concept of precedent was followed not just in one area of the law, but in all of them, and it involved the method of judicial decisionmaking rather than simply the application of certain legal rules.[84] Thus, giving weight to a series of precedents would have been seen to be an aspect of judging, not simply one of a multitude of rules judges happened to apply.[85]

The constitutionally required precedent rule just outlined is so narrow in scope, however, that it is unlikely to have any practical import in a world where precedent is accepted as a value. Rather, its most important contribution is theoretical: the rule indicates that the original meaning of the Constitution embraces at least some precedent. This rule shows that the no precedent position is unconstitutional. The bulk of precedent rules, however, derive from another source: these rules are a matter of common law that is revisable by congressional statute.

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[82] *See* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 524 (2000).

[83] *Id.*

[84] John Harrison views precedent rules as evidentiary rules about the nature of the law. He then argues that just as evidentiary rules for facts that were regularly applied, such as the hearsay rule, were not incorporated into the judicial power, precedent rules were also not so incorporated. *See* Harrison, *supra* note 82, at 524. We agree that the hearsay rule was not made part of the judicial power, but disagree that this implies that no aspects of precedent are part of the judicial power. Precedent rules were applied by more judges and to a more distinctively judicial task than hearsay rules. Precedent rules were applied by all judges as compared to hearsay rules which were mainly applied by trial judges. Moreover, precedent rules involve judicial decisions by judges on the law rather than decisions made largely in aid of jury decisionmaking. In addition, at the time of the Framing, the hearsay rule was a relatively recent development. *See* 5 JOHN H. WIGMORE, EVIDENCE § 1364, at 18 (John H. Chadbourn ed., rev. ed. 1974) (dating origin of hearsay rule to between 1675 and 1690). By contrast, while we have shown that some form of precedent was followed consistently from at least the time of Coke, precedent was thought to be a part of the English legal system from the earliest periods, *see* JAMES KENT, COMMENTARIES ON AMERICAN LAW 473-78 (12th ed. 1873), or even to predate it, *see* 1 WORKS OF JAMES WILSON 342 (1967) (suggesting that the doctrine of precedent was brought to England by the Romans). Thus, while the hearsay rule was certainly one of the broader common law rules, it did not have the generality, history, and connection with judicial decisionmaking that precedent had.

[85] John Harrison argues against incorporating precedent into the judicial power on the ground that the constitutional enactors would have viewed civil law judges, who did not formally follow precedent, as exercising the judicial power. *See* Harrison, *supra* note 82, at 522 n.61. This argument, however, fails to recognize that the term "judicial power" would have had different meanings depending on the context. Since the enactors were enacting a legal document within the Anglo-American legal system, they would be presumed to have in mind the judges of that legal system, who employed precedent. For the same reason, terms within the Constitution are often given their common law meaning rather than looking to their meaning under the civil law. It is, no doubt, true that the enactors would have deemed civil law judges as exercising judicial power in some sense of the term, but that does not mean that they used that foreign or secondary sense of the term in the Constitution.

2. Common Law as a Basis for Precedent.—There are two basic arguments for treating precedent as a matter of common law. First, it is difficult to view precedent rules as other types of law, including constitutional law, statutory law, or state law. Second, precedent has the characteristics of common or general law. But before making these arguments, it is useful to briefly discuss the concept of federal common law, or more accurately, the general law. In recent years, scholarship has begun to recover the idea of general law that existed in the early years of the republic.[86] This general law was unwritten and not the product of a single sovereign, but instead originated in both private and judicial custom. Yet, where applicable, this law was deemed authoritative and courts were therefore bound to apply it. Examples of general law include admiralty law, interstate law, and the law applied when the Supreme Court exercises original jurisdiction.[87]

Typically, general law would apply when it was not displaced by some superior law issued by the federal or state governments.[88] The general law would then bind the courts. An important feature of the general law is that it is not, as the federal common law is conceived today, supreme law of the land under the Supremacy Clause.[89] Two important implications follow from the general law not being the supreme law of the land: the general law is inferior to written federal law, and the general law cannot, on its own force, displace state law.[90]

Having clarified the nature of general law, we can now return to the two arguments for understanding precedent as part of the general law. Here we follow the pathbreaking work of John Harrison, who first articulated this

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[86] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

[87] *See* Harrison, *supra* note 82, at 525–26. It seems clear that the Constitution was written with an understanding that general law would apply. Constitutional provisions make much more sense if we assume that the enactors expected the general law to apply. For example, consider cases involving interstate border disputes, which are within the original jurisdiction of the Supreme Court. The law governing such disputes needs to include some common law as it cannot be entirely federal statutory law—because Congress has no enumerated power to legislate on border disputes—or state law, because one state cannot have authority to resolve a border dispute with another. Given the text and overall structure of the Constitution, it seems that the constitutional enactors expected the Supreme Court to resolve such disputes in accordance with the general law.

[88] Thus, in our view, except for the minimal concept of precedent commanded by the "judicial power," the Court's precedent rules are similar to default rules that the people acting through their representatives can vary.

[89] The Supremacy Clause provides that "this Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, § 1, cl. 2.

[90] Since it is not the supreme law of the land, the general law would not be binding on state courts when these courts construe federal law. This Article does not address how precedent would operate in state courts.

understanding of precedent.[91] The first argument for viewing precedent as general law is through a process of elimination. The alternative ways for viewing precedent are not sustainable.[92] The main alternative source of precedent rules—the Constitution—cannot establish any more than a minimal portion of those rules. While the judicial power can be fairly read to require a minimal precedent rule that was widely and consistently followed and was connected to judicial decisionmaking, other precedent rules do not satisfy these criteria. Rather, there has been a diversity of precedent rules, both horizontal and vertical, that has governed judicial decisions both before and after the Constitution was enacted.[93] It is hard to see how one could derive a single precedent approach from this diversity. One would have to select a particular precedent rule and then show how it was incorporated into the term "judicial power," despite the existence of diverse precedent approaches. One would also have to explain why the Constitution's enactors would have sought a single precedent approach that did not change even as circumstances did. Nor can precedent be viewed as federal statutory law or state law. Congress has not passed any statutes that directly address precedent, especially at the Supreme Court level.[94] Moreover, state laws cannot be viewed as the appropriate source of precedent for the federal courts throughout the nation.[95]

The second argument for treating precedent as general law is that precedent has the characteristics of general law.[96] As our historical review has shown, precedent norms existed across different jurisdictions in the Anglo-American legal world. Thus, there was a general law to apply. Moreover, that law was unwritten, originated in judicial custom, and was deemed authoritative. Finally, while commentators are not as explicit about the nature of precedent as one might like, they did indicate that precedent was a common law doctrine.[97]

Furthermore, the history recounted above perfectly fits the view that precedent is a matter of common law. While this history strongly suggests that the Constitution does not prohibit precedent, the historical variability of

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[91] *See* Harrison, *supra* note 82, at 525–29. While we follow Harrison's view of precedent as a matter of general law, we do disagree with his view that the Constitution does not incorporate any notion of precedent under the judicial power. *See id.* at 518–21.

[92] *Id.* at 525.

[93] *See* Harrison, *supra* note 82, at 521–23; *supra* Part I.B.

[94] Harrison, however, does argue persuasively that precedent in federal courts is at best understood as reflecting a mixture of statutory structure and general law. *See* Harrison, *supra* note 82, at 525–31.

[95] We leave aside the question of whether the application of such state laws to federal courts would be unconstitutional, as Harrison believes, *see id.* at 525 (citing *McCulloch*), or whether they would simply be preempted under the statutes establishing federal courts.

[96] *Id.* at 529.

[97] *See* ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 9 (1822) ("Stare decisis is a fundamental maxim of the common law."); *see also* Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 286 (1850) (Curtis, J.) (referring to "the maxim of the common law, *stare decisis*").

precedent rules also indicates that the Constitution does not enact most of the precedent rules. Treating precedent as a matter of common law allows for precedent to operate under the Constitution without requiring identification of a single unchanging precedent approach. Thus, given the absence of an alternative source of law and its conformity with the history, the argument for treating precedent as a matter of common law is compelling.

Although precedent rules have been treated as a matter of common law, a strong argument exists that Congress can revise these rules. Congressional power to establish or revise precedent rules for constitutional cases in federal courts is found in Congress's authority to pass laws that are necessary and proper for carrying into execution the judicial power. This power permits Congress to pass laws that will permit the Judiciary to perform its job more effectively. If a law can be viewed as enabling the Judiciary to perform more effectively, then the Constitution gives to Congress the discretion to decide whether to pass it.[98] Precedent rules involve questions such as how judges would best balance conflicting values of the judicial enterprise, like accuracy and predictability. Precedent rules are therefore easily classified as helping the courts perform their function more successfully. Thus, Congress is given the authority to decide which precedent rules courts should follow. Just as Congress can use this power to legislate rules of procedure for the federal courts, so too can it use this power to enact rules of precedent.[99]

One might object that permitting judges and legislatures to shape precedent rules delegates too much power to ordinary officials to change the Constitution, thus exacerbating agency costs in a manner the constitutional enactors would have avoided. But precedent does not allow subsequent actors to change the meaning of the Constitution.[100] Rather, it governs the internal operations of the Judiciary by telling judges how to balance values such as accuracy and predictability when deciding whether to follow potentially erroneous decisions. Moreover, the Necessary and Proper Clause permits Congress to frame only genuine precedent rules, not subterfuges for reaching particular results—that is, to exercise legislative,

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[98] *See* Harrison, *supra* note 82, at 532–34; William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 793–94 (1975).

[99] *See* Harrison, *supra* note 82, at 532–34.

[100] Thus, the distinction between rules that constitute the original meaning of the Constitution and precedent rules that govern the internal operation of the Court is crucial to the argument here. Congress lacks the power to change the meaning of the Constitution. For instance, it could not enact interpretive rules that would tell the Court to look for modern meanings rather than original meanings or to emphasize text more than intent. As we discuss elsewhere, the interpretive methods deemed applicable to the Constitution at the time of its enactment provide the rules for constituting the Constitution's meaning, and Congress cannot change these rules any more than it can change the words of the Constitution. While Congress's authority to pass genuine precedent rules is a significant power, the power to enact interpretive rules that would change the meaning of the Constitution would be awesome and would be inconsistent with the constraint that is an essential aspect of a constitution.

not judicial, power. Consequently, these precedent rules must be relatively general in scope and application. Judges and legislatures cannot pick and choose certain rules to protect the authoritative value of cases they like, while applying different rules to overturn the cases of which they disapprove. Instead, they are permitted to make general decisions, such as to what extent society should value the benefits of original meaning as compared to predictability and constraint. Furthermore, because judicial power incorporates a minimal concept of precedent, there are additional limits on Congress's power to use its authority to legislate precedent rules to decide particular cases.

Of course, we do not understand precedent ever to replace the original meaning of the Constitution. Originalism remains the sole route to establishing its meaning. But precedent is authorized by the original meaning of the Constitution. Indeed, there is nothing strange about the Constitution authorizing decisions that depart from its original meaning. For example, the Constitution clearly requires the executive to enforce court judgments in specific cases, even if it believes these judgments have misconstrued the Constitution. The Constitution establishes this rule presumably because it sometimes regards other values as taking priority over following the original meaning. Similarly, the Constitution should be understood as authorizing that precedent be followed rather than the original meaning, because it sometimes confers greater weight on other values, such as predictability, clarity, and stability.

An ideal theory of precedent would balance these values against the benefits from preserving the Constitution's original meaning. Of course, this ideal theory need not be the one courts previously struck, either today or historically. We have used traditional precedent practice to show that precedent was an essential part of the law at the Framing, not to argue that the balance it struck was necessarily optimal. It is to the optimal balance that we now turn.

II. THE NORMATIVE THEORY OF PRECEDENT

Because precedent is not significantly constrained by the Constitution but instead is a matter of common law and statute, it is useful to consider the optimal approach to precedent in constitutional cases. Ultimately, this optimal approach should be applied to constitutional cases through common law and federal statute.

We begin by briefly presenting the normative arguments for the supermajoritarian theory of originalism. The next several sections then start distilling desirable precedent rules. First, we examine the relative benefits of following the original meaning and of following precedent. We then identify three specific rules for when precedent should be followed: when following precedent is necessary to avoid enormous costs, when precedent has been entrenched, and when precedents correct defects of the superma-

joritarian process for enacting constitutional provisions. We next identify several factors or circumstances when precedent would be relatively more or less beneficial—factors from which additional precedent rules could be constructed. After contrasting our approach to precedent with that of other scholars and the Supreme Court's approach in *Planned Parenthood v. Casey*, we conclude by applying the three proposed precedent rules to some important Supreme Court cases.

A. The Supermajoritarian Theory of Constitutional Originalism

In previous articles, we have argued that originalism is the best interpretive method for the United States Constitution because it is more likely to produce desirable results than other interpretive approaches.[101] Our argument consists of four steps. First, entrenched constitutional provisions that are desirable should take priority over ordinary legislation, because such entrenchments operate to establish a beneficial framework for governance, including representative institutions, checks and balances, and the protection of individual rights. Second, the use of strict supermajority rules to enact and amend constitutional provisions generally produces desirable entrenchments. Strict supermajority rules help to assure that constitutional provisions are supported by a consensus. They also impede the passage of partisan measures because support from both parties is needed for enactment. Further, supermajority rules produce desirable constitutional provisions because they place the constitutional enactors behind a limited veil of ignorance that leads them to focus more on the public interest than on narrow interests.[102]

Third, with one important exception—the exclusion of African Americans and women from the constitutional enactment process—appropriate supermajority rules have generally governed the passage of the Constitution and its amendments.[103] While this exclusion once had enormous ill effects, allowing slavery of blacks and disenfranchisement of both blacks and women, the constitutional consequences of these exclusions have largely been corrected and the costs of further judicial correction are higher than the benefits.[104] Finally, because it was the original meaning that the drafters, ratifiers, and public used to decide whether to adopt the Constitution by

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[101] We have discussed this theory at length previously. *See* McGinnis & Rappaport, *Three Views*, *supra* note 1; McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 1; McGinnis & Rappaport, *The Condorcet Case*, *supra* note 1.

[102] These are just a few of the arguments. For fuller treatment, see McGinnis & Rappaport, *Three Views*, *supra* note 1, at 1172–81; McGinnis & Rappaport, *The Condorcet Case*, *supra* note 1, at 109–15.

[103] McGinnis & Rappaport, *The Desirable Constitution and the Case for Originalism*, *supra* note 1.

[104] We have developed a theory of supermajoritarian failure that addresses what should be done about departures from appropriate supermajority rules. In cases where the departures have been either fully or largely corrected, as with the exclusion of blacks and women, we contend that the Constitution should be enforced as if it had been originally enacted in accord with appropriate supermajority rules. *See id.* at 34–37.

supermajority,[105] the desirability of the Constitution requires that judges interpret the document based on its original meaning.

Thus, originalism is necessary to preserve the benefits of a desirable Constitution enacted under supermajority rules. This justification suggests that the focus of originalism should be on how a reasonable person at the time would have understood its meaning. To answer that question, one must look to the commonly accepted meanings of the words and the interpretive rules that were deemed applicable to the Constitution. One would not look to the interpretive rules that modern scholars believe best state the original meaning of a provision, but instead to those rules and methods that people at the time would have employed. We call this interpretive approach "original methods originalism."

B. The Relative Benefits of Original Meaning and Precedent

We now turn to the question of how to fit precedent into our normative theory of originalism. When precedent departs from the original meaning of the Constitution, Supreme Court Justices must decide whether to follow the precedent or the original meaning of the relevant constitutional provision. Because the supermajoritarian theory of the Constitution and originalism is a consequentialist theory, we answer this question by comparing the benefits of following originalism with those of following precedent. One advantage of our consequentialist theory in this area is that it treats both originalism and precedent as having commensurable effects that can be compared.

1. The Benefits of Following Original Meaning.—The benefits of original meaning are threefold. First, as discussed above, our supermajoritarian theory shows that the original meaning of the Constitution is likely to be desirable because it was enacted through a strict supermajoritarian process. Thus, enforcing the original meaning of this desirable Constitution is likely to be beneficial.

A second benefit of originalism derives from the clarity, predictability, and judicial constraint that it is likely to produce. Justice Antonin Scalia, among others, has emphasized this benefit.[106] While the original meaning of the text does not always yield clear rules, it usually yields clearer guidance than an approach that allows a majority of judges to interpret provisions based on their policy views. While this benefit may be insufficient to justify originalism on its own, it is nonetheless significant and adds considerable force to the argument based on the likely desirability of a Constitution produced by supermajority rules.

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[105] *Id.* at 17–18.

[106] ANTONIN SCALIA, A MATTER OF INTERPRETATION 45–46 (Amy Guttman ed., 1997); Antonin Scalia, *The Rule of Laws as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79, 1184–85 (1989).

A third benefit of originalism is rarely recognized and therefore deserves a more extended discussion. Originalism preserves the important role of the constitutional amendment process. An effective supermajoritarian amendment process is necessary to update the Constitution while also preserving the benefits produced by supermajoritarian enactment of constitutional provisions. However, nonoriginalism, especially when it attempts to update the Constitution, prevents that amendment process from operating effectively.

The strict supermajoritarian process for constitutional amendments requires that there be a strong consensus in favor of a specific constitutional change. Establishing such a consensus, however, will often involve an extended period before the requisite number of people are convinced that the constitutional change is needed. During this period, there will generally be a political movement in which people can promote the change in a variety of ways. Examples include enacting the change at the state level and demonstrating the benefits of the change through its statewide effects, passing the change in the form of a federal statute, or simply keeping the issue on the political agenda. Eventually, successful movements gain enough support to pass the change as a constitutional amendment.

Judicial updating of the Constitution short circuits this process. A court that believes it is empowered to update the Constitution is quite likely to do so during this period when many people, perhaps a significant majority, favor constitutional change but do not have the requisite support for an amendment. Once the Supreme Court takes action, the opportunity to amend the Constitution will likely cease. Even if the amendment process would have reached a different result than the Court did, an amendment will not be able to secure the necessary support unless the Supreme Court's decision is very far from what the country would have enacted.

For example, during the 1970s, a movement grew to pass an equal rights amendment protecting women against government discrimination, because women had not been found protected under the Fourteenth Amendment. The movement stalled, however, in part because the Supreme Court updated the Constitution by starting to protect women under the Equal Protection Clause.[107] Once women were protected, there was less reason to enact the Equal Rights Amendment, especially given the other concerns the Amendment raised.[108]

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[107] We do not mean to suggest that the particular Equal Rights Amendment (ERA) that passed Congress and was sent to the states would necessarily have been enacted had the Supreme Court remained inactive. As we suggest, that Amendment raised other concerns that might have led to its failure, including, most importantly, that it employed general language in a world where courts were regularly engaged in the practice of creative judicial interpretation. *See infra* note 196 and accompanying text. If, however, the Supreme Court had refused to act, it seems likely that an amendment with more specific language that addressed broader concerns, such as women in combat, might have been enacted.

[108] We have previously suggested that Court decisions helped preclude the possibility of an Equal Rights Amendment for women. *See* McGinnis & Rappaport, *A Pragmatic Defense*, *supra* note 1, at

The fact that the Supreme Court updates the Constitution rather than the constitutional amendment process imposes significant harm. The Supreme Court's decision may differ from the constitutional amendment that would have passed in several different ways. First, the constitutional amendment would have reflected a consensus of the nation. By contrast, the Supreme Court decision would merely reflect the views of a majority of the Court, who will tend to follow their own political preferences rather than the consensus of the nation.[109] Second, because the constitutional amendment cannot easily be changed and therefore will be applied in future circumstances that cannot be anticipated, it is enacted behind a limited veil of ignorance. By contrast, because the Justices know that they can distinguish, ignore, or overturn precedents, they are not adopting their decisions behind such a veil of ignorance. Third, even if the Court's decision might have led to the same result as the amendment process would have, the nation would not know this. Therefore, the Judiciary's decision would be less accepted—and more subject to revision and resistance—than if it had been enacted as a constitutional amendment.

Thus, originalism has substantial benefits—it enforces desirable constitutional provisions; it promotes clarity, predictability, and constrained

393. Jack Balkin has disputed this contention. He observes that a substantial number of states had already rejected the ERA before a plurality of the Court in *Frontiero v. Richardson*, 411 U.S. 677 (1973), applied strict scrutiny to legislation that discriminated by sex. *See* Jack Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 472 n.119 (2007).

We disagree with Balkin and also believe that he may misunderstand our argument. We acknowledge that there were other causes for the failure of the ERA that passed Congress to be ratified. In particular, the general judicial activism of the Warren and Burger Courts preceding any states' rejection of the ERA was an important cause of the failure of that amendment. Given the background of the judicial activism, citizens could not be confident that the Court would have interpreted the ERA, especially with its general language, according to the meaning its enactors claimed to attach to it. To be concrete, citizens at the time had reason to fear that the Court would use the amendment to impose a more radical vision of sexual equality than was widely shared by the enactors. By not enforcing the Constitution according to its understood terms, the Court reduces the effectiveness of constitutional amendment process generally.

Still, had the Court not acted to protect women under the Fourteenth Amendment, an equal rights amendment might have been ratified—either the one with general language passed by Congress or one with more specific limitations that might have been subsequently enacted. In 1971, before the ERA was even passed by Congress, the Supreme Court decided *Reed v. Reed*, 404 U.S. 71 (1971), in which it invalidated an Idaho law that gave preference to male over female administrators for estates. While that case did not expressly endorse heighted scrutiny, it effectively provided more substantial scrutiny for sex discrimination than for ordinary economic legislation. Indeed, the subsequent plurality in *Frontiero* stated that there was already implicit support for "heightened judicial scrutiny" of sex discrimination in *Reed*. 411 U.S. at 682. Thus, even at the time states rejected the ERA and before the decision in *Frontiero*, legislators could have rationally believed that sex discrimination was already subject to heightened judicial scrutiny.

[109] We recognize that the Supreme Court does not have unlimited power to choose any norms it wants because it faces overruling by amendment and political backlash if it goes too far. Nevertheless, the Court has substantial leeway in choosing norms that lack supermajoritarian or even majority support, so long as they have sufficient support to prevent a constitutional amendment or substantial and effective political response. *See* McGinnis & Rappaport, *supra* note 103, at 22.

judges; and it protects the constitutional amendment process. These benefits suggest that originalism should be followed in cases of first impression, and all the more so in cases when there is a precedent that accords with original meaning. But when there is a precedent that conflicts with the original meaning, the benefits of departing from that meaning and following the precedent must also be considered.[110]

2. *The Benefits of Following Precedent.*—There are several benefits from following precedent. We only briefly summarize them here because, unlike the virtues of originalism from a consequentialist perspective, these benefits are well known. The first two of these benefits overlap with some of the benefits of originalism. First, precedent can often make the law more predictable. If a constitutional provision is ambiguous or vague, a judicial decision can resolve the uncertainty. Second, by clarifying ambiguous or vague provisions, precedent can also serve to constrain judges in the future.[111] An important aspect of this constraint advances a core value of the rule of law—helping to assure that like cases are decided alike.[112] Finally, precedents often create important reliance interests.[113] When precedents are overturned, people who took actions in reliance on them may incur significant costs. Following precedents in these circumstances will not only avoid such costs, but it will also reduce uncertainty in the law.[114]

3. *The Tradeoff.*—Having briefly discussed the main benefits of originalism and precedent, we are now in a position to compare those competing benefits and to explore the tradeoff between them. Under our consequentialist approach, the goal is to use the original meaning when it produces greater net benefits than precedent and to use precedent when the reverse holds true. Because rules have significant advantages in terms of judicial manageability, economy, predictability, and constraint, it is not desirable to have judges decide whether original meaning or precedent produces greater benefits on a case-by-case basis. Instead, judges should apply

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[110] Our discussion of entrenched precedent below describes circumstances in which the benefits outweigh the costs of overruling such precedent. *See infra* Part II.C.2.

[111] *See* Merrill, *supra* note 4, at 278 (2005) (precedent provides a thicker body of norms to constrain judges).

[112] *See id.* at 276–77.

[113] *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1185–86 (1999).

[114] Some commentators have argued strong precedent rules are justified because they protect the institutional legitimacy of the Court. *See, e.g.*, Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v Louisiana, 57 U. CHI. L. REV. 1260, 1262–63 (1990). This argument is troubling because it suggests that hiding and perpetuating errors is superior to acknowledging and correcting them. Such an argument would never be applied to other parts of the government. If the President violated the Constitution, few commentators would suggest the appropriate response is to cover up the violation, rather than criticize it, because to do so would "undermine the President's legitimacy." We believe the same analysis applies to the Court, and wonder what else could justify this difference in treatment.

a comprehensive doctrine with rules that identify when either originalism or precedent produces greater net benefits.

In this Article, we do not propose a comprehensive doctrine of precedent. Our work is more preliminary than that. Instead, we take two steps towards such a doctrine. First, we recommend that judges should follow precedent in three specific situations: when following precedent would avoid enormous costs, when a precedent is entrenched, and when following precedent would correct failures in the supermajoritarian enactment process. While these three rules are only a part of a comprehensive doctrine of precedent, they do represent an important step in the development of that doctrine. Second, we identify several factors that make it more or less likely that precedent will be beneficial. These factors do not constitute rules that we recommend judges apply, but instead will prove useful in generating additional precedent rules.

Ultimately, precedent doctrine should allow significant room for both original meaning and precedent. Of course, when an issue is one of first impression or has been previously decided in accord with the original meaning, there is no reason not to follow the original meaning. But when an existing precedent conflicts with the original meaning, an intermediate approach that sometimes follows original meaning and sometimes follows precedent is best. For example, as we note below, our intermediate approach recommends that the Supreme Court follow *Griswold v. Connecticut*[115] as an entrenched precedent, but it does not protect *Roe v. Wade*[116] from being overturned.

Our consequentialist approach to originalism and precedent has been criticized by Jack Balkin.[117] Balkin argues that our approach faces a dilemma. On the one hand, if we provide limited protection to precedent, that would require wholesale overruling of a vast swatch of cases, rendering our theory both impractical and radically inconsistent with Supreme Court practice.[118] On the other hand, if we broadly protect precedent, that would undermine our supermajoritarian justification for the desirability of the Constitution because much of the Constitution's meaning would be supplied by a majority of Justices rather than a strict supermajority of the nation.[119]

Balkin's criticism, however, is misplaced. First, Balkin appears to commit the fallacy of the excluded middle, because he ignores the possibility of pursuing the intermediate approach that we endorse. This intermediate approach neither requires wholesale overruling nor ignoring the original

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[115] 381 U.S. 479 (1965).

[116] 410 U.S. 113 (1973).

[117] *See* Balkin, *supra* note 108, at 471–81.

[118] *Id.* at 475.

[119] *Id.*

meaning. Rather, it pursues a middle path that attempts to gain the greatest benefits from both original meaning and precedent.

There is, moreover, no incongruity between our embracing both originalism and substantial precedent. We are consequentialists and therefore must consider the interrelation of different and sometimes conflicting objectives of a complex and mature legal system. One objective of this system is to obtain the best possible rules, operating on a clean slate. Originalism furthers this goal. Another objective is promoting predictability, reliance, and stability. Precedent furthers this goal. These different objectives may conflict, and we must make the best tradeoff possible to promote desirable consequences.

It would be wonderful if constitutional decision-makers never made any mistakes. But in the real world, where such mistakes are not infrequent, one must consider how to respond to them. It is undesirable to correct all mistakes because the costs are simply too large. But while some nonoriginalist precedents must thus be accepted, we still can correct those errors that are not too costly to rectify.

C. Precedent Rules

Having examined the benefits and costs of following originalism and of following precedent, the next three sections recommend three specific precedent rules. These rules come in determinate enough form so that they can be applied by judges. While we believe that a comprehensive precedent doctrine would include additional rules, here we recommend only these three.

1. Precedent, Which, if Overruled, Would Result in Enormous Costs.—Precedent should be respected when overruling it would result in enormous costs. Extremely important institutions are sometimes based on judicial interpretations of the Constitution. Two obvious examples are Social Security and paper money. While some originalists believe that the Supreme Court decisions interpreting the Constitution to allow Social Security[120] and legal tender laws for paper money[121] were wrongly decided, overruling those cases would result in enormous costs. The fear, uncertainty, and chaos that overruling these decisions would cause to the nation's public pensions and monetary system are so tremendous that they would far exceed any benefits from returning to the original meaning.

But this category of enormous costs is broader than simply these two extreme cases. Where a decision would require a large number of programs to be struck down, a strong case exists for concluding that the costs are

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[120] Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[121] Juilliard v. Greenman, 110 U.S. 421 (1884); Knox v. Lee, 79 U.S. 457 (1870); Hepburn v. Griswold, 75 U.S. 603 (1869).

simply too large to allow it to be overruled. For example, while there is a strong case for concluding that the original meaning of the Commerce Clause was much narrower than the New Deal interpretations,[122] returning to that original meaning would require the immediate elimination of a vast number of government programs from securities regulation to environmental protection. The benefits of returning to the original meaning now do not compare with these costs.

By contrast, many important precedents do not rise to this level. Even if overruling a decision would cause a large number of statutory provisions to become unconstitutional, that would not necessarily mean it would fall into this category. As an example, consider *INS v. Chadha*,[123] which in effect held more than 300 legislative veto provisions in 200 statutes to be unconstitutional. Assume, contrary to the actual case, that *Chadha* overruled a Supreme Court precedent that had upheld the legislative veto. Such an overruling would not have created significant disruption because the invalidated statutory provisions could in the main continue to operate and in other cases were relatively easy to correct.[124]

2. Entrenched Precedent.—The second precedent rule involves entrenched precedent. First, we describe why the Court should confer great weight on entrenched precedents. Second, we consider how to assess whether a precedent is entrenched. Finally, we discuss similar theories of precedent for which entrenched precedent supplies a more precise justification.

Entrenched precedents are decisions that are so strongly supported that they would be enacted by constitutional amendment if they were overturned by the courts. For instance, if the Supreme Court were to hold that sex discrimination was not significantly restricted by the Equal Protection Clause, then it is quite likely that the nation would quickly act to place this protection back into the Constitution. A similar point applies if the Supreme Court were to reverse *Brown v. Board of Education*[125] based on the mistaken view that separate but equal stated the original meaning of the Fourteenth Amendment.

Under our approach, it is straightforward that entrenched precedent should take priority over the original meaning. For entrenched precedents,

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[122] *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987)

[123] INS v. Chadha, 462 U.S. 919, 967 (1983) (Powell, J., concurring in the judgment). For a partial list of the affected statutes, see *id.* at 1003–13.

[124] While the enormous costs of the cases in this category of precedent seem to justify keeping them irrespective of the factors that might argue for the return to original meaning, one can identify precedents, the overturning of which would impose lesser costs. These costs should be deemed one factor in the analysis of determining whether a precedent should be followed or overturned. Certainly, *Chadha* would fall into this category, as would a large number of other cases.

[125] 347 U.S. 483 (1954).

the benefits of following originalism are small and the benefits of following precedent are large. The benefits of following the original meaning are small because there is strong support for the new constitutional rule announced in the precedent. It is the precedent rather than the original meaning that currently has consensus support and thus a presumption of beneficence. The benefits of following the precedent are large, not only because of its presumed desirability, but also because it does not involve a change in the law.

Now, it might be argued that the consensus represented by the entrenched precedent is in important ways inferior to that forged by a constitutional amendment. The advantage of the amendment process is that it creates not only a consensus but also one visible to the polity, thus muting disagreement. Moreover, it may be difficult for Justices to determine what decisions would have attained the requisite consensus and to identify the actual underlying principles of those decisions. Consequently, one might argue that the Judiciary should be required to overrule the precedent in favor of the original meaning to ensure that the consensus exists, which would be proved by a subsequent amendment.

Such a requirement, however, would have great costs. First, because this approach would require the overruling of all precedents that conflict with original meaning, including those that are genuinely entrenched, it would cause great harm to the nation's attachment to widely accepted opinions. These opinions have now come to be valued; overruling them would harm people's attachment to their understanding of the Constitution—an attachment which helps unify the nation.[126] Second, a practical and rationally ignorant public is unlikely to understand or sympathize with such overrulings.[127] They might regard it as extremely burdensome to have to pass a constitutional amendment merely to confirm what they believe everyone already knows—that the Constitution authorizes the precedent and a consensus supports that precedent. Moreover, the public might be suspicious of such overrulings, believing that the Justices did not actually support the entrenched decision. This public opposition might also make it more difficult for the Justices to reach originalist decisions on other difficult issues because the public would be more likely to doubt the Court's legitimacy. Finally, fearing the reactions of the public, the Justices might be reluctant to overrule the decision and be led to engage in dishonest evasions, thus undermining the goal of making the law clear and accessible.

Consequently, it is less costly for the Justices to follow genuinely entrenched precedents. While the Justices may make mistakes in determining when such a consensus exists, there are factors that can discipline their in-

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[126] For instance, the sex discrimination cases of the 1970s, discussed *supra* note 108, represent such consensus even if they do not reflect an accurate understanding of the Fourteenth Amendment.

[127] On rational ignorance, see ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 20 (1998).

quiry. Most importantly, the search for consensus is factual, not ideological. Justices are to assess whether the principle in the proffered precedent would now secure the consensus requisite to a constitutional amendment, not whether the principle is sound. Thus, as with originalist inquiries themselves, Justices are directed away from their own commitments and passions to purposes not their own. This focus is a source of discipline.[128]

The proper way to test whether the requisite consensus exists is to ask whether there is any significant opposition to the substance of the constitutional principle embedded in the precedent. By focusing on substance, we mean to exclude opposition that rests on disagreement with the means by which the principle was created—by judicial lawmaking rather than constitutional amendment. For the reasons discussed above, it is counterproductive to force Justices to overrule a precedent simply to assure that the constitutional principle is enacted by the legitimate constitution-making process.

Furthermore, the Justices should not attempt to predict whether the amendment would be passed by taking into account matters that are unrelated to the public's support for the principle. For example, one might believe that the public would be unmotivated to enact constitutional amendments to reenact *Griswold v. Connecticut*[129] or even mid-level scrutiny for discriminations based on sex, on the ground that existing state and federal law does not infringe on these rights. But whether or not people would be motivated to *act* on principles and symbols is difficult to predict. It is much easier to determine whether there appears to be support for a principle.[130]

In framing this precedent rule we also have to determine what degree of likelihood should be demanded for the passage of a constitutional amendment that would enact the precedent. Our view is that Justices should be persuaded that the amendment is more likely than not to have passed. Requiring a lesser probability would permit the displacement of an original constitutional provision that would still likely be controlling and therefore still likely beneficial. Requiring a greater probability would pre-

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[128] Moreover, the Justices here are constrained by having to find a precedent whose principle is to be tested for consensus. They are not simply to ask whether consensus exists for any principle they choose, but must instead point to a principle embedded in a previous decision. This limitation substantially narrows the field of possible principles to follow, providing another disciplinary framework.

[129] 381 U.S. 479 (1965).

[130] For the same reasons, the Justices should not attempt to predict whether political conflicts—partisan or otherwise—would interfere with the constitutional amendment. For example, it might be thought that liberals and conservatives could not agree on the proper way to define intermediate scrutiny because they might attempt to grandstand in order to promote other positions, such as their differing views on abortion. But these problems should be ignored, because they are difficult to predict, may change over time, and do not really go to the basic point of whether there is support for the underlying principle.

serve a constitutional provision that would more likely than not be displaced by a constitutional amendment, absent judicial intervention.[131]

Finally, it is important to correctly describe the scope of the entrenched precedent. Entrenched precedent extends only to the principle that enjoys the consensus of a constitutional amendment. Thus, entrenched precedent may well not include the dicta of a precedent or even a broad reading of its holding. For instance, it may well be that in 1994 a requisite consensus supported a reading of the New Deal cases that endorsed plenary federal control over economic matters. But no consensus existed to endorse federal power over noneconomic matters, like carrying guns around a school. The *Lopez* Court was therefore correct not to have considered itself foreclosed by precedent in reaching its result.[132]

Similarly, Justices should choose a less sweeping view of what the 1970s sex equality cases mean when evaluating them as precedent. There seems to be a consensus that government should not discriminate on the basis of sex without a substantial reason. But as shown by the opposition to unisex bathrooms or women's participation in combat—opposition that emerged during the debates over the Equal Rights Amendment—the principle is narrower than the principle against racial discrimination. Under the consensus view, the law can recognize that society regards men and women as different in ways that the races are not. The law can therefore follow widely shared norms favoring separation of the sexes to protect bathroom privacy and to shield women from the threats of violent combat.

In contrast, our theory of entrenched precedent would not encompass what has become recently known as a "superprecedent"—a precedent that the Court has itself reaffirmed and therefore is thought by some to be entitled to dispositive weight.[133] For instance, at the time of the confirmation

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[131] Another question involves the time at which a precedent must have consensus support. One view would be that the precedent should have consensus support at the time when it is to be applied. Another view would be that the precedent could satisfy the consensus requirement at any time after it was decided, even if it no longer had consensus support at the time it was to be applied. We believe the first rule is superior for four reasons.

First, if the precedent does not command a consensus at the time the Justices are to apply it, the original rule it displaces still has a claim to presumptive beneficence. Thus, the argument for precedent displacing originalism is much weaker. Second, in those circumstances, a decision by Justices to discard a precedent in favor of the original meaning is not so costly in terms of public reputation because there is no current consensus. Third, it is much more difficult for the Justices to determine whether there ever existed the requisite consensus than to assess whether the requisite consensus exists currently. Therefore, the disciplinary framework for such decisionmaking would be less reticulated and the error costs accordingly higher. Finally, requiring consensus at the time the Justices are to apply the precedent differentiates a precedent from a constitutional amendment that remains binding even if the consensus in its favor dissipates. Such a differentiation helps preserve incentives to make constitutional changes through amendment rather than through judicial decision.

[132] *See* United States v. Lopez, 514 U.S. 549, 554–61 (1995).

[133] *See* Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1204, 1216 (2005) (discussing Chief Justice Roberts's and Justice Alito's testimony at the Senate Committee on the Judiciary hearings in which superprecedents were mentioned).

hearings of Chief Justice John Roberts and Justice Samuel Alito, many Senators and commentators argued that the reaffirmation of some aspects of *Roe v. Wade*[134] by *Planned Parenthood of Southeastern Pennsylvania v. Casey*[135] made *Roe* a superprecedent that could not be overruled.[136] But there is no necessary or even strong relation between a judicial reaffirmation and the consensus requisite for a constitutional amendment. The Judiciary cannot create popular consensus by its own fiat, even by repeating itself.

3. Corrective Precedent.—Another rule for following precedent that grows out of our supermajoritarian theory of originalism involves what we call corrective precedent—precedent that operates to correct imperfections in the supermajoritarian process for enacting and amending the Constitution. There is a strong case for following such corrective precedents.

Our supermajoritarian theory of originalism is premised on the view that constitutional provisions enacted pursuant to appropriate supermajority rules will generally be desirable.[137] But the original supermajority rules for enactment and amendment, while quite appropriate in their overall structure and strictness, nonetheless were grossly defective in excluding blacks and women. Supermajority rules are designed to ensure the Constitution reflects a consensus and the rules cannot adequately fulfill this purpose if they exclude a portion of the population. While those defects had enormous consequences originally, their consequences have now largely been corrected through subsequent constitutional amendments and judicial decisions.[138]

When there is a defect in the supermajority rule for enacting and amending the Constitution, the Justices face a difficult question. Should they attempt to correct any remaining defects that are the result of the exclusion by interpreting the Constitution so that it has the content that appropriate supermajority rules would have produced? Or should they simply enforce the imperfect Constitution as written, on the ground that doing so is nonetheless better than attempting to judicially revise it?

In our prior work, we argued that judicial correction of these supermajoritarian failures is generally disfavored but can be justified when the failures are substantial.[139] On the one hand, the benefits of these corrections

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[134] 410 U.S. 113 (1973).

[135] 505 U.S. 833 (1992).

[136] *See Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 321 (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 144–45 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

[137] See *supra* Part II.A.

[138] McGinnis & Rappaport, *supra* note 103, at 37–43.

[139] *See id.* at 37–39.

can be significant because provisions that are likely to have been different under appropriate supermajority rules do not have a presumption of desirability. On the other hand, the costs of corrections can be very large if Justices disagree over what provisions would have been different under appropriate supermajority rules and over how to effect those changes. Justices with different ideological viewpoints would seek to correct the document in ways that reflect their own ideologies. These disagreements would be hard to resolve because they depend on historical counterfactuals analyzing what would have occurred had excluded groups been included.

But once a court has corrected the Constitution—even if the correction was unjustified—there is a strong argument for treating its decision as a binding precedent. Once a decision has been made, the relative benefits and costs shift towards following a precedent. First, when there is an existing precedent that corrects a supermajoritarian failure, the Court's decision to follow that precedent avoids the possibility of a spiral of disagreements associated with the initial decision to correct the failure. Second, following the corrective precedent also produces a variety of benefits that precedent generally serves, such as reliance, predictability, judicial constraint, and judicial economy.

For example, assume again that *Brown v. Board of Education*[140] was—contrary to our view—wrongly decided as a matter of original meaning. Even in this case, the Court would be justified in following it under our doctrine of corrective precedent. Had African Americans been fully included in the constitution-making process in 1868 (or even 1789), it is likely that they would have placed a high priority on obtaining a general prohibition on racial discrimination as to important government benefits, such as public schooling.

Moreover, it is likely that at least in 1866 they could have made that priority a part of the Fourteenth Amendment. Michael McConnell has shown that there was substantial support for desegregating the public schools in the aftermath of the Fourteenth Amendment, even though African Americans were not fully enfranchised.[141] Thus, with the full participation of African Americans in the Fourteenth Amendment drafting and ratification process, it is quite likely that a stronger nondiscrimination provision encompassing public education would have been adopted. Thus, even if *Brown* was wrong as an original matter, it is now a justified correction of a supermajoritarian failure.[142]

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[140] 347 U.S. 483 (1954).

[141] *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 962–71 (1995); *see also* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 U. TEX. L. REV. 7 (2008) (noting that thirty-six out of thirty-seven state constitutions established a state duty to provide a public school education).

[142] Assuming that *Brown* was wrong as an original matter, whether the decision is justified as a matter of corrective precedent is a harder question. The answer turns on a host of considerations, including

It is interesting to note that, even if (contrary to our own view) *Brown* was wrongly decided as an original matter, it would be protected under both the corrective and entrenched precedent rules. This helps explain why *Brown* is a bedrock of constitutional jurisprudence under an originalist regime, whatever one's view of its correctness as an original matter.

Of course, it not enough for a precedent to be claimed as corrective for it to be treated as binding. To be followed, a corrective precedent must have a reasonable likelihood of actually being corrective. For instance, while it is likely that African Americans could have secured a prohibition on racial discrimination in public schooling, it is implausible to believe that they could have secured a requirement of forced busing in the interest of diversity or some other social goal. The political philosophy of that time was more hostile to interference with personal liberties to achieve social goals.[143]

D. Factors Relevant to Beneficial Precedent Rules

Here we explore various factors that indicate when it makes more or less sense to follow precedent. These factors are not intended as precedent rules to be applied by judges. Rather, they provide information about the desirability of precedent in different circumstances and are useful as a means of developing precedent rules.

1. Uncertainty in the Constitution's Original Meaning.—One key factor in determining whether to follow a precedent is the clarity of the original meaning of the Constitution. When the original meaning is uncertain, there is a far stronger argument for following precedent—provided that it is within the range of uncertainty regarding the original meaning—than there is if the precedent clearly conflicts with the original meaning. In a superb article, Caleb Nelson argues that courts in the early years of the Republic generally used an approach under which they would follow precedent if it reasonably resolved an ambiguity, but not if it was demonstrably erroneous.[144]

This factor follows from our tradeoff between originalism and precedent. When the Constitution is itself unclear, the virtues of following the original meaning are not as strong. One justification for originalism is that it promotes clarity in the law. But if the original meaning is unclear, then there is less reason to follow it. Instead, a precedent that reasonably re-

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the extent to which the Court could have decided other issues, based on the original meaning, which would have reduced the need for *Brown*. For example, if the Court could have enforced the voting rights provisions of the Fourteenth and Fifteenth Amendments effectively, this would have reduced the need for *Brown*.

[143] *Cf.* Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 458 (2001) (mentioning the Whig and free-soil origins of the Fourteenth Amendment).

[144] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 (2001).

solves the uncertainty will better promote clarity, even though later a judge may believe it resolved the matter incorrectly.[145] A second justification for originalism—the one we emphasize most—is that it enforces provisions with desirable consequences. But here, as well, constitutional ambiguity militates against originalism because we cannot be sure of what the original meaning is. Thus, there is a diminished value in following the original meaning.[146]

2. Reliance Costs.—Another important factor in determining whether to follow a precedent is the degree of reliance on that precedent. Reliance occurs when someone takes an action he would not otherwise have taken based on the assumption that a precedent will be followed. The degree of reliance on precedents varies with the number of people who have relied on it and with the costs that they would incur if the precedent was overturned. Traditionally, precedent rules were significantly influenced by reliance interests. In particular, stronger precedent rules were applied to property—and, sometimes, commercial interests—based on the view that reliance in this area was greater. One way to think of the reliance factor is that it is a variation on the huge costs rule discussed earlier.[147] The costs of overruling a precedent on which there has been substantial reliance are higher than the costs of overruling a precedent on which there has been no reliance. Not only does overturning a precedent that has been relied upon upset expectations and impose costs, it also weakens people's willingness to rely on future precedent and thus to plan for the future.

The greater the reliance costs, the stronger the argument for not overturning a precedent. Reliance costs can be especially significant in at least two situations. First, they will be great when the government establishes a program that people significantly rely upon, such as Social Security. Second, these reliance costs can be great when people make significant private investments based on assumptions about the law.

3. Precedent Established in Violation of the Precedent Rules.—Our consequentialist approach would also suggest that precedent should be fol-

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[145] One of the virtues of clarity is that it helps treat similarly situated litigants equally and such equal treatment is thus a virtue that rides on clarity. Originalism, of course, has the same virtue when original meaning is clear, and thus the benefits of equal treatment do not always favor precedent over originalism.

[146] The limitation here that the precedent be within the range of uncertainty of the original meaning is essential. If a court were to interpret an uncertain provision in a clearly mistaken way, then the costs of following the precedent would be much greater because it would be clearly departing from the original meaning.

Our discussion here of uncertainty in the original Constitution overlaps with the common claim that precedent should be followed if it represents a plausible construction of the original meaning. If one interprets a plausible construction as one that is within the range of uncertainty of the original meaning, then the two factors are identical.

[147] *See supra* Part II.C.

lowed less, other things being equal, if the precedent was not decided according to the proper rules of precedent. The important benefit from such a rule is that it creates a disciplining effect. If judges know that decisions that violate precedent rules will not be treated as authoritative precedent, they will have better incentives to comply with the rules of precedent. Such incentives are most beneficial if the precedent rules themselves reflect the optimal tradeoffs that we are outlining here.

4. Epistemic Value of Precedent.—Precedent may also have an important epistemic value. Justices, like other humans, must recognize that they are not infallible. That a majority of Justices previously interpreted the original meaning of the Constitution in one way provides evidence for that interpretation. Precedent thus appropriately changes a Justice's prior beliefs about the correct interpretation,[148] just as an opinion of an expert appropriately changes the prior beliefs of decisionmakers about the conclusion to which the expert testifies. When a precedent raises the probability that its interpretation of the Constitution conforms to the original meaning, a Justice should give the precedent weight in his or her assessment.

The nature of epistemic precedent in an originalist world is limited in two important respects. First, only cases that make a good faith effort to discover the original meaning deserve epistemic weight.[149] Many cases—from *Lochner v. New York*[150] to *Roe v. Wade*[151]—have deserved no weight on epistemic grounds because they have not attempted to derive their results from the Constitution's original meaning. Second, current Justices also have a particular reason to discount the epistemic value of past precedent if they discover new evidence relevant to the original meaning that the previous decision did not consider. In contrast, one might believe that early Supreme Court cases that attempted good faith discovery of the original meaning deserve additional weight on epistemic grounds, because the Justices' temporal proximity to the Constitution makes them more likely to get the right answer.

5. Other Possible Precedent Rules.—Our discussion of factors is intended to clarify the benefits and costs of precedent and ultimately to help generation of additional precedent rules. While this Article only endorses

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[148] For a discussion of how judges' prior beliefs or "priors" can be changed, see RICHARD POSNER, HOW JUDGES THINK 68 (2008).

[149] *See* Barnett, *supra* note 16, at 267.

[150] 198 U.S. 45 (1905). While we are critical here of *Lochner* for not attempting an originalist justification for its decision, we do not necessarily mean to criticize the result in *Lochner*. That may or may not be justified on originalist grounds, depending on how one reads the Privileges or Immunities Clause of the Fourteenth Amendment. For defenses of the Clause that read it as justifying the result in *Lochner*, see RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003); Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunites of United States Citizens: A Modest Tribute to Professor Seigan*, 45 SAN DIEGO L. REV. 777 (2008).

[151] 410 U.S. 113 (1973).

three precedent rules, we believe that others may be justified. In an effort to illustrate the type of rules that might be justified, we here suggest one possible rule. Although we do not recommend it here, we think it might turn out, upon further analysis, to be sound.

According to this rule, a precedent should be followed when the original meaning of a provision is unclear, the precedent followed a reasonable interpretation of the provision, that interpretation established a clear rule, and the precedent has been relied upon significantly. Such reliance could be shown either through significant private activities taken in reliance of the decision or a large number of statutory programs that must be changed. Such a precedent rule would generate a clear constitutional meaning and protect reliance interests, but not endorse an interpretation that was clearly inconsistent with the meaning employed by the constitutional enactment process.

E. The Contrast with Other Approaches to Precedent

In this section, we contrast our precedent approach first with the Supreme Court's most famous and extended recent discussion of precedent and then with that of other scholars.

1. The Contrast with the Supreme Court's Approach in Casey.—The Supreme Court's most recent extended discussion of precedent is in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[152] In that case, the Court's plurality listed several factors that bear on its willingness to decline to follow precedent. Here, we critique the Court's approach, both to show its weakness from a consequentialist perspective and to highlight the differences with our own approach.[153]

To begin with, our approach contrasts with the *Casey* approach in two general ways. First, in *Casey*, the plurality appears to adopt a presumption in favor of following precedent. We reject this presumption. We believe that there is a strong reason for following the original meaning generally and therefore a presumption in favor of precedent is unjustified. Second, the *Casey* opinion does not articulate specific rules, but mentions factors that appear to make it more or less likely that precedent should apply. By contrast, we believe that questions of precedent should be settled by rules, not by factors, because of the advantages in terms of predictability and constraint that rules confer.

Even assuming that factors are an acceptable way to frame a precedent doctrine, we disagree with how the plurality employs the factors in *Casey*. First, the *Casey* plurality suggests that it is less likely to follow a precedent

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[152] 505 U.S. 833, 854–69 (1992) (plurality opinion).

[153] The precedent analysis of *Casey* has been relied upon subsequently by the Court. *See* S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 166 (1999); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 233 (1995).

that is not practically workable or, in another formulation is in some sense "unworkable."[154] It is obvious that a precedent that is unworkable either because the rule it furnishes is unclear or leads to inconsistent results is a precedent without significant value. Far from offering good consequences that may counterbalance the bad consequences of following a rule that is presumptively inferior to the original meaning, precedent that is unworkable itself wreaks a kind of legal havoc.

Our analysis, however, does not embrace the converse proposition that a precedent should be retained because it is workable. Many legal rules may be workable but unsound. The advantage of following the original meaning is that it is likely not only to be workable but also to be better than other rules. Thus, unworkability undermines the force of precedent while workability does little to generate that force.

We have a similar skepticism about another *Casey* factor: "[W]hether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[155] If a precedent is a "remnant" and inconsistent with other rules around it, the precedent is likely contributing to legal incoherence.[156] Legal incoherence in jurisprudence has negative consequences because individuals have more trouble complying with a set of rules that are incoherent and hard to understand. Such incoherence provides a factor militating against retaining precedent.

But the coherence of a precedent with the rest of law is, by itself, not a reason for retaining a precedent. First, that a precedent coheres with the rest of the law does not mean that a case overruling it may not also be coherent. Many different plausible rationales can serve to make a set of cases coherent just as many plausible shapes can connect a set of dots. Second, coherence with other precedents counts as a reason for preserving the precedent at issue only if those precedents should themselves be preserved. Thus, any analysis would require an assessment of whether these other precedents are themselves protected by the appropriate rules of precedent, such as whether overruling them would create enormous costs.

Another factor discussed by the *Casey* plurality is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[157] Once again it is relatively clear how changed facts can undermine a precedent if they rob it of "legal significance." If a precedent depends on a set of facts that no longer holds, it is manifestly subject to revision. But merely because the facts underlying a precedent have not changed is not a reason to retain that precedent. The

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[154] *Casey*, 505 U.S. at 855 ("Although *Roe* has engendered opposition, it has in no sense proven 'unworkable' . . . .").

[155] *Id.*

[156] We are not suggesting that originalists would often confront such a situation. To be a remnant the nonoriginalist precedent must be inconsistent not with simply one other precedent but with several.

[157] *Id.* at 855.

original meaning of the Constitution should lead to a better result even if the facts do not change from the time the precedent was decided. A precedent should be followed rather than the original meaning only if the precedent fits within a rule of precedent that encapsulates important beneficial consequences.

In short, the *Casey* plurality tried to establish a presumption in favor of following precedent. The plurality suggests that precedent should be followed unless there are particular factors that undermine its utility. Our analysis of the tradeoff of precedent versus originalism does not support such a presumption. Instead, the original meaning should be followed unless a justified precedent rule indicates otherwise. Moreover, the rule-oriented analysis we have advocated provides a more disciplined framework than *Casey*'s multiple factor analysis.

2. The Contrast with Other Scholars.—This section compares our precedent theory with that of other scholars. We show that our normative approach to precedent is distinctive and intermediate between scholars who see no role for precedent and scholars who think that precedent should routinely be followed.

We previously expressed our disagreement with scholars who argue that precedent should have no role in constitutional adjudication because it is unconstitutional.[158] In contrast, we suggested that precedent should be followed in cases where following a precedent rule will have better consequences than adhering to original meaning. Depriving constitutional law of all reliance on precedent would create substantial political instability as it would require the Court to overrule cases for which the polity has a consensus or which would cause enormous costs. Examples of these cases include those that give Congress plenary power over economic affairs under the Commerce Clause[159] as well as widely accepted results such as *Griswold v. Connecticut*.[160] We cannot help but note that opposition to all precedent is also tactically hopeless: no Supreme Court now or in the foreseeable future is going to reconsider decisions that would have enormous costs or that are widely accepted. As a result, a no-precedent position is not likely to be followed.

We also disagree with Professor Randy Barnett's more nuanced rejection of precedent.[161] Like Lawson and Paulsen, Barnett argues that precedent should never insulate from reversal a decision that is contrary to the original meaning.[162] But he also argues that in many cases the Constitution is so ambiguous or vague that many different interpretations are compatible

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[158] *See supra* Part I.A.

[159] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

[160] 381 U.S. 479 (1965).

[161] *See* Barnett, *supra* note 16.

[162] *Id.* at 258–59.

with the original meaning.[163] Barnett thus argues in cases of what he calls constitutional "construction" that a precedent does have a claim to being respected even if other decisions might also have been consistent with the original meaning.[164] We disagree with his theory of constitutional construction.[165] But, in any event, construction does not save his precedent theory from having many of the same practical difficulties as those of Lawson and Paulsen. Some precedents are incompatible with the original meaning and yet reflect a current consensus or cannot be overturned without enormous social costs.[166] Our precedent theory addresses these difficulties, but Barnett's does not. As a result, his theory will have many of the same defects as the theories that deny any substantial weight to prior cases.

Finally, our intermediate position also differs from those who argue that precedent should be routinely and presumptively followed. A leading modern exponent of this view is Tom Merrill.[167] Like our approach, Merrill's normative theory is consequentialist. But unlike our approach, Merrill's article focuses only on advancing the objective of judicial restraint.[168] He thus leaves out a crucial comparison—whether adherence to original meaning or to precedent is more likely to generate good rules and preserve the amendment process.

Even the question of whether the original meaning or precedent better constrains judges seems to us far closer than Merrill allows. First, when the original meaning yields a clear rule, it may well be more constraining than precedent. Merrill appears to suggest that precedents create thicker norms and thereby inherently tend to be more constraining than the original meaning.[169] But given that precedents span many eras and emerge from conflicting majorities,[170] they may be less coherent and more subject to manipulation than the more uniform original design and thus less constraining than the original meaning. Moreover, stare decisis in the American system is not absolute, and the possibility that precedent can be overruled creates additional uncertainty not present in adherence to original meaning.

In addition, our version of originalism—original methods originalism—thickens originalism's norms, to use Merrill's term. The original

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[163] *Id.* at 263–66.

[164] *Id.*

[165] *See* McGinnis & Rappaport, *Original Methods Originalism*, 103 NW. U. L. REV. 751 (2009).

[166] For discussion of such precedents, see *supra* Part II.C.2.

[167] *See* Merrill, *supra* note 4, at 272–73. Another important article which is more tentative, but points to much the same position, is Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 771–72 (1988) (suggesting that originalism plays an "increasingly subordinate [role]" compared to precedents in constitutional adjudication).

[168] Merrill, *supra* note 4, at 273. Part of his argument for the judicial restraint that adherence to precedent provides is that it helps treat similarly situated litigants alike. *Id.* at 276.

[169] *Id.* at 278.

[170] *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805–806 (1982).

methods approach directs interpreters to follow the enactors' interpretive rules.[171] It thus provides jurists with additional methods to resolve ambiguities and vagueness. Accordingly, it potentially offers more constraint than other originalist theories.

Thus, our approach to precedent canvasses the full range of relevant considerations for a consequentalist theory and appropriately confines precedent to circumstances in which it is likely to have better consequences than the original meaning. Such a framework preserves the beneficial original meaning through the ages better than does Merrill's. In particular, it leaves open to challenge precedents that the Court has reaffirmed but that are incompatible with original meaning and whose overruling would not offend the kind of consequentialist precedent rules that we have described. Examples of such precedent would include many of the Warren Court's criminal procedure decisions, like the exclusionary rule,[172] and important details of the administrative state, like decisions that circumscribe the President's power to fire subordinates.[173]

F. Applying the Approach to Previous Supreme Court Overruling Decisions

This section applies some of our theories by considering important Supreme Court decisions that overrule precedents from *Brown v. Board of Education* onwards. Our purpose here is illustrative only, and we are not attempting to provide a comprehensive picture of the Court's decisions whether to overrule precedent. To focus on the question whether the Court should overrule precedents to pursue the original meaning, we generally assume that the overrulings would move constitutional jurisprudence closer to the original meaning. In some of the cases, we believe that the Court acted correctly in deciding whether to overrule precedent, but in one important case—*Planned Parenthood v. Casey*—we think the Court's use of precedent to protect the constitutional right to abortion was misplaced.

In *Brown,* the Supreme Court did not follow *Plessy v. Ferguson*'s[174] holding that separate but equal accommodation of the races complied with

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[171] *See* McGinnis & Rappaport, *supra* note 165, at 772–81.

[172] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (evidence obtained by an unconstitutional search and seizure is inadmissible in a criminal trial in a state court).

[173] *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988) (upholding congressional power to limit the Attorney General's ability to remove Congress's appointed independent counsel); Humphrey's Executor v. United States, 295 U.S. 602 (1935) (upholding the congressional power to limit the President's ability to dismiss Federal Trade Commissioners). While we believe that the appropriate precedent rules do not protect the decisions that allow the creation of independent agencies from being overruled (assuming as we believe that they conflict with the original meaning), one important exception may exist to this claim. We are inclined to believe that the independence of the Federal Reserve is now so well accepted that it should be regarded as an entrenched precedent.

[174] 163 U.S. 537, 537–38 (1896).

the Fourteenth Amendment.[175] *Plessy* was not a precedent that should have been retained. Its holding was not supported by a substantial consensus, did not correct a supermajoritarian failure, and its overruling did not create enormous costs. First, separate but equal did not command the kind of national consensus needed to reach a constitutional amendment in 1954. Second, it was not plausibly a correction of a supermajoritarian failure; in fact, it helped to subordinate a class—African Americans—who were inadequately represented in the constitution-making process.

The most superficially plausible argument in favor of retaining *Plessy* is that overturning it would lead to enormous costs in the form of social disruption. But this social disruption is very different from the kind that might stay the Court's hand in overruling the New Deal cases that authorized Congress to engage in economic regulation of manufacturing and labor. The disruption from overruling *Plessy* occurred because of the threat of violence from a number of people—particularly southern whites—who refused to peacefully comply with the decision. This kind of disruption is not one the Court should take into account as insulating precedent from reconsideration because it amounts to the legal equivalent of a heckler's veto. Declining to overrule a case simply from fear of opposition, even of a violent kind, would encourage others to threaten disruption should other decisions be overruled. Thus, this kind of defense of precedent could lead to most unfortunate consequences for social peace and thoughtful public deliberation about constitutional issues.

Moreover, in this particular case, another group—African Americans—would have been harmed and offended if the doctrine of separate but equal had been reaffirmed. And if, as we believe, the oppression that led to their distress was in direct contravention of the Constitution, it would seem especially problematic to allow the feelings of others to be a barrier to vindicating the rights whose denial led to their justified anger.

In *Gregg v. Georgia*,[176] the Supreme Court essentially overruled its previous decision in *Furman v. Georgia*[177] that the death penalty was unconstitutional. The Court was correct not to follow *Furman*. Once again,

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[175] The precedential effect of *Plessy* is limited to the question of the correctness of separate but equal, not the question of whether the Fourteenth Amendment covers public schools. Our view is that *Plessy* is plainly wrong on the question of separate but equal. In that case, African Americans and railroad companies were denied the opportunity to contract to sit in certain coaches (those restricted to whites) that they wished. *Id.* at 538–39. The fact that whites were also denied the right to contract to sit in other coaches (those restricted to African Americans) is irrelevant, because it was the equality in contracting for a particular set of coaches (those in which whites also sat) that was at issue. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1459, 1462 (1992). The question of whether the equality guarantee of the Fourteenth Amendment applies to public schools is a harder one, but we are inclined to believe it does. *See* McConnell, *supra* note 141, at 1132–36; *see also* Harrison, *supra*, at 1462–63.

[176] 428 U.S. 153 (1976).

[177] 408 U.S. 238 (1972).

the precedent did not represent the consensus of the country, was not a correction of a supermajoritarian failure, and was not overruled at great cost. Far from being an entrenched precedent that elicited national consensus, *Furman* triggered an adverse public reaction and prompted states to reenact their death penalty statutes.[178] *Furman* was also not a corrective precedent: there seems never to have been near the consensus needed to constitutionally ban capital punishment. Thus, the inclusion of excluded groups would not have created such a consensus in the previous centuries. Permitting the states to impose the death penalty did not undermine specific forms of reliance or create social disruption.[179]

The Court's decision in *United States v. Lopez*[180] was also justified. While the Court did not explicitly say that it was overruling prior precedent, many commentators thought *Lopez* upended the common view that Congress had plenary regulatory power under the Commerce Clause.[181] In *Lopez*, the Court felt free to act inconsistently with the understanding that the New Deal cases gave the Congress plenary legislative power.[182]

Under our precedent approach the Court was correct in doing so. *Lopez* did not disturb the precedent that gave Congress plenary power over core economic matters, like regulation of manufacturing, labor, and production. Strong arguments have been made that overruling such congressional authority would lead to very substantial disruption.[183] Moreover, there seems to be a consensus that the federal government should have at least some powers over economic matters that an originalist reading of the Commerce Clause might well deny.

Instead, the Court merely denied Congress the authority to regulate matters that were not commercial. While there may be a consensus to give the federal government regulatory power over economic matters, there is no similar consensus to allow the federal government control over the noncommercial matters, such as those at issue in *Lopez*. Similarly, overruling the New Deal precedent over noncommercial matters is unlikely to cause substantial disruption. Congress has not substantially regulated noncommercial matters.

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[178] JOHN HART ELY, DEMOCRACY AND DISTRUST 65 (1980).

[179] One might also see the decision as justified because *Furman* itself did not follow the rules of precedent in striking down the death penalty.

[180] 514 U.S. 549 (1995).

[181] *See* Andrew Koppelman, *How "Decentralization" Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. 11, 20–21 (2003).

[182] *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1157 (2008) (discussing how *Lopez* invalidated a federal statute as beyond Congress's authority, but did not overrule any previous cases, including any New Deal decisions).

[183] Robert Bork, for instance, has stated to overrule that reading of the New Deal would "overturn much of modern government and plunge us into chaos." ROBERT BORK, THE TEMPTING OF AMERICA 158 (1991).

The Court was similarly correct to flout precedent in *National League of Cities v. Usery*,[184] where the Court overruled *Maryland v. Wirtz*,[185] and held that Congress lacked power to regulate state operations.[186] Overruling *Wirtz* did not cause substantial disruption. Moreover, the notion that the federal government could regulate the operations of states certainly did not command consensus support, nor can it be plausibly understood as a correction of supermajoritarian failure.

Finally, in our view, *Planned Parenthood v. Casey*,[187] was wrong to rely on the precedential effect of *Roe v. Wade*.[188] Here we contrast *Roe* with *Griswold v. Connecticut*.[189] Under our analysis, *Griswold* is an entrenched precedent that enjoys the kind of consensus support equivalent to a constitutional amendment.[190] In other words, while some constitutional commentators still argue that *Griswold* was wrong as an original matter,[191] almost no one argues that as a policy matter contraception should be illegal or even that it would be desirable for the states to retain the authority to prohibit contraception. In contrast, *Roe* is not an entrenched or corrective precedent and overruling it would not create enormous costs.

It is obvious that *Roe* does not command the kind of constitutional consensus that would be needed to pass a constitutional amendment.[192] Some have argued that *Roe* is rightly decided under the Equal Protection Clause because women did not vote on abortion statutes. One could try to translate this claim into a case of constitutional correction by suggesting that women lacked representation in the political process when the Fourteenth Amendment was adopted and that their presence would have led to

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[184] 426 U.S. 833 (1976).

[185] 392 U.S. 183 (1968).

[186] Unlike the other overrulings discussed in this section, we do not mean to suggest that *National League of Cities* captures the original meaning. But for an argument that it does based on the meaning of states and the their structural position in the Constitution, see Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 819–20 (1999).

[187] 505 U.S. 833 (1992).

[188] 410 U.S. 113 (1973).

[189] 381 U.S. 479 (1965).

[190] *See* Mark Tushnet, *Response: Liberal Political Theory and the Prerequisites of Liberal Law*, 11 YALE J.L. & HUMAN. 469, 473 n.13 (1998).

[191] *See, e.g.*, Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004). In that article, one of the authors of the current Article argued in favor of overruling *Griswold*. *Id.* at 1611-12. The concept of entrenched precedent offered here had not been developed at the time. He now believes that the entrenched precedent analysis should control and that *Griswold* should not be overruled.

[192] *See* Jonathan Klick, *Econometric Analyses of U.S. Abortion Policy: A Critical Review*, 31 FORDHAM URB. L.J. 751, 751 (2004) (discussing polls showing the nation divided relatively equally on abortion rights). The Senate has recently divided almost equally on *Roe v. Wade* with 52 Senators supporting *Roe* and 46 opposing it. *See* U.S. Senate: Legislation & Records, Roll Call Vote, 108th Congress, 1st Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00048.

the protection of abortion rights.[193] But this contention is implausible. Even now women are not much more likely to support abortion rights than men.[194] In any event, it seems very unlikely that the Fourteenth Amendment would have been modified in a way that included abortion rights. At the time of the Fourteenth Amendment, abortion was widely prohibited and was not generally seen as a women's rights issue.[195] Moreover, even if women had put such items on the agenda, there is no indication that they could have commanded the requisite constitutional consensus.[196]

In addition, the costs of overruling *Roe* would not be enormous. To be clear, we are not addressing the costs of prohibiting all abortions.[197] We focus only on the costs of the transition to a regime in which it is legal for states to prohibit abortion. Overruling *Roe v. Wade* will not make abortion illegal, and most states will probably maintain relatively permissive abortion laws. Thus, the transition costs may be relatively small because the effective legal norms will not change significantly in most places.

CONCLUSION

Precedent is often seen as an embarrassment for originalists. In this Article, we have argued that precedent is a legitimate and coherent doctrine within our version of originalism. It is legitimate because the Constitution itself authorizes a common law of precedent that is revisable by statute. It is coherent because the values relevant to precedent, like stability and reliance, can be balanced against the values of originalism, such as the beneficence of rules from a desirable constitution-making process. This balancing can result in precedential doctrines that are workable and attractive.

We have also shown how our theory generates two new justifications for precedent—entrenched precedent and corrective precedent. Together

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[193] *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1368 (1998) (suggesting that abortion statutes lack legitimacy if electorate that voted on them excluded women).

[194] *See* JOSEPH.W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 958 (2006). Dellapenna states: "Support for abortion breaks down more on class lines than on gender lines. Some studies found that women are slightly more supportive of abortion rights than men if one controls for such variables as level for education, affluence, career orientation, religious devotion, and so on." *Id.*

[195] *See* Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1290 n.205 (1975) (discussing prevalence of anti-abortion laws at time of the enactment of the Fourteenth Amendment).

[196] Indeed, even at the time of the Equal Rights Amendment, the argument that the ERA might conceivably become a basis for a constitutional right to abortion was used in efforts to kill it. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 422 (2007). And abortion was a problem for the Amendment *despite* relatively clear legislative history that it could not have passed the Senate without the votes of Senators who were opposed to abortion and understood the ERA not to encompass a right to abortion. *See* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1037–40 (1984).

[197] We are assuming here an originalist approach. For such an approach, such costs are not relevant.

these justifications provide a sound basis to follow cases like *Brown v. Board of Education* and *Frontiero v. Richardson*, even if one does not believe these cases were decided correctly as an original matter. Thus, our theory deprives originalism's opponents of their familiar complaint that to embrace originalism is to abandon cases that have become fundamental to our constitutional order.

Addendum U

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ARTICLE

STARE DECISIS AND DEMONSTRABLY ERRONEOUS PRECEDENTS

Caleb Nelson[*]

AMERICAN courts of last resort recognize a rebuttable presumption against overruling their own past decisions. In earlier eras, people often suggested that this presumption did not apply if the past decision, in the view of the court's current members, was demonstrably erroneous.[1] But when the Supreme Court

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[1] See Smith v. Allwright, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 352–53 (1936) (Brandeis, J., concurring) ("This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous."); Benjamin N. Cardozo, The Nature of the Judicial Process 158 (1921) ("The United States Supreme Court and the highest courts of the several states overrule their own prior decisions when manifestly erroneous."); see also, e.g., United States v. Nice, 241 U.S. 591, 601 (1916) (overruling a prior case's interpretation of a statute because "we are constrained to hold that the decision in that case is not well grounded"); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 652–53 (1873) (overruling two prior decisions because they were not "founded on a correct view of the law"); Trebilcock v. Wilson, 79 U.S. (12 Wall.) 687, 692 (1871) (rejecting a prior decision because it "appears to have overlooked the third clause" of the relevant statute); Mason v. Eldred, 73 U.S. (6 Wall.) 231, 237–38 (1867) (declining to rely on a prior decision

makes similar noises today,[2] it is roundly criticized.[3] At least within the academy, conventional wisdom now maintains that a purported demonstration of error is not enough to justify overruling a past decision.[4]

The Court itself frequently endorses this conventional wisdom. In the realm of statutory interpretation, the Court has said that it will adhere even to precedents that it considers incorrect unless they have proved "unworkable," have been left behind by "the growth of judicial doctrine or further action taken by Congress," pose "a direct obstacle to the realization of important objectives embodied in other laws," or are causing other problems.[5] Even in constitutional cases—which are thought to demand less respect for precedent[6]—the Court has said that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[7]

Indeed, people often assume that this requirement is an essential feature of *any* coherent doctrine of *stare decisis*. "To permit overruling where the overruling court finds only that the prior court's

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because its reasoning was "not satisfactory"); see also infra Part II (discussing antebellum cases).

[2] See, e.g., Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citing *Smith*, 321 U.S. at 665, for the proposition that "when governing decisions . . . are badly reasoned, 'this Court has never felt constrained to follow precedent'").

[3] See, e.g., Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 112–13 (1991) (arguing that *Payne*'s criterion for overruling precedent "clearly would wreak havoc on the legal system").

[4] See, e.g., Charles Fried, Constitutional Doctrine, 107 Harv. L. Rev. 1140, 1142–43 (1994); Gerhardt, supra note 3, at 71; Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1120 n.75 (1995); Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723, 756–63 (1988).

[5] Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989); see also, e.g., id. at 171–73 (noting that "[s]ome Members of this Court believe that *Runyon* [*v. McCrary*, 427 U.S. 160 (1976),] was decided incorrectly," but are nonetheless adhering to it because a decision to overrule would require some "special justification" above and beyond the mere demonstration of error); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283–84 (1995) (O'Connor, J., concurring) (reiterating her view that the majority had been wrong in a past case from which she dissented, but following that case "because there is no 'special justification' to overrule [it]") (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

[6] See, e.g., Neal v. United States, 516 U.S. 284, 295–96 (1996); Hubbard v. United States, 514 U.S. 695, 711–12 & n.11 (1995) (plurality opinion of Stevens, J.); *Patterson*, 491 U.S. at 172–73; Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 424 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

[7] Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 864 (1992).

decision is wrong," writes Deborah Hellman, "is to accord the prior decision only persuasive force . . . without according it any weight *as precedent.*"[8] Even Justice Scalia—who seems less wedded to precedent than some of his colleagues[9]—has said that "the doctrine [of *stare decisis*] would be no doctrine at all" if it did not require overruling judges to "give reasons . . . that go beyond mere demonstration that the overruled opinion was wrong."[10]

Other Justices associate this requirement with "the very concept of the rule of law underlying our . . . Constitution."[11] Professor Michael Gerhardt explains that if the applicable rules of precedent permitted the Court to overrule past decisions "based solely on disagreement with the underlying reasoning of those precedents," future Courts would in turn be free to reject the reasoning of the overruling decisions.[12] According to supporters of the conventional academic wisdom, changes in judicial personnel could thus generate an endless series of reversals, and the "inevitable consequence" would be "chaos."[13]

This logic, however, is too facile. If one accepts Justice Scalia's premise that judges can sometimes give a "demonstration" that a prior opinion "was wrong"—that is, if one believes that there can be such a thing as a demonstrably erroneous precedent—then one might well reject the presumption against overruling such precedents. This Article suggests that one can readily develop a coherent doctrine of *stare decisis* that does not include such a presumption. If certain assumptions hold true, moreover, the elimination of this presumption would not unduly threaten the rule of law.

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[8] Hellman, supra note 4, at 1120 n.75; accord, e.g., Larry Alexander, Constrained by Precedent, 63 S. Cal. L. Rev. 1, 59 (1989) ("[I]f incorrectness were a sufficient condition for overruling, there would be no precedential constraint in statutory and constitutional cases."); Amy L. Padden, Note, Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After *Payne v. Tennessee*, 82 Geo. L.J. 1689, 1706 (1994) ("If 'wrongness' were a sufficient basis for overruling precedent, each Justice could decide each case as if it were one of first impression and entirely disregard any precedent.").

[9] See infra notes 192–93 and accompanying text.

[10] *Hubbard*, 514 U.S. at 716 (Scalia, J., concurring in part and concurring in the judgment).

[11] *Casey*, 505 U.S. at 854.

[12] Gerhardt, supra note 3, at 71.

[13] Id. at 71, 145.

The theory is grounded in a simple point: Even in cases of first impression, judges do not purport to have unconstrained discretion to enforce whatever rules they please. Many of their arguments appeal instead to external sources of law, like statutes or established customs. These external sources of law will often be indeterminate and incomplete; they will leave considerable room for judicial discretion. But unless they are *wholly* indeterminate, they will still tend to produce some degree of consistency in judicial decisions. If (as some commentators suggest) the primary purpose of *stare decisis* is to protect the rule of law by avoiding an endless series of changes in judicial decisions,[14] we may be able to achieve this purpose without applying a *general* presumption against overruling past decisions. We may, in short, be able to refine the doctrine of *stare decisis* to take advantage of the consistency that would tend to exist even in its absence.

Part I of this Article draws on the familiar framework of *Chevron U.S.A. v. Natural Resources Defense Council*[15] to suggest such a refinement. As we shall see, the theory sketched out in Part I suggests a possible link between one's perceptions of legal indeterminacy and one's views about *stare decisis*. In particular, the more determinate one considers the external sources of the law that judicial decisions seek to apply, the less frequently one might deem precedents binding.

Part II seeks to establish the *descriptive* power of the theory sketched out in Part I. Focusing on the period between the Founding and the Civil War (which tracks what Frederick Kempin has called the "critical years" for the doctrine of *stare decisis* in America[16]), I argue that the theory explains why—and to what extent—American courts and commentators embraced *stare decisis*. In both the written law (discussed in Section II.A) and the unwritten law

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[14] See, e.g., Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 Cal. L. Rev. 1309, 1357 (1995) (arguing that "stare decisis . . . can best be understood . . . as a cycle-prevention vehicle").

[15] 467 U.S. 837 (1984). Under *Chevron*, when an administrative agency has adopted a "permissible" interpretation of the statute that it administers, courts are generally supposed to accept that interpretation even if they would have construed the statute differently as an original matter. Courts, however, are not similarly bound by agency interpretations that they deem "impermissible." Id. at 842–45.

[16] Frederick G. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800 to 1850, 3 Am. J. Legal Hist. 28 (1959).

(discussed in Section II.B), Americans viewed *stare decisis* as a way to restrain the "arbitrary discretion" of courts.[17] But this sort of discretion was thought to exist only within a certain space, created by the indeterminacy of the external sources of law that courts were supposed to apply. Outside of that space, presumptions against overruling precedents were not considered necessary; the external sources of law would themselves avoid an arbitrary discretion by providing determinate answers to the questions that courts confronted. People did not expect courts presumptively to adhere to past decisions that got those answers wrong. To the contrary, once courts and commentators were convinced that a precedent was erroneous (as measured against the determinate external rules of decision), they thought that the decision should be overruled unless there was some special reason to adhere to it.

Part III explores the *normative* issues raised by this approach. It discusses the obvious risk that courts will find "demonstrable error" where none exists, and it also examines whether the approach will produce any offsetting benefits. In the end, I conclude that the conventional academic wisdom is unproven: Depending on one's assumptions about how legal communication works, one might well expect the theory laid out in Part I to yield better results than a general presumption against overruling past decisions.

I. USING *CHEVRON* TO REFINE THE DOCTRINE OF *STARE DECISIS*

Imagine, for a moment, that our legal system was based entirely on statutory codes, and that the codes were perfectly clear about their application to every conceivable case. This system is beyond the capacity of human beings to produce; even civil-law countries do not enjoy such a completely determinate set of statutes. But if we found ourselves in such a world, we might see no reason for *any* presumption against overruling precedents. Because the codes yield a single determinate answer to all conceivable legal questions, we might well expect judges applying the codes to reach the same results even if not bound by each other's conclusions. Even without help from *stare decisis*, then, the underlying rules of decision set out in the governing statutes would themselves generate fairly con-

[17] See The Federalist No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

sistent results. And while individual judges might sometimes make mistakes, letting future judges overrule those mistakes would not necessarily risk an endless series of reversals; we might expect the overruling judges to be able to give a reasoned explanation of their position, and we might expect this explanation to be capable of *persuading* future judges even though it did not *bind* them.

Now relax our assumptions to make them more realistic. In deference to modern skepticism about whether we can meaningfully speak of the common law apart from judicial precedents, let us continue to focus on written laws. In particular, let us imagine that a case turns on the proper interpretation of a statute or a constitutional provision. But let us acknowledge that the relevant provision may well be ambiguous: Although it is not completely indeterminate (in the sense that interpreters could read it to establish any rules they pleased),[18] it lends itself to a number of different constructions.

In the realm of administrative law, the *Chevron* doctrine tells us that a statute of this sort gives the implementing agency authority to pick one of the "permissible" constructions.[19] When no administrative interpretation is in the picture, we would read the statute to give similar discretion to the courts.[20] Whether the interpreter is an administrative agency or a court, however, the interpreter's discretion is limited. If the statute may be construed to establish Rule *A*, Rule *B*, or Rule *C*, the statute gives the interpreter some discretion over which of these three rules to pick, but the interpreter is not free to read the statute to establish Rule *D* instead.

Despite the familiarity of this framework, neither courts nor commentators have fully appreciated how it bears on common understandings of *stare decisis*. When we think about *stare decisis*, we are used to asking whether courts should follow a past decision even though they would have reached a different conclusion as an original matter. But *Chevron* teaches us that this formulation is

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[18] If we thought that a federal statute was completely indeterminate in this sense, we would say either that it violated the nondelegation doctrine or that it was void for vagueness. See, e.g., Touby v. United States, 500 U.S. 160, 165 (1991) (discussing the nondelegation doctrine); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497–99 (1982) (discussing vagueness doctrine).

[19] See *Chevron*, 467 U.S. at 843–44 & n.11.

[20] See, e.g., John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 701 (1997).

imprecise: It obscures a distinction that may well be important. When judges say that they would have reached a different conclusion as an original matter, they may be saying either of two things. Perhaps they are saying that the prior court simply made a different discretionary choice than they would have made; the prior court used its discretion to pick Rule *A* when the current judges would have picked Rule *B*. Or perhaps the current judges are saying that the prior court went *beyond* its discretionary authority; the relevant provision could permissibly be construed to establish Rule *A*, *B*, or *C*, but the prior court read it to establish Rule *D*.

These are quite different possibilities, and respect for the rule of law does not necessarily require *stare decisis* to have the same effect in both situations. In the first situation, a presumption against overruling the precedent makes perfect sense: Before we let current judges substitute their discretionary choices for the discretionary choices made by their predecessors, we may well want to require a "special justification" (such as the proven unworkability of the prior judges' chosen rules). Letting judges overrule past decisions of this type simply because they would have made a different discretionary choice might indeed generate an endless series of reversals.

In the second situation, however, this fear is less acute. If the prior court went outside the range of indeterminacy, it did not simply exercise its discretion; it made a demonstrably erroneous decision. Letting future courts overrule such decisions does not necessarily open the floodgates to an endless series of reversals. As long as the overruling court adopts a rule within the range of indeterminacy, we might expect that rule to be stable.

In the second situation, indeed, one could have a coherent doctrine of *stare decisis* that flips the conventional presumption against overruling precedents. Instead of requiring a "special justification" for overruling the prior decision (such as its practical unworkability), one who considered the prior decision demonstrably erroneous might require a special justification for *adhering* to it (such as the need to protect reliance interests).[21]

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[21] Cf. Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 26–27 (1994) (invoking Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1807), and arguing that just as courts should not close their eyes on the Constitution and see only a statute, so too courts should not close their eyes on the Constitution

Thus, the conventional wisdom is wrong to suggest that any coherent doctrine of *stare decisis* must include a presumption against overruling precedents that the current court deems demonstrably erroneous. The doctrine of *stare decisis* would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter. But when a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law. These are two different statements, and the doctrine of *stare decisis* could take account of this difference: One could recognize a rebuttable presumption *against* overruling decisions that are *not* demonstrably erroneous while simultaneously recognizing a rebuttable presumption *in favor of* overruling decisions that *are* demonstrably erroneous. If one truly believes in the concept of "demonstrable error," moreover, one might see no threat to the rule of law in such a doctrine.

II. THE HISTORICAL LINK BETWEEN PERCEPTIONS OF INDETERMINACY AND *STARE DECISIS*

Any proposal to adopt the theory described in Part I, and self-consciously to link *stare decisis* with current judges' perceptions of "demonstrable error," obviously invites a variety of objections. But let us defer those objections until Part III. Whatever one thinks of the normative desirability of the theory described in Part I, the theory has considerable descriptive power. In fact, this Part argues that the theory accounts for the growth of *stare decisis* in American law: Antebellum Americans embraced *stare decisis* to restrain the discretion that legal indeterminacy would otherwise give judges, and they did not extend *stare decisis* farther than this purpose seemed to demand. In particular, when convinced of a precedent's error, most courts and commentators did not indulge a presumption against overruling it.

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and see only an erroneous precedent); Commonwealth v. Posey, 8 Va. (4 Call) 109, 116 (1787) (opinion of Tazewell, J.) (asserting that "the uniformity of decisions" about the proper interpretation of a statute "does not weigh much with me," because "although I venerate precedents, I venerate the written law more").

Careful modern scholars have concluded that the antebellum conception of *stare decisis* stood "in an uneasy state of internal conflict."[22] But the theory set forth in Part I helps us dissolve the alleged tension in antebellum thought. Equipped with this theory, we can fully explain why the same jurists who spoke of a duty to correct past errors also spoke of an obligation to follow certain precedents that they would have decided differently as an original matter.

A. Antebellum Conceptions of Stare Decisis *in the Written Law*

"To avoid an arbitrary discretion in the courts," Alexander Hamilton declared in *Federalist 78*, "it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ."[23] As we shall see, concern about such discretion was a common theme throughout the antebellum period; in one form or another, it shaped most antebellum explanations of the need for *stare decisis*.[24] But the "arbitrary discretion" that wor-

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[22] Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 666 (1999).

[23] The Federalist No. 78, supra note 17, at 439.

[24] See, e.g., 1 Diary and Autobiography of John Adams 167 (L.H. Butterfield ed., Athenum 1964) (draft of November 5, 1760) ("[E]very possible Case being thus preserved in Writing, and settled in a Precedent, leaves nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge."); Alexander Addison, The Constitution and Principles of Our Government a Security of Liberty (1796), *in* Charges to Grand Juries of the Counties of the Fifth Circuit in the State of Pennsylvania 188, 197 (Phil., T. & J.W. Johnson & Co. 1883) (indicating that *stare decisis* keeps law from depending on "the variable and occasional feelings and sentiments of a court"); William Cranch, Preface, *in* 5 U.S. (1 Cranch) iii, iii (1804) (arguing that "the least possible range ought to be left for the discretion of the judge," and that the publication of case reports "tends to limit that discretion"); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 87 (1807) (argument of counsel) (praising *stare decisis* as a way to restrain "the ever varying opinions and passions of men" and to keep each judge from "set[ting] up his own notions, his prejudices, or his caprice"); Church v. Leavenworth, 4 Day 274, 280 (Conn. 1810) (portraying *stare decisis* as a way to avoid giving effect to "the discretion of the judge"); Daniel Chipman, Preface, *in* 1 D. Chip. 9, 30–31 (Vt. 1824) (noting how reports of past decisions limit "the discretion of the Judge"); Joseph Story, Law, Legislation, and Codes, *in* 7 Encyclopedia Americana app. at 576–92 (Francis Lieber ed., 1831), *reprinted in* James McClellan, Joseph Story and the American Constitution app. III at 359 (1971) (noting that *stare decisis* "controls the arbitrary discretion of judges, and puts the case beyond the reach of temporary feelings and prejudices, as well as beyond the peculiar opinions and complexional

ried Hamilton should be contrasted with what Chief Justice John Marshall called "a mere legal discretion," exercised by judges in "discerning the course prescribed by law."[25] This "legal discretion" connoted skilled judgment, not freewheeling choice.[26] In the context of statutory interpretation, for instance, it meant that judges would draw upon known principles of interpretation to figure out "the sound construction of the act," and hence their "duty."[27]

The contrast between "arbitrary discretion" and "duty" (as identified by "mere legal discretion") informed antebellum conceptions of *stare decisis*. In this Section, I focus on conceptions of *stare decisis* as applied to questions of written law. I argue that for much of our nation's history, the dominant view of *stare decisis* was both remarkably consistent and remarkably similar to the theory described in Part I.

1. James Madison's Discussion of "Liquidation"

When describing the courts' "duty" in matters of statutory interpretation, antebellum lawyers frequently spoke as if courts exercised no will of their own. Whether one is reading *Federalist 78*

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reasoning of a particular judge"); Intelligence and Miscellany, 7 Am. Jurist & L. Mag. 448, 449 (1832) (reprinting speaker's comment that *stare decisis* "limits [the judges'] discretion" and avoids "arbitrary power"); Gulian C. Verplanck, Speech When in Committee of the Whole, in the Senate of New-York, on the Several Bills and Resolutions for the Amendment of the Law and the Reform of the Judiciary System 27–28 (Albany, Hoffman & White 1839) (praising "[t]he authority of decided cases" as "the best safeguard against the arbitrary or capricious discretion of Judges"); McDowell v. Oyer, 21 Pa. 417, 423 (1853) (emphasizing that *stare decisis* keeps law from depending on "the caprice of those who may happen to administer it"); see also William E. Nelson, Americanization of the Common Law 18–19 (1975) (noting that in colonial Massachusetts, "[m]en as politically antagonistic as Thomas Hutchinson and John Adams viewed the doctrine of precedent . . . as a means of limiting judicial discretion").

[25] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

[26] See G. Edward White, The Marshall Court and Cultural Change, 1815–1835, at 198 (1988); see also, e.g., Brown v. Van Braam, 3 U.S. (3 Dall.) 344, 350 (1797) (argument of counsel) (contrasting "a sound legal discretion" with "mere will, whim and caprice"); Rex v. Wilkes, 98 Eng. Rep. 327, 334 (K.B. 1770) (Mansfield, L.J.) ("[D]iscretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.").

[27] *Osborn*, 22 U.S. (9 Wheat.) at 866; see also The Federalist No. 78, supra note 17, at 436 (calling the judiciary's duty to follow the Constitution rather than unconstitutional statutes an "exercise of judicial discretion in determining between two contradictory laws").

or Chief Justice Marshall's opinion in *Osborn v. Bank of the United States*, the message is the same: "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."[28]

This did not mean that antebellum lawyers thought that statutes would always be perfectly determinate, and would never leave any room for different interpretive choices. To the contrary, as James Madison noted in *Federalist 37*, written laws inevitably had "a certain degree of obscurity."[29] Some ambiguities could be traced to the human failings of the people who drafted the laws; they might have been careless in thinking about their project or in reducing their ideas to words, and they would certainly be unable to foresee all future developments that might raise questions about their meaning. Other obscurities would result simply from the imperfections of human language, which is not "so copious as to supply words and phrases for every complex idea."[30] Written laws, then, would have a range of indeterminacy.

Madison and his contemporaries believed that precedents would operate within this range. According to Madison, the certainty and predictability necessary for the good of society could not be attained if each judge always remained free to adopt his own "individual interpretation" of the inevitable ambiguities in written laws.[31] Throughout his public career, Madison therefore empha-

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[28] *Osborn*, 22 U.S. (9 Wheat.) at 866; see also The Federalist No. 78, supra note 17, at 433 ("The judiciary . . . may truly be said to have neither FORCE nor WILL but merely judgment . . . .").

[29] The Federalist No. 37, at 197 (James Madison) (Clinton Rossiter ed., 1999); cf. The Federalist No. 22, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (arguing that a single supreme court had to have final say over the construction of laws and treaties because "[t]here are endless diversities in the opinions of men" and there might otherwise "be as many different final determinations on the same point as there are courts").

[30] The Federalist No. 37, supra note 29, at 196–97. Madison emphasized that even perfect draftsmanship could not avoid this latter source of obscurity. See id. at 197 ("When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.").

[31] Letter from James Madison to Jared Ingersoll (June 25, 1831), *in* 4 Letters and Other Writings of James Madison 183, 184 (Phil., J.B. Lippincott & Co. 1865); accord, e.g., Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 3 Letters and Other Writings of James Madison, supra, at 642–43.

sized that "a regular course of practice" could "liquidate and settle the meaning" of disputed provisions in written laws, whether statutory or constitutional.[32] Once the meaning of an ambiguous provision had been "liquidate[d]" by a sufficiently deliberate course of legislative or judicial decisions, future actors were generally bound to accept the settled interpretation even if they would have chosen a different one as an original matter.[33]

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[32] Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 3 Letters and Other Writings of James Madison, supra note 31, at 145 ("It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter; . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."); see also The Federalist No. 37, supra note 29, at 197 (noting that because of the inevitable ambiguities in written language, "[a]ll new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications").

[33] Madison repeatedly used this argument to explain his alleged flip-flop on the constitutionality of the Bank of the United States. Before President Washington signed the 1791 bill establishing the First Bank of the United States, Thomas Jefferson had argued that the Constitution did not give Congress the power to create a national bank, and had unsuccessfully tried to persuade Washington to veto the bill. At the time, Madison had agreed with Jefferson. In 1816, however, President Madison himself signed the bill chartering the Second Bank of the United States.

To explain why he did not veto this bill, Madison stressed that Congress and the Washington Administration had amply considered the constitutional question in 1791. For the next twenty years, moreover, Congress had recognized the Bank in annual appropriations laws. See Letter from James Madison to Jared Ingersoll, supra note 31, at 186. Throughout this period, the Bank "had been often a subject of solemn discussion in Congress, had long engaged the critical attention of the public, and had received reiterated and elaborate sanctions of *every* branch of the Government; to all which had been superadded many positive concurrences of the States, and implied ones by the people at large." Letter from James Madison to James Monroe (Dec. 27, 1817), *in* 3 Letters and Other Writings of James Madison, supra note 31, at 55–56. Although Madison retained his own "abstract opinion of the text of the Constitution," he believed that the deliberate course of practice adopting a contrary view of that text overrode his "individual opinions" and freed him to sign the 1816 Bank Bill. See Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *in* 4 Letters and Other Writings of James Madison, supra note 31, at 165; accord Letter from James Madison to the Marquis de LaFayette (Nov. 1826), *in* 3 Letters and Other Writings of James Madison, supra note 31, at 542; cf. Letter from James Madison to James Monroe, supra, at 55–56 (distinguishing the Bank from legislative precedents in which Congress and the President had acted more hastily and without adequately considering the constitutionality of their measures).

Academics have appropriately emphasized this aspect of Madison's thought,[34] but they have not yet captured the nuances in Madison's concept of "liquidation." Although his usage of the term is now obsolete, in Madison's day "to liquidate" meant "to make clear or plain"; to "liquidate" the meaning of something was to settle disputes or differences about it.[35] Because of the ambiguities of written laws, Madison believed that early interpreters of a law or constitution had some power to affect the law's meaning.[36] But this power was not unlimited. Madison's idea of "liquidation" is like modern notions of "liquidated damages":[37] The interpreter gets to pick a particular interpretation from within a range of possibilities, but the interpreter is not at liberty to go beyond that range. Madison drew a sharp distinction between the question of "whether precedents could expound a Constitution" and the question of "whether precedents could alter a Constitution."[38] Indeed, Madison thought this distinction "too obvious to need elucidation": While "precedents of a certain description fix the interpretation of a law," no one would "pretend that they can repeal or alter a law."[39]

For Madison, then, when the early interpreters of a statute or constitutional provision that was obscure or "controverted" gave it a permissible construction, they helped to "settle its meaning"; subsequent interpreters could be bound to follow that construction even if they would have adopted a different one as an original mat-

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[34] See generally H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 935–44 (1985) (discussing Madison's theory of constitutional interpretation and the role of precedent).

[35] 8 Oxford English Dictionary 1012 (2d ed. 1991) (reporting the word's obsolete meaning of "[t]o make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes)," and offering numerous examples of this usage from the eighteenth century).

[36] See, e.g., Letter from James Madison to Spencer Roane, supra note 32, at 143 (indicating that there is an extent to which the meaning of a law or constitution "depends on judicial interpretation").

[37] Cf. Black's Law Dictionary 392 (6th ed. 1990) (noting that damages for breach of a contract "may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach [and other related considerations]").

[38] Letter from James Madison to N.P. Trist (Dec. 1831), *in* 4 Letters and Other Writings of James Madison, supra note 31, at 211.

[39] Id.

ter.[40] The fact that a series of independent interpreters had all reached the same construction, moreover, might itself be evidence that the construction was permissible.[41] But if, after giving precedents the benefit of the doubt, subsequent interpreters remained convinced that a prior construction went beyond the range of indeterminacy, they did not have to treat it as a valid gloss on the law. There might be a presumption that past interpretations were permissible, but once this presumption was overcome and the court concluded that a past interpretation was erroneous, there was no presumption against correcting it.

In sum, Madison's concept of "liquidation" closely tracks the theory described in Part I. If a past decision was demonstrably erroneous—if it "alter[ed]" the determinate law rather than "expound[ing]" an ambiguity—it lacked the binding force of true liquidations.

2. "Liquidation" in Antebellum Case Law

The Madisonian concept of "liquidation" dominated antebellum case law. Court after court used its framework to think about the effect of past decisions interpreting written laws.

To the extent that a statutory or constitutional provision was ambiguous, a regular course of practice (including but not necessarily limited to court decisions) could settle its meaning for the future. Constructions that had been acted upon ever since the law was first adopted had special force.[42] But even in the absence of

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[40] Letter from James Madison to Professor Davis (c. 1833) (not sent), *in* 4 Letters and Other Writings of James Madison, supra note 31, at 249.

[41] Cf. Letter from James Madison to C.E. Haynes, supra note 33, at 165 (suggesting this point, though adding that "cases may occur which transcend all authority of precedents"); see also infra text accompanying notes 124–26 (elaborating upon antebellum discussions of the difference between an isolated decision and a series).

[42] See, e.g., Packard v. Richardson, 17 Mass. (17 Tyng) 121, 143 (1821) (describing how, "[i]f there is ambiguity in [a statute's] language," the contemporaneous construction can "become[] established law," and adding that the community's understanding and application of the statute—when acquiesced in by the legislature and the courts—"is the strongest evidence that it has been rightly explained in practice"); Respublica v. Roberts, 1 Yeates 6, 7 (Pa. 1791) (following the "constant practice" that unmarried people could be guilty only of fornication and not of adultery under Pennsylvania's statute, even though "the decision of the court might be different from what it now is" if the case had "been *res integra*"); Minnis v. Echols, 12 Va. (2 Hen. & M.) 31, 36 (Va. 1808) (opinion of Roane, J.) ("If . . . this were *res integra*, I should desire further to

such contemporaneous interpretations, a regular course of decisions could "settle[]" the construction of statutes "so far as that construction depended upon the [courts]."[43]

This was true even if later courts would have resolved the ambiguity in a different way, as long as the prior interpretation was not demonstrably erroneous. Consider, for instance, an 1840 case in which the Supreme Court of New York declined to overrule its past interpretation of a statute. The court explained that "the question is undoubtedly one of construction upon the words of an act which, when taken generally, sustain the decision which has been made upon them"; under these circumstances, "even if the balance of our minds should now be the other way," the doctrine of *stare decisis* counseled against "indulg[ing] the inclination."[44] Wisconsin's highest court agreed that "when it is apparently indifferent[] which of two or more rules is adopted," the one selected by past decisions "will be adhered to, though it may not, at the moment, appear to be the preferable rule."[45] As the Ohio Supreme Court put it, "the simplest justice to our predecessors as well as the public should prevent us from interfering with decisions deliberately made, merely because a difference of opinion might exist between them and us upon a doubtful and difficult question of construction."[46]

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consider whether the provision, respecting the reading the deposition of an aged, infirm, or absent witness, applied also to this case: but I believe that the practice and general understanding of the country has decided the question in the affirmative, and I am not now disposed to disturb it.").

[43] Goodell v. Jackson, 20 Johns. 693, 720 (N.Y. 1823) (Kent, C.); see also, e.g., Peter S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 81–82 (Phil., Abraham Small 1824) (indicating that legislation inevitably leaves much "to the sound discretion of the constitutional expositors of the laws," expressed in "the successive decisions of Judges on points which the textual laws... have not sufficiently explained"); Verplanck, supra note 24, at 28 (discussing how usage and judicial decisions can "fix[] th[e] interpretation" of ambiguous language in statutes and constitutions); cf. Ex Parte Burford, 7 U.S. (3 Cranch) 448, 449 (1806) (finding precedent "decisive" in a case in which "[t]here is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution").

[44] Bates v. Relyea, 23 Wend. 336, 340 (N.Y. Sup. Ct. 1840).

[45] Pratt v. Brown, 3 Wis. 603, 609 (1854); cf. id. at 609–10 (urging courts to remain vigilant against "error" in past decisions).

[46] Kearny v. Buttles, 1 Ohio St. 362, 367 (1853); accord, e.g., Lemp v. Hastings, 4 Greene 448, 449–50 (Iowa 1854) ("When a rule or principle of law has been fully recognized by the supreme court, it should not be overruled, unless it is palpably

This presumption against overruling past decisions, however, did not extend beyond the statute's range of ambiguity. If convinced that a past decision was erroneous, courts would overrule it *unless* people had relied upon it or there were other substantial reasons for adherence. Courts assumed, in other words, that they should ordinarily correct past errors.

We can trace this assumption in judicial rhetoric from the 1780s through the Civil War and beyond. Listen, for instance, to the Pennsylvania Supreme Court in the 1786 case of *Kerlin's Lessee v. Bull*:[47]

> A Court is not bound to give the like judgment, which had been given by a former Court, unless they are of opinion that the first judgment was according to law; for any Court may err; and if a Judge conceives, that a judgment given by a former Court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law.[48]

One might be tempted to view this statement skeptically, on the assumption that courts make such comments when they want to overrule a troublesome past decision. But the Pennsylvania Su-

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wrong . . . ."); Breedlove v. Turner, 9 Mart. 353, 366–67 (La. 1821) (noting that past decisions interpreting a statute are "evidence of what the law is," and although "it is the duty of the [current] court to see that they are correct," they are binding "unless we are clearly, and beyond doubt, satisfied that they are contrary to law or the constitution"); Bellows v. Parsons, 13 N.H. 256, 263 (1842) (noting that because no "clear and undoubted mistake" had been shown in the past decisions, the court did not have to determine how it would have resolved the ambiguity "were it for the first time submitted to our consideration"); Proprietors of Cambridge v. Chandler, 6 N.H. 271, 289 (1833) ("We have carefully reconsidered the question settled in *Sayles v. Batchelder* [regarding the meaning of a statute], and find it one that is not without doubt and difficulty. It is a question upon which much may be said on either side. And as we are by no means satisfied that the question was incorrectly settled in *Sayles v. Batchelder*, we feel ourselves bound by the decision.").

[47] 1 Dall. 175 (Pa. 1786).

[48] Id. at 178. The Pennsylvania Supreme Court drew this language from Chief Justice John Vaughan's opinion in Bole v. Horton, 124 Eng. Rep. 1113 (C.P. 1673). But the court made an interesting modification that fits well with the concept of "liquidation." Vaughan had declared that "if a Judge conceives a judgment given in another Court to be erroneous, he . . . ought not to give the like judgment," for he is "sworn to judge according to law, *that is, in his own conscience*." Id. at 1124 (emphasis added). By rearranging Vaughan's words, the Pennsylvania court omitted Vaughan's gloss on the phrase "according to law." This omission seems significant: The Pennsylvania court was suggesting that when a statute could be interpreted in several different ways, a past court's judgment might be "according to law" even if the current court would have chosen a different resolution.

preme Court's statement is hard to impeach on this basis: The court ended up adhering to the precedent in question, concluding that the proper interpretation of the statute was "doubtful" and that the precedent had given rise to substantial reliance interests that deserved protection.[49]

Or consider judicial treatment of Connecticut's statute of limitations for quieting claims to real estate. In 1807, Connecticut's highest court had endorsed a broad interpretation of a tolling provision in the statute.[50] But in the 1810 case of *Bush v. Bradley*,[51] Justice Nathaniel Smith went out of his way to say that this construction was erroneous. "On a doubtful point," Smith noted, "I should consider myself bound by [the court's past interpretation]; but as the statute, in my judgment, is perfectly plain, I am constrained to say that its obligations are paramount to any precedent, however respectable."[52] A few years later, the full court agreed with Smith and overruled the past interpretation. As Chief Justice Zephaniah Swift explained, "the construction given to the statute [in the prior case] is not warranted by the fair import of it," and the

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[49] See *Kerlin's Lessee*, 1 Dall. at 179 ("[A]s this construction of the Act has been so long accepted and received as a rule of property, . . . it is but reasonable we should acquiesce and determine the same way in so doubtful a case . . . ."); cf. infra note 62 and accompanying text (discussing "rules of property" and how reliance interests could overcome the normal presumption that erroneous precedents should be overruled).

[50] See Eaton v. Sanford, 2 Day 523, 527 (Conn. 1807). The relevant statute extinguished rights of entry that were not asserted within a certain number of years after they first accrued. But the statute made an exception for anyone who, "at the time . . . the said right or title first . . . accrued," was "within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas"; such people had to assert their rights "within five years next after . . . their full age, discoverture, or coming of sound mind, enlargement out of prison, or coming into this country." An Act (or Acts) Concerning Possession of Houses, Lands, &c., tit. 97, ch. 3, § 4, 1808 Conn. Pub. Acts 434, 435 (originally enacted May 1684). In *Eaton*, the court indicated that even if only one of the listed disabilities had existed at the time the right of entry first accrued, the elimination of that disability did not start the five-year clock if another disability had arisen in the interim. Thus, someone who was under twenty-one when her right first accrued, and who subsequently became a *feme covert* before turning twenty-one, did not have to assert her claim within five years after attaining majority, but instead had until five years after discoverture.

[51] 4 Day 298 (Conn. 1810).

[52] Id. at 309–10 (opinion of Smith, J.).

past decision therefore "ought not to be considered as possessing the authority of a precedent."[53]

Even when courts were divided about the effect of past interpretations, the majority and the dissent often used the same framework for their analyses, disagreeing only about how it applied to the particular case at hand. Consider, for instance, judicial treatment of the Takings Clause in the Ohio Constitution, which declared that private property would "ever be held inviolate" but remained "subservient to the public welfare, provided a compensation in money be made to the owner."[54] When the City of Cincinnati took property in order to widen one of its streets, it proposed to compensate owners for the difference between the value of their original property before the street's improvement and the value of their remaining property *after* the street's improvement. Property owners protested that this approach gave them too little; they were supposed to be compensated "in money," and the city was effectively proposing to give them part of their compensation in the form of a wider street. Concluding that "the meaning of the [constitution] is obscure" on this point, a majority of the Ohio Supreme Court's members sided with the city on the strength of "[l]ong contemporaneous construction" by the state's legislative and judicial authorities.[55] A dissenter conceded that "contemporaneous construction . . . may be resorted to, in construing doubtful written laws and constitutions," but noted that "where there is no ambiguity, there is no room for construction; and the laws, as written, must prevail."[56] According to the dissenter, "there is neither doubt nor ambiguity in the wording of the constitution," and the past constructions were simply wrong.[57]

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[53] Bunce v. Wolcott, 2 Conn. 27, 33 (1816).

[54] Ohio Const. of 1802, art. VIII, § 4.

[55] Symonds v. City of Cincinnati, 14 Ohio 147, 175 (1846).

[56] Id. at 180 (Read, J., dissenting).

[57] Id. at 180–81 (Read, J., dissenting); cf. Stoolfoos v. Jenkins, 8 Serg. & Rawle 167, 173 (Pa. 1822) ("[U]sage ought only to prevail when the construction is doubtful. . . . Usage against a Statute, is an oppression of those concerned, and not an exposition of the law.").

For a mirror image of *Symonds*, in which the majority voted to reject a past interpretation that the dissent wanted to retain, see Leavitt v. Blatchford, 17 N.Y. 521 (1858). There, the judges in the majority believed that they could demonstrate the "error" of the past interpretation. See, e.g., id. at 543–44 (opinion of Johnson, C.J.); id. at 533 (opinion of Harris, J.) ("When a question has been well considered and de-

This framework for assessing the force of past decisions was remarkably widespread. The same courts that recognized a presumption against overruling permissible past constructions of "doubtful" provisions also acknowledged the need to overrule constructions that went beyond the range of ambiguity.[58] The overruling rhetoric used by courts across the country confirms this point: A court could explain why it was overruling a past interpretation of a statute or constitutional provision simply by showing that the past interpretation was mistaken, without claiming that the past interpretation was causing any other problems.[59] In other words, once courts concluded that a past decision was demonstrably erroneous, they needed no special reasons to justify overruling

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liberately determined, whatever might have been the views of the court if permitted to treat it as *res nova*, the question should not again be disturbed or unsettled. On the other hand, I hold it to be the duty of this court, as well as every other, freely to examine its own decisions, and, when satisfied that it has fallen into a mistake, to correct the error by overruling its own decision."). According to the dissenter, however, the choice between the two possible interpretations of the statute was at most "a mere conflict of opinion"; the prior interpretation was not "manifestly erroneous," and so "no valuable end is to be attained by reversing what has been heretofore decided." Id. at 560 (Selden, J., dissenting).

[58] See, e.g., Goodell v. Jackson, 20 Johns. 693, 722 (N.Y. 1823) (Kent, C.); Pratt v. Brown, 3 Wis. 603, 610 (1854); see also cases cited supra notes 46 and 57.

[59] See, e.g., Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 556 (1844) (overruling two prior decisions because "upon our maturest deliberation we do not think that [they] . . . are sustained by a sound and comprehensive course of professional reasoning"); Talcott v. Marston, 3 Minn. 339, 343–44 (1859) ("[U]pon a careful review of the statute, the Court is now of the unanimous opinion that the rule established as the measure of damages in the case above referred to, is erroneous."); Gwin v. McCarroll, 9 Miss. (1 S. & M.) 351, 371 (1843) ("We are now satisfied that [a prior decision] is not the law."); Pike v. Madbury, 12 N.H. 262, 267 (1841) (overruling a prior decision because "the construction we now hold to is the true construction of the act"); Kottman v. Ayer, 32 S.C.L. (1 Strob.) 552, 573 (1847) (overruling a past decision because "[t]his construction of the Act, a majority of this Court are of opinion was error"); Crowther v. Sawyer, 29 S.C.L. (2 Speers) 573, 578 (1844) ("[A]lthough the wisdom of the maxim *stare decisis*, is acknowledged, and we rarely think it prudent to overrule a former decision, yet when it . . . has proceeded upon a plain mistake of the law, it is our duty to put it out of the way."); Purvis v. Robinson, 1 S.C.L. (1 Bay) 493, 495 (1795) ("[The judges] admitted that the general practice hitherto had been otherwise, but that the act, when fully considered, did not warrant it."); Sharp v. Nelson, 17 Tenn. (9 Yer.) 34, 36 (1836) ("We feel satisfied that the case cannot have been very fully discussed or attentively considered by the court, and we are unable to yield to its authority."); cf. Livingston v. Story, 36 U.S. (11 Pet.) 351, 399–400 (1837) (Baldwin, J., dissenting) (urging the Court to adhere to the "settled construction" of a state law, but "freely admit[ting] that a court may and ought to revise its opinions[] when, on solemn and deliberate consideration, they are convinced of their error").

it; the presumption favored correcting such errors, not letting them stand.

Indeed, some people suggested that courts should *never* adhere to a past interpretation that they were now convinced was erroneous. In an 1854 dissent, Supreme Court Justice Peter Daniel suggested that even the desire to protect substantial reliance interests could not justify adhering to an erroneous interpretation of the Constitution. *Stare decisis*, he noted, "is a rule which, whenever applied, should be derived from a sound discretion, a discretion having its origin in the regular and legitimate powers of those who assert it."[60] For Daniel, it followed that *stare decisis* could never be used to enshrine demonstrably erroneous interpretations of the Constitution. "Wherever the Constitution commands, discretion terminates."[61]

Most courts did not go this far. Judges frequently indicated that if past decisions had established "rules of property"—if titles had passed in reliance on them or if people had otherwise conducted transactions in accordance with them—the resulting reliance interests could provide a reason to adhere to the decisions even if they were now deemed erroneous.[62] The conclusion that a past decision

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[60] Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 343 (1854) (Daniel, J., dissenting).

[61] Id. at 344 (Daniel, J., dissenting); see also, e.g., Goodell v. Jackson, 20 Johns. 693, 722 (N.Y. 1823) (Kent, C.) (indicating that a court might be "bound" to overrule its former interpretation of a statute if its members "had become entirely satisfied, that they had previously mistaken the law"); Sheldon's Lessee v. Newton, 3 Ohio St. 494, 506 (1854) (suggesting that even where substantial reliance interests had built up over a twenty-year period, overruling might be proper if it was "unquestionabl[e]" that "the rules of law have been violated, and the rights of the parties disregarded").

[62] See, e.g., Rogers v. Goodwin, 2 Mass. (2 Tyng) 475, 477 (1807); Bevan v. Taylor, 7 Serg. & Rawle 397, 401–02 (Pa. 1821); Girard v. Taggart, 5 Serg. & Rawle 19, 539–40 (Pa. 1818) (opinion of Duncan, J.); Kerlin's Lessee v. Bull, 1 Dall. 175, 179 (Pa. 1786); Nelson v. Allen, 9 Tenn. (1 Yer.) 360, 376–77 (1830); Taylor v. French, 19 Vt. 49, 53 (1846); Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351, 353–55 (1860); see also Thomas Emerson, Advertisement, *in* 1 Tenn. (1 Overt.) xxi, xxi (1813) (noting that when decisions are "wrong," the publication of case reports will help them "be corrected in time, before they are sanctioned by long acquiescence").

The force of these "rules of property" derived from prevailing views of the nature of judging. In general, people assumed that courts could not overrule their past interpretations of a statute purely prospectively; courts sat to declare what the law was, not what the law would be in the future. When a court overruled its past interpretation, then, it was declaring that the statute had always meant something other than what the past decision had said. This conclusion might unsettle titles that had passed in re-

was erroneous, then, merely established a rebuttable presumption that it should be overruled; this presumption could be overcome if there were special reasons for adherence.

The important point, however, is that few antebellum lawyers endorsed a presumption *against* overruling erroneous decisions. For most courts, the demonstrated error of a past interpretation of a statutory or constitutional provision was reason enough to overrule the past interpretation *unless* there were special reasons (such as the need to protect reliance interests) for adhering to it.

In sum, Americans from the Founding on believed that court decisions could help "liquidate" or settle the meaning of ambiguous provisions of written law. Later courts generally were supposed to abide by such "liquidations," for precisely the reasons identified in Part I. To the extent that the underlying legal provision was determinate, however, courts were not thought to be similarly bound by precedents that misinterpreted it.

B. The Common Law and Stare Decisis

Antebellum notions of *stare decisis* in the unwritten common law followed the same framework. But explaining this point is complicated, because antebellum Americans did not share modern conceptions of the common law itself. Their views of the common law, moreover, went through some changes over time, with corresponding effects on the prominence of *stare decisis*. This Section accordingly proceeds in stages.

As Section II.B.1 notes, many American lawyers in the late eighteenth and early nineteenth centuries thought that at least part of the common law had external sources, such as custom and reason. Section II.B.2 explains that in the unwritten law as in the written law, *stare decisis* played its greatest role where those external sources were deemed silent or ambiguous. In areas where the law's external sources were thought to yield determinate answers to the questions that judges confronted, it was possible for past decisions to be demonstrably erroneous, and courts were expected to

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liance on the past interpretation's view of the law. See *Bevan*, 7 Serg. & Rawle at 401. In order to avoid such retrospective effects, many people thought it preferable for erroneous decisions that had established "rules of property" to be corrected by the legislature rather than the courts. See, e.g., White v. Denman, 1 Ohio St. 110, 115 (1853).

overrule such decisions unless there were special reasons to retain them.

As time went by, some commentators attacked the notion that the common law rested on determinate and discoverable external sources. In their view, common-law decisionmaking amounted to "judicial legislation"; instead of deriving pre-existing principles from external sources, judges were exercising their own discretion to make up rules for each occasion. Mainstream lawyers in the antebellum period disagreed, but even they lost some of their faith in the external sources of the common law. As Section II.B.3 explains, *stare decisis* became correspondingly more prominent; people saw the doctrine as a brake on the discretion that the incompleteness of the law's external sources would otherwise give judges.

The commentators who criticized the common law did not consider *stare decisis* an adequate solution to the problem of judicial discretion. They wanted to abandon the common-law system entirely and to replace it with statutory codes. Predictably, these reformers tended to put considerable stock in the determinacy of their proposed codes. Section II.B.4 shows that they expected *stare decisis* to play a correspondingly narrow role in their system.

Throughout the antebellum period, then, we can track a strong relationship—across a range of different ideological views—between *stare decisis* and perceptions of legal indeterminacy. This is precisely what the theory set forth in Part I would lead us to predict.

1. Views of the Common Law in the Early American Republic

From our modern vantage point, it is easy to identify the common law with *stare decisis*. As Stanley Reed asserted before his appointment to the Supreme Court, "the doctrine of *stare decisis* has a philosophic necessity in the common law system which is not found elsewhere," because the common law "amounts to no more than a collection of decided cases."[63]

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[63] Stanley Reed, *Stare Decisis* and Constitutional Law, 9 Pa. B. Ass'n Q. 131, 133 (1938); see also, e.g., Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review 116 (1989) ("The fundamental premise of systems based on common law is that *stare decisis* . . . is the primary justification acceptable for most court decisions.").

In the late eighteenth century, however, many American lawyers would have rejected this positivist conception of the common law. Much of the common law was thought to rest on external sources. Lawyers of the day might not always have agreed with each other about exactly what those sources were; some accounts of the common law stressed the dictates of natural reason,[64] others stressed the customs adopted in some relevant community,[65] and many wove reason, custom, and divine revelation together.[66] But each of these sources of law had an existence separate and apart from judicial decisions. To a large extent, then, courts were thought to *discover* rather than to *make* the rules and principles that they applied.[67]

Most lawyers would have been willing to concede that *some* aspects of the common law had no external source, but simply derived from what courts had done in the past. Few people thought, for instance, that there had been anything foreordained about the technical rules of pleading, such as the distinction between "trespass *vi et armis*" and "trespass on the case." But the basic idea that there ought to be remedies for such trespasses was different: The fundamental principles of justice required remedies to be available for those injuries, even though the precise forms

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[64] See, e.g., Rhodes v. Risley, N. Chip. 84, 91 (Vt. 1791) (opinion of Chipman, C.J.) (asserting that "the principles of the common law" are "the principles of common justice as they apply to the general circumstances and situation of this Commonwealth"); 1 Zephaniah Swift, A System of the Laws of the State of Connecticut 46 (Windham, John Byrne 1795) (indicating that "reason and justice" are "the basis of all laws").

[65] See, e.g., Lessee of George Woods v. Galbreath, 2 Yeates 306, 307 (Pa. 1798) (observing that "[c]ourts of justice are frequently governed in their determinations by the customs of the country"); Campbell's Lessee v. Rheim, 2 Yeates 123, 124–25 (Pa. 1796) (noting, at least with respect to the rules of real property, that "the law itself has been said to be nothing but common usage"); Gorgerat v. M'Carty, 1 Yeates 94, 95 (Pa. 1792) (opinion of M'Kean, C.J.) (seeking to resolve a case by identifying "the custom of merchants"); 1 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia app. E at 406 (Phil., William Young Birch & Abraham Small 1803) (indicating that unwritten laws "acquire their force and obligation by long usage and custom, which imply a tacit consent").

[66] See generally James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. Chi. L. Rev. 1321 (1991).

[67] See, e.g., White, supra note 26, at 129 ("[C]ommon law doctrines, as articulated by judges, were seen as principles that had been discovered rather than new laws that were being made.").

that litigants needed to use reflected decisions made by past courts.[68]

Zephaniah Swift, the future Chief Justice of Connecticut, put the point more generally in his 1795 treatise *A System of the Laws of the State of Connecticut*. "The science of the law," he explained, "is grounded on certain first principles," which either have been introduced by statute or have been "derived from the dictates of reason, and the science of morals."[69] This foundation of discoverable principles did not answer all possible questions; "our courts have erected an artificial fabrick of jurisprudence" on top of it.[70] Still, the common law was not *entirely* "artificial." The foundational principles of the common law enjoyed an existence independent of any judicial decisions, and the courts' goal was to "square their decisions to the fundamental doctrines on which [the science of jurisprudence] is established."[71]

Even within the "artificial fabrick of jurisprudence" that had been built on top of the foundational principles, Swift identified some external sources of law. Certain "principles and doctrines," he noted, had "become law by the usage and practice of the people";[72] even though these customs could not necessarily be derived by reason, they remained binding on courts in cases to which they applied. In addition, the principles reflected in a state's written laws—its constitution and statutes—could also inform decisions on questions of the unwritten law.[73]

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[68] See 2 Swift, supra note 64, at 20–21. Swift notes that before "trespass on the case" was recognized, the writ of trespass covered only those injuries that were "[a]ccompanied by force." As society became increasingly commercial and "the principles of jurisprudence were better understood," it became "apparent that new remedies must be devised." Swift suggests that the courts of that day had a choice about exactly how to cure the "imperfection" of the existing forms of action: They could either "extend the old remedies to supply the defect" or use their statutory authority to "establish some new actions." But they did not have a choice about providing some avenue of relief; this was "absolutely necessary." Id.; cf. Du Ponceau, supra note 43, at xvi ("I consider it as of very little consequence whether an ejectment suit is brought in the fictitious names of John Doe and Richard Roe, or in the real names of the plaintiff and defendant, provided justice is done to the parties in the end. But what I think is not to be tolerated in any system of law, is actual *injustice* . . . .").

[69] 1 Swift, supra note 64, at 39.

[70] Id.

[71] Id.

[72] Id. at 2.

[73] See, e.g., id. at 1–2, 39, 44.

Writing in 1793, Judge Jesse Root of the Connecticut Superior Court offered a similar taxonomy that identified three overlapping sources of common law. Root acknowledged that part of the common law was judge-made; he described "the adjudications of the courts of justice and the rules of practice adopted in them" as an "important source of common law."[74] Two other "branch[es] of common law,"[75] however, had external sources. First, many types of cases were to be resolved according to "usages and customs" that had been "universally assented to and adopted in practice by the citizens at large, or by particular classes of men, as the farmers, the merchants, etc."[76] These commercial customs, if "reasonable and beneficial," formed "rules of right" that courts ought to apply "in the construction of transactions had and contracts entered into with reference to them."[77]

The second external source of rules of decision was more fundamental. In contrast to both judge-made rules and man-made customs, it was not a human creation at all; it "ar[ose] from the nature of God, of man, and of things, and from their relations, dependencies, and connections."[78] While this aspect of common law was "the perfection of reason,"[79] it was "[not] a matter of speculative reasoning merely[,] but of knowledge and feeling";[80] the principles of this law were "within us, written upon the table of our hearts, in lively and indelible characters."[81] This source of law cov-

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[74] Jesse Root, Introduction, *in* 1 Root i, xiii (Conn. 1793).

[75] Id. at xi.

[76] Id.

[77] Id. at xi–xii.

[78] Id. at ix.

[79] Id. The phrase, of course, comes from Coke. See 1 Edward Coke, The First Part of the Institutes of the Lawes of England 97b (London, Societie of Stationers 1628) (asserting that "the Common Law itselfe is nothing else but reason, which is to be understood of an artificiall perfection of reason gotten by long studie, observation and experience and not of every mans naturall reason").

[80] Root, supra note 74, at xi.

[81] Id. at x. As this passage suggests, Root associated this branch of the common law with God. See id. at x ("[B]y it we are constantly admonished and reproved, and by it we shall finally be judged . . . ."); id. ("The dignity of its original, the sublimity of its principles, the purity, excellency and perpetuity of its precepts, are most clearly made known and delineated in the book of divine revelation . . . ."); id. ("[H]eaven and earth may pass away and all the systems and works of man sink into oblivion; but not a jot or tittle of this law shall ever fail."); cf. 1 Swift, supra note 64, at 8 (indicating that God has "invested [man] with social feelings" that prompt man "to enter into a

ered a broad range of topics, such as which injuries are actionable, what conduct is criminal, and what obligations members of the family unit owe each other.[82] It was completely determinate, being "in itself perfect, clear and certain."[83] And its content did not depend on judicial decisions: "[T]he decisions of the courts of justice serve to declare and illustrate the principles of this law[,] but the law exists the same."[84]

For further evidence that the common law was thought to have external sources, one need only consult the fledgling states' "reception" laws—statutes or constitutional provisions enacted shortly after Independence in order to confirm that pre-existing laws would remain in force. When incorporating British *statutes* into their law, states carefully adopted only those statutes that they had already been observing or that had been passed before a certain date; states wanted to make clear that the British Parliament was not still legislating for them.[85] Many of the same provisions, how-

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state of society" and "to adopt and observe those rules and regulations which are necessary to secure the rights of individuals, and preserve the peace and good order of society").

[82] See Root, supra note 74, at x. Initially, in fact, Root suggested that this branch of common law "embraces all cases and questions that can possibly arise." Id. at ix. It seems unlikely that Root really believed that this branch of common law was quite so comprehensive, because that conception would leave no room for the other two branches of common law that he discussed. Still, Root plainly thought that the universal part of the common law covered many different fields.

[83] Id. at ix.

[84] Id. at xi.

[85] See, e.g., Del. Const. of 1776, art. 25 (limiting reception to statutes "heretofore adopted in Practice" in Delaware); Md. Decl. of Rights of 1776, art. III (limiting reception to "such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used, and practised by the courts of law or equity"); N.J. Const. of 1776, art. XXII (limiting reception to "so much of the statute-law, as have been heretofore practised" in New Jersey); An Act to revive and put in force such and so much of the late laws of the Province of Pennsylvania as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice, and for other purposes therein mentioned, § 2, ch. II, 1776–1777 Pa. Acts 3, 4 (limiting reception to "such of the Statute Laws of England as have heretofore been in force in the said Province"); Ordinance of Virginia Convention, May 1776, *in* 9 The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, at 127 (William Waller Hening ed., Richmond, J. & G. Cochran 1821) (limiting reception to English statutes "made in aid of the common law prior to [1606], and which are of a general nature, not local to that kingdom"); see also An Act Adopting the Common and Statute Law of England, 1782 Vt. Laws 3, 3–

ever, adopted "the common law of England" without imposing any similar qualifications.[86] The people who drafted this language surely did not expect the newly independent states to be bound by English decisions handed down after the Revolution.[87] Rather, they simply did not equate "the common law of England" with judicial decisions (whether pre- or postrevolutionary). As Virginia Chancellor Creed Taylor confirmed, "it was the common law we adopted, and not English decisions."[88]

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4 (June session) (limiting reception to statutes passed before October 1, 1760). For an overview of the reception of British statutes, see Elizabeth Gaspar Brown, British Statutes in American Law 1776–1836 (1964).

[86] See Del. Const. of 1776, art. 25; Md. Decl. of Rights of 1776, art. III; N.J. Const. of 1776, art. XXII; An Act to revive and put in force such and so much of the late laws of the Province of Pennsylvania as is judged necessary to be in force in this commonwealth, and to revive and establish the Courts of Justice, and for other purposes therein mentioned, § 2, ch. II, 1776–1777 Pa. Acts 3, 4; An Act Adopting the Common and Statute Law of England, 1782 Vt. Laws 3, 3 (June session); Ordinance of Virginia Convention, May 1776, supra note 85, at 127.

[87] At least five states, in fact, went so far as to ban the mere citation of such decisions in judicial proceedings. See Francis R. Aumann, American Law Reports: Yesterday and Today, 4 Ohio St. L.J. 331, 332 (1938) (identifying such bans in Delaware, Kentucky, New Hampshire, New Jersey, and Pennsylvania); cf., e.g., Chesnut Hill & Spring House Tpk. Co. v. Rutter, 4 Serg. & Rawle 6, 18 (Pa. 1818) ("The laws of the Commonwealth forbid my tracing this point through the English Courts, since the revolution . . . .").

[88] Marks v. Morris, 14 Va. (4 Hen. & M.) 463, 463 (Super. Ct. Ch. 1809); see also, e.g., Young v. Erwin, 2 N.C. (1 Hayw.) 323, 328 (Super. Ct. 1796) (argument of counsel) ("Neither the old nor the modern decisions are the very common law itself—they only profess to ascertain what it is."). But cf. An act adopting the common law of England, 1796 Vt. Laws 4, 4 (explaining a reception provision as an effort "at once to provide a system of maxims and precedents" to guide the state's courts); An Act, repealing a part of the act entitled "An Act, declaring what laws shall be in force in this state," 1806 Ohio Laws 35, 35 (repealing a prior statute receiving "the common law of England," perhaps because Ohio legislators identified that law with English decisions they disliked).

At the very least, it seems clear that Americans of the late eighteenth century did not equate the common law with *individual* judicial decisions. Cf. infra notes 124–26 and accompanying text (discussing the role of a *series* of decisions); see also R. Randall Bridwell, Theme v. Reality in American Legal History, 53 Ind. L.J. 449, 462–65 (1978) (book review) (describing how judicial decisions about the existence of a particular custom could accumulate to the point that they were taken as conclusive evidence of the custom, but stressing that the courts still were not considered the "ultimate source" of the resulting common-law rule).

2. Stare Decisis *in the Common Law*

a. "A Principle . . . Which Corrects All Errors and Rectifies All Mistakes"

To the extent that common-law rules were thought to have external sources, we should not assume that all common lawyers placed great weight on *stare decisis*. To the contrary, some of the commentators who emphasized the external sources of the common law did so precisely to explain why a state's courts were *not* bound to follow English precedents despite the state's reception of "the common law of England."

In 1792, for instance, Vermont Chief Justice Nathaniel Chipman wrote a detailed essay analyzing Vermont's reception statute, which adopted "so much of the common law of England, as is not repugnant to the Constitution, or to any act of the Legislature of this State."[89] This statute, Chipman emphasized, did not require Vermont courts to follow English precedents that were irrational.[90] Quoting Lord Mansfield, Chipman argued that even English courts were supposed to treat precedents only as "illustrat[ing]" and "giv[ing] . . . a fixed certainty" to the "principles" on which the common law truly depended.[91] According to Chipman, those principles "are the true principles of right, so far as discoverable."[92]

To the extent that the true principles of the common law could be derived by reason, it was possible for judicial decisions to be demonstrably erroneous. Indeed, Chipman suggested that many English precedents *were* erroneous. Some had been wrong from the start, having been "made . . . in an age when the minds of men were fettered in forms" and "clouds . . . hung over the reasoning faculties."[93] Others may have made sense at one time, but depended upon circumstances that had since changed.[94] As various rights and principles "were investigated, and better understood,"

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[89] An Act Adopting the Common and Statute Law of England, 1782 Vt. Laws 3, 3 (June session).

[90] See Nathaniel Chipman, A Dissertation on the Act Adopting the Common and Statute Laws of England, *in* N. Chip. 117, 123–39 (Vt. 1793).

[91] Id. at 136–37 (quoting Jones v. Randall, 98 Eng. Rep. 954, 955 (K.B. 1774)).

[92] Id. at 135.

[93] Id. at 124–26.

[94] See id.

English courts had overruled some of their erroneous precedents.[95] But the eradication of error had been far from complete: English courts had failed to recognize some of their past mistakes, and other erroneous decisions had already generated "rule[s] of property" that insulated them from reversal in England.[96] Still other English precedents might be perfectly valid as applied to England, but did not accord with Vermont's circumstances or the republican nature of Vermont's government.[97]

Notwithstanding the Vermont legislature's adoption of "the common law of England," Chipman maintained that Vermont courts were not bound by such precedents. "[I]nstead of entertaining a blind veneration for ancient rules, maxims and precedents," Chipman urged Vermont courts "to distinguish between those, which are founded on the principles of human nature in society, which are permanent and universal," and those which were erroneous or reflected circumstances unique to England.[98] To the extent that English precedents conflicted with the "principles and reasons, which arise out of the present state," the presumption favored discarding the precedents; Vermont courts should follow them only if they had already been "adopted in practice" and had therefore given rise to rules of property in Vermont.[99]

Chipman's other writings suggest that he did not limit this analysis to *English* precedents. In the preface to his published reports of Vermont decisions (which appeared at a time when books of American decisions were quite unusual[100]), Chipman explained why

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[95] Id. at 126.

[96] Id. at 124, 126–27; see also supra note 62 and accompanying text (discussing "rules of property" and the protection of reliance interests).

[97] See Chipman, supra note 90, at 137–38.

[98] Id. at 129 n.*, 137–38.

[99] Id. at 128–29; accord, e.g., Rhodes v. Risley, N. Chip. 84 (Vt. 1791).

[100] America did not have any indigenous volumes of case reports until 1789, when both Ephraim Kirby's *Connecticut Reports* and Francis Hopkinson's *Judgments in Admiralty in Pennsylvania* appeared. See Erwin C. Surrency, Law Reports in the United States, 25 Am. J. Legal Hist. 48, 53 (1981). In the fifteen years after these two books appeared, only a handful of other reports were published. Not until the nineteenth century did any state have an official reporter or subsidize the publication of its case reports. See Aumann, supra note 87, at 340; see also, e.g., Letter from James Kent to Thomas Washington (1828?), *excerpted in* William Kent, Memoirs and Letters of James Kent, LL.D. 116 (Boston, Little Brown & Co. 1898) (recalling that when appointed to the New York bench in 1798, "I never dreamed of volumes of reports" because "[s]uch things were not then thought of"). In many states, indeed, judges did

case reports were valuable. He stressed that case reports help courts preserve "what is right in their decisions." But he also emphasized that case reports help courts identify and overrule "what is wrong." As Chipman explained, the publication of reports "may enable [judges] to correct their former errors, and at leisure to discover those principles of Justice, and the exceptions and limitations of each, which might have escaped their utmost sagacity in the hurry of the circuit."[101]

Zephaniah Swift believed in a similar type of error-correction. To be sure, Swift saw considerable room for *stare decisis* to operate; he endorsed the notion that "when a court ha[s] solemnly and deliberately decided any question or point of law, that adjudication bec[omes] a precedent in all cases of a similar nature, and operate[s] with the force and authority of a law."[102] But Swift's emphasis on *stare decisis* simply reflected his view that the external sources of the common law did not themselves answer all questions.[103] Swift did *not* expect courts presumptively to adhere to decisions that were demonstrably erroneous. To the contrary, courts were free to depart from a common-law decision if it "has been founded upon mistaken principles."[104] Borrowing from Blackstone, Swift added that in such cases, the overruling courts "do not determine the prior decisions to be bad law; but that they are not law."[105] Swift then gave Blackstone a telling gloss: "Thus in the very nature of

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not even issue written opinions in most cases. See id. at 117; see also William Johnson, Preface, *in* 1 Johns. Cas. iii, iii (N.Y. 1808) (noting that Johnson's first volume of New York reports began with decisions from 1799 "because, except in a few cases . . . , sufficient materials could not be obtained for an authentic and satisfactory account of the decisions prior to that time").

[101] Nathaniel Chipman, Preface to the Reports, *in* N. Chip. 4, 4–5 (Vt. 1793).

[102] 1 Swift, supra note 64, at 40.

[103] See supra text accompanying notes 69–73 (describing Swift's view of the common law).

[104] 1 Swift, supra note 64, at 41. Swift indicated that past decisions should also be overruled if they conflicted with the *internal* sources of the law. See id. (discussing decisions that were "repugnant to the general tenor of the law"). Even if a precedent was not erroneous in this sense—that is, even if it did not conflict with either the external or the internal sources of the law—Swift added that it could be overruled if "the rule adopted by it be inconvenient." Id. Thus, while the presumption favored adhering to precedents in the absence of demonstrated error, this presumption could be overcome by practical considerations.

[105] Id.; cf. 1 William Blackstone, Commentaries on the Laws of England *69–70 (1765) (using this language to refer to decisions that are "manifestly absurd or unjust").

the institution [of precedent], is a principle established which *corrects all errors and rectifies all mistakes.*"[106]

Based partly on this passage, Morton Horwitz asserts that "Swift . . . came as close as any jurist of the age to maintaining that law is what courts say it is."[107] But Swift himself would surely have rejected this suggestion. In Swift's view, judges were free to overrule past decisions precisely because the common law was *not* just what courts said it was; it rested in part on principles that stood independent of past decisions, and judicial decisions could be tested against those principles.[108]

Other jurists of the day shared this conception of the unwritten law. Jacob Radcliff of the Supreme Court of New York, for instance, agreed with Swift and Chipman that common-law decisions could be erroneous, and he suggested that erroneous decisions should not be followed unless overruling them would have a "retrospective influence" or "affect pre-existing rights."[109] Radcliff explained that if courts gave "binding force" to decisions that were "founded on mistake," then "error might be continued, or heaped on error."[110] Radcliff could not imagine that such a system would be sustainable; eventually, "the common sense of mankind[] and the necessity of the case" would "oblige us to return to first principles, and abandon precedents."[111] Edmund Pendleton of the Virginia Court of Appeals agreed that if "in any instance" the Court were to "discover a mistake in a former decision," and if the Court were to do so before there had been time for reliance interests to develop, "we should surely correct it, and not let the error go forth to our citizens, as a governing rule of their conduct."[112]

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[106] 1 Swift, supra note 64, at 41 (emphasis added).

[107] Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 25 (1977).

[108] Cf. Bridwell, supra note 88, at 468 ("The fundamental error in Horwitz's analysis lies in confusing the terms 'precedent' and 'law,' and a consequent failure logically to pursue the ramifications of maintaining a once well-understood distinction between the two in analyzing early cases.").

[109] Silva v. Low, 1 Johns. Cas. 184, 190 (N.Y. Sup. Ct. 1799) (opinion of Radcliff, J.).

[110] Id. at 191.

[111] Id; cf. Horwitz, supra note 107, at 26 (discussing this passage).

[112] Jollife v. Hite, 5 Va. (1 Call) 301, 328 (1798) (opinion of Pendleton, P.J.). *Jollife* happened to be an appeal from a decree in equity, but Pendleton's formulation covers actions at law too. The same is true of Cadwallader v. Mason, Wythe 188, 189 (Va. High Ct. Ch. 1793) ("[T]o a decision, by any court, which results not, by fair deduc-

b. The Role of Precedent

Of course, the courts' willingness to overrule erroneous decisions hardly means that precedents had no influence. Just as precedents could "liquidate" the meaning of ambiguous provisions in the written law, so they could resolve questions that the external sources of the unwritten law did not settle. As Part I predicts, the less completely people thought that the external sources of law addressed a particular area, the more emphasis people put on precedents in that area.

Consider, for instance, the technical rules of pleading and practice. As we have seen, many jurists did not think that the unwritten law's foundational principles had dictated particular rules of procedure; appropriate rules had instead been built up by the custom of the courts.[113] These customary rules might be arbitrary, in the sense that different rules could equally well have been developed. For the most part, however, courts tended to think that the existing customs fell within an acceptable range; they did not conflict with any discoverable principles, and hence could not be labeled demonstrably erroneous. On technical questions of pleading and practice, then, courts frequently followed precedents even when they would have chosen a different rule as an original matter.[114] Indeed, one meaning of the word "precedent" was a form of pleading that courts had found acceptable in the past.[115]

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tion, from the principles alleged to warrant it, the authority of a precedent, which ought to govern in like cases is denied.").

[113] See supra notes 68 and 74 and accompanying text.

[114] See, e.g., Waldron v. Hopper, 1 N.J.L. 339, 340 (1795) (opinion of Kinsey, C.J.); State v. Carter, 1 N.C. (Cam. & Nor.) 210, 212 (Ct. Conf. 1801) (opinion of Johnston, J.); Cooke v. Simms, 6 Va. (2 Call) 39, 48 (1799); Cabell v. Hardwick, 5 Va. (1 Call) 345, 355 (1798) (opinion of Fleming, J.); Hill v. Pride, 8 Va. (4 Call) 107, 108 (Gen. Ct. 1787) (opinion of Lyons, J.). Even in later years, lawyers still cast their arguments for adherence to precedents in these terms. See, e.g., Wakeman v. Banks, 2 Conn. 445, 461 (1818) (Gould, J., dissenting) (noting that the lawyers who were advocating adherence to a particular precedent had sought to cast the relevant question as "a point of *practice*, which might be settled, indifferently, either way").

This is not to say that the forms of pleading remained completely stable throughout the years. Although courts presumptively adhered to precedents that were not demonstrably erroneous, courts might be able to identify special reasons for departing from such precedents. See supra note 104. Statutory reforms also played a role in changing the forms of pleading. Cf. Nelson, supra note 24, at 77–88 (describing how the writ system in Massachusetts broke down).

[115] See Thomas Walter Williams, A Compendious and Comprehensive Law Dictionary (London, Gale & Fenner 1816) (unpaginated, definition of "precedents") (noting

Some judges discussed the influence of past cases in precisely these terms. In one case before the Supreme Court of New Jersey, a man's will had directed that a particular female slave was "to be sold . . . for the term of fifteen years, and at the end of that term to be free."[116] The woman had a son during the fifteen-year period, and her owner claimed the son as a slave. In support of this claim, the owner cited some cases about legacies. But the Court rejected this argument, pointing out that the "arbitrary" rules reflected in those cases were "inapplicable to this case of personal liberty."[117]

Discussions of the law of evidence neatly reflect the correlation between the role of precedents and people's views about the comprehensiveness of the law's external sources. While Zephaniah Swift thought that "[t]he rules of evidence are of an artificial texture" and are "not capable in all cases of being founded on abstract principles of justice,"[118] Spencer Roane insisted that "[t]here is no subject or doctrine of our law . . . which is more a system of right reason, depending upon just inference and deduction by enlightened minds from plain and self evident principles."[119] When convinced that prior decisions about evidence law conflicted with those discoverable principles, Roane seemed willing to disregard the past decisions.[120] Judges who shared Swift's view, by contrast, often treated precedents as conclusive on questions of evidence.[121]

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that "[t]here are also *precedents* or *forms* for conveyances, and pleadings in the courts of law, which are to be followed, and are of great authority"); see also, e.g., Ward v. Clark, 2 Johns. 10, 12 (N.Y. Sup. Ct. 1806) (referring to *Morgan's Precedents*, a book of templates that lawyers could copy in drafting pleadings for a variety of different actions).

[116] State v. Anderson, 1 N.J.L. 36, 36 (1790).

[117] Id. at 37.

[118] Zephaniah Swift, A Digest of the Law of Evidence, in Civil and Criminal Cases xi (Hartford, Oliver D. Cook 1810).

[119] Baring v. Reeder, 11 Va. (1 Hen. & M.) 154, 161 (1806).

[120] See id. at 163 (expressing a willingness to correct "the errors of former times").

[121] See, e.g., Church v. Leavenworth, 4 Day 274, 280 (Conn. 1810) (Swift, C.J.) (adhering to an established rule about the admissibility of evidence, lest "all principles [be] again thrown afloat on the ocean of uncertainty, without any compass but the discretion of the judge"); State v. Lyon, 1 N.J.L. 403, 406–07 (1789) (noting that a defendant's motion to exclude oral testimony raised no great principles—"[t]he objections that have been urged apply wholly to the convenience of the judges"—and then deciding to follow past practice and receive the testimony); see also Swift, supra note 118, at x (explaining that his evidence treatise included "some of the most important cases that have been reported" because "it will often be necessary to recur to the original cases, to ascertain the tendency and bearing of general rules, and to facilitate

Aside from their influence on questions that the external sources of the unwritten law were not thought to answer, precedents also enjoyed a second type of influence. Even where the external sources of the unwritten law *were* thought to provide answers, current courts were not supposed to be arrogant, or to assume that they were always better acquainted with those sources than their predecessors had been. To the contrary, the views of respected past judges or other learned commentators were entitled to some respect. To the extent that the principles of the unwritten law could be derived by reason, later judges might trust the logic of Lord Mansfield more than their own.[122] Likewise, to the extent that the unwritten law rested on customs adopted throughout the mercantile world (or in some smaller community), past decisions by people familiar with the relevant customs constituted good evidence of what those customs were.[123]

This was particularly true when a long line of decisions had all reached the same conclusion. If a series of judges had all deemed something to be a "correct" statement of the unwritten law, a later judge who doubted the statement ought to be modest enough to question his own position. According to many courts, then, a series of decisions could settle the law in a way that individual judges

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their application"); cf. Gorgerat v. M'Carty, 1 Yeates 94, 100 (Pa. 1792) (opinion of Bradford, J.) ("This is not a question of general law, but a question of evidence, which must always be regulated by the particular rules of that tribunal to which a plaintiff applies himself for relief.").

[122] See, e.g., Comm'rs of the Treasury v. Brevard, 3 S.C.L. (1 Brev.) 11, 13 (1794) ("I do not feel myself at liberty to contradict the opinion of a judge of so much wisdom and liberality as Lord Mansfield, who . . . ever was careful to examine exceptions which seemed more nice than useful, and bring them to the test of reason and sound sense. He has decided that a variance like the present is fatal; and his reasoning seems to be conclusive."); cf. Kempin, supra note 16, at 38 (noting that in early Maryland decisions, "the citation of cases appears to rest as much on the authority of the particular judge as on the decision itself").

[123] In keeping with the logic behind this principle, the circle of people whose decisions were entitled to respect extended well beyond judges. See, e.g., Parker v. Kennedy, 1 S.C.L. (1 Bay) 398, 414 (1795) (Waties, J., dissenting) (invoking a past jury verdict as "a respectable authority" on a commercial question, because the jury had included "some of the best informed and most judicious merchants in this city"); see also Tims v. Potter, 1 N.C. (Mart.) 22, 24 (Super. Ct. 178_) (opinion of Ashe, J.) (mentioning the judgment of "professional[s]" in the same breath as "judicial opinions formerly given"); Gorgerat v. M'Carty, 1 Yeates 94, 97 (Pa. 1792) (opinion of Yeates, J.) (emphasizing that "the latest writers on the law of bills of exchange" recognized a particular case as being part of the law).

would not dare to reject.[124] Yet even this phenomenon is not quite the same thing as a presumption against overruling erroneous precedents. The influence of a series of decisions did not rest on the notion that judges should presumptively adhere to past decisions even when convinced of their error, but rather on the notion that judges should be exceedingly hesitant to find error where a series of their predecessors had all agreed.[125]

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[124] See, e.g., Fisher v. Morgan, 1 N.J.L. 125, 126–27 (1792) (referring to "the law as it has long been established," and expressing a need to follow "settled principles" rather than "our individual ideas of justice and fitness"); Le Roy v. Servis, 1 Cai. Cas. iii, vii (N.Y. 1801) (indicating that "a series of uniform decisions" could bind down the law "in a manner not to be shaken," though finding this principle inapplicable to the issue at hand because "[t]he cases on this question are contradictory"); Reports of Cases Argued and Determined in the Superior Courts of Law in the State of South Carolina, Since the Revolution 12 (Elihu Hall Bay 2d ed., 1809) (editor's note appended to White v. M'Neily, 1 S.C.L. (1 Bay) 11 (1784)) ("This case has been relied upon ever since [its decision], and the principle . . . has been sanctioned by the judges, as a correct and just one in all similar cases, down to the present day. It may, therefore, be considered as part of the common law of *South-Carolina.*"); id. at 235 (appending a similar note to Johnston v. Dilliard, 1 S.C.L. (1 Bay) 232, 235 (1792)); cf. George M. Bibb, Introduction, *in* 4 Ky. (1 Bibb) 15, 16 (1815) (suggesting that each individual decision is but a "fact," and that it requires "multiplication of facts" to produce "precedents"); see generally Kempin, supra note 16, at 30 (distinguishing between reliance upon "the accumulated experience of the courts," which was common in late eighteenth-century opinions, and the use of a single precedent as binding authority, which was not so common). But see Young v. Erwin, 2 N.C. (1 Hayw.) 323, 327 (Super. Ct. 1796) (argument of counsel) (asserting that courts can reconsider "even a series of decisions," and noting "how that which hath been supposed to be the common law in a great variety of points, hath undergone successive changes by subsequent determination, founded . . . upon better reasons"); 1 James Kent, Commentaries on American Law 444 (N.Y., O. Halsted 1826) ("Even a series of decisions are not always conclusive evidence of what is law . . . .").

[125] See, e.g., Fitch v. Brainerd, 2 Day 163, 176 (Conn. 1805) (argument of counsel) ("The precedent . . . will have its due weight, in proportion to the soundness of the reasons, on which it was founded, and the number and respectability of the judges, who acted upon it."); see also Burton v. Kellum, 1 Del. Cas. 83, 84 (C.P. 1795) ("If this plea is wrong, the courts have been [wrong] five hundred times since my remembrance, for I think I have known [the plea] put in that many times."); State v. Carter, 1 N.C. (Cam. & Nor.) 210, 212 (Ct. Conf. 1801) (opinion of Johnston, J.) (following "all the authorities," for "I am not disposed to give a judgment which might appear in any respect to run counter to the opinion of the most learned and respectable judges, who have written or decided in like cases"). As a practical matter, of course, if "[a] long course of uniform decisions" had put a particular principle on such firm ground that no current judge would dare to question its validity, it was "very unimportant" whether courts thought of themselves as "follow[ing] the precedents, or the principle which they establish." *Fitch*, 2 Day at 177 (argument of counsel).

Indeed, the respect that courts accorded to a series of past decisions was premised on the understanding that judges would *not* presumptively adhere to a decision that they were convinced was erroneous. The reason people trusted a series of decisions more than an individual judge's opinion was that the series reflected a *collective* judgment. This logic, in turn, assumes that the judges in the series did not follow their predecessors' views blindly, but instead conducted independent analyses. After all, if each judge in the series had felt bound by the first decision on the issue, then there would have been no difference between a series of decisions and an isolated precedent; the chance that the series was correct would be identical to the chance that the first decision was correct. A uniform series of decisions was particularly strong evidence of the correctness of a particular rule *precisely because* the judges in the series would have overruled decisions that they deemed demonstrably erroneous.[126]

Precedents did enjoy one type of influence that applied even when current courts were convinced of their error. In the unwritten law as in the written law, courts gave great weight to precedents that had established "rules of property" or had otherwise generated commercial reliance interests.[127] Chief Justice McKean of the

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[126] In keeping with this point, when judges in late eighteenth-century America invoked isolated past decisions, they frequently saw fit to add that they had reconsidered those decisions and continued to think that they were correct. See, e.g., Miller v. Spreeher, 2 Yeates 162, 163 (Pa. 1796) ("The same point was determined in this court some years ago between *Baron* v. *Hoare*, and we see no reason for adopting a different decision in the present case."); Evans v. Jones, 1 Yeates 172, 173 (Pa. 1792) ("We still adhere to that opinion."); Horde v. M'Roberts, 5 Va. (1 Call) 337, 337 (1798) ("This case stands upon the same ground as that of Kennon v. M'Roberts. The Court have revised and considered that decision; and, unanimously approve it.").

[127] See, e.g., Welles v. Olcott, Kirby 118 (Conn. Super. Ct. 1786) (following two precedents on construction of wills and noting that "[u]niformity of decision is to be preserved"); Evans v. Gifford, 1 N.J.L. 197, 198 (1793) (following precedent in enforcing an informal instrument of conveyance); Ruston v. Ruston, 2 Yeates 54, 69 (Pa. 1796) (opinion of Smith, J.) (asserting that where usage or judicial decisions have made English laws "the land marks of property," a judge "is bound by them, although he would not in the first instance have adjudged them applicable to us"); Fuller v. M'Call, 1 Yeates 464, 470 (Pa. 1795) (following precedents in insurance law); Syme v. Butler, 5 Va. (1 Call) 105, 111–12 (1797) (opinion of Fleming, J.) (following precedent in contract law); see also Lee, supra note 22, at 688–90 (discussing English cases to the same effect); cf. Hynes v. Lewis's Ex'rs, 1 N.C. (Tay.) 44 (Super. Ct. 1799) (postponing decision during the illness of one judge, "in order that a case which is likely to

Pennsylvania Supreme Court explained that even if the decisions were "originally founded on fallacious grounds," changing course could sometimes cause "greater injury to society" than simply adhering to the error; "[i]t is not of so much consequence what the rules of property are, as that they should be settled and known."[128] Again, however, the importance of precedents that had generated "rules of property" does not reflect any general presumption against overruling erroneous decisions. At most, the importance of "rules of property" merely shows that the presumption in favor of *correcting* past errors was rebuttable: Courts would adhere to erroneous decisions when reliance interests provided a special reason to do so.[129] This use of precedent is perfectly consistent with the theory set forth in Part I.

3. Stare Decisis *as a Constraint on the Discretion of Common-Law Judges*

The basic framework for *stare decisis* in the unwritten law remained similar as the antebellum period wore on. But the *application* of that framework changed, because people started to

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settle an important rule of property may be decided with all the advantage it can derive from a more deliberate examination").

[128] Lessee of Haines v. Witmer, 2 Yeates 400, 405 (Pa. 1798). Indeed, several early reporters saw the protection of rules of property and commercial reliance interests as one of the principal reasons to publish case reports. See, e.g., Ephraim Kirby, Preface, *in* Kirby iii, iii (Conn. Super. Ct. 1789) (asserting that the lack of reports in Connecticut had caused "a confusion in the determination of our courts;—the rules of property became uncertain, and litigation proportionably increased").

[129] On one view, indeed, following common-law precedents that had generated "rules of property" did not involve adhering to error at all. For judges who agreed with Jesse Root that the unwritten law governing property and business transactions rested largely on the usages and customs of the people, see supra text accompanying note 76, a decision that was wrong when rendered could become correct by the time courts reconsidered it. Even if the legal rule announced by the decision had not accurately reflected the customs and usages that prevailed when the decision was rendered, people might alter their practices in reliance on the decision. If that happened, the decision would be a self-fulfilling prophecy; by the time the courts reconsidered the decision, it would accurately reflect the relevant community's customs and usages, which courts were supposed to enforce. To the extent that the decision really had generated a "rule of property," then, it would no longer be erroneous.

This argument, however, does not explain why courts respected "rules of property" in the *written* law. See supra note 62 and accompanying text. Accordingly, it may be simpler to think of reliance as something that could provide a special reason for letting a past error stand.

change their views of the unwritten law itself. The less determinate the unwritten law's external sources were thought to be, the more questions were governed by *stare decisis*.

Some radical reformers denied that the common law had any external sources at all. In the 1810s, the most prominent of these reformers was the English utilitarian philosopher Jeremy Bentham, who wrote the American people a series of open letters attacking orthodox views of the common law. Bentham charged that whenever a common-law case comes up for decision, the judge either "makes for the purpose a piece of law of his own" or "adopts, and employs for his justification, a piece of law already made . . . by some other Judge or Judges."[130]

A loose-knit group of American reformers was soon expressing similar views.[131] In a celebrated 1823 speech, William Sampson argued that the "mummery" reflected in traditional claims about the sources of the common law was "out of date."[132] Instead of pretending that judges discovered the common law, the time had come to "lay[] aside the veil of mystery" and acknowledge the law to be "a human, not a preternatural institution."[133] Sampson's allies bluntly asserted that "the whole of the common law is the mere creature of judicial legislation."[134]

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[130] Jeremy Bentham, Supplement to Papers Relative to Codification and Public Instruction 105–08 (London, J. McCreery 1817); see also Samuel Romilly, Review of Bentham's *Papers Relative to Codification*, 29 Edinburgh Rev. 217, 223 (1817) (agreeing that in common-law cases, "the Judges, though called only expounders of law, are in reality legislators").

[131] For a detailed discussion of attacks on the common law during this period, see Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (1981). For commentary on the broader historical context of these calls for law reform, see Robert W. Gordon, Book Review, 36 Vand. L. Rev. 431, 436–41 (1983).

[132] William Sampson, An Anniversary Discourse, Delivered before the Historical Society of New York, on Saturday, December 6, 1823; Showing the Origin, Progress, Antiquities, Curiosities, and Nature of the Common Law, *in* Sampson's Discourse and Correspondence with Various Learned Jurists, upon the History of the Law, with the Addition of Several Essays, Tracts, and Documents, Relating to the Subject 1, 10 (Pishey Thompson ed., Wash., Gates & Seaton 1826) [hereinafter Sampson's Discourse].

[133] Id. at 6.

[134] Letter from Thomas Cooper to William Sampson (undated), *in* Sampson's Discourse, supra note 132, at 69; accord, e.g., Letter from Gov. John L. Wilson to William Sampson (Aug. 24, 1825), *in* Sampson's Discourse, supra note 132, at 103.

According to these critics, the indeterminacy of the common law's external sources left each judge free to indulge an arbitrary discretion. In an 1836 speech, Robert Rantoul decried the common law as the "will or whim of the judge," and declared that it "does not exist even in the breast of the judge" until the moment of decision.[135] Edward Livingston added that common-law decisions were continually shaped "by the caprice, or the bigotry, or the enthusiasm of the judge."[136]

Mainstream commentators disagreed. Throughout the antebellum period, it remained common to speak of judges as "professors of a science,"[137] who exercised "no will" of their own[138] and were "without discretion."[139] But in explaining why this was so, the mainstream legal community put increasing emphasis on the restraining force of past judicial decisions; as people lost some of their faith in the determinacy or comprehensiveness of the common law's external sources, its *internal* sources became correspondingly more central.[140] Indeed, what was meant by legal science itself began to

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[135] Robert Rantoul, Jr., Oration at Scituate (July 4, 1836), *in* Memoirs, Speeches and Writings of Robert Rantoul, Jr. 251, 280 (Luther Hamilton ed., Boston, John P. Jewett and Co. 1854); accord, e.g., Edward Livingston et al., To the Honorable the Senate and House of Representatives of the State of Louisiana 8 (New Orleans, J.C. de St. Romes 1823) (denying that the common law exists before any judge "creates and applies" it).

[136] Edward Livingston, A System of Penal Law for the State of Louisiana 56 (Phil., James Kay, Jr. & Brother 1833).

[137] 2 Official Report of the Debates and Proceedings in the State Convention, Assembled May 4th, 1853, to Revise and Amend the Constitution of the Commonwealth of Massachusetts 768 (Boston, White & Porter 1853) (remarks of Richard Dana, Jr.).

[138] Id. at 766.

[139] Henry A. Boardman, The Federal Judiciary 16 (Phil., William S. & Alfred Martien 1862); see generally White, supra note 26, at 82–105, 144–54 (tracing views of legal science in the antebellum period); see also Caleb Nelson, A Re-evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America, 37 Am. J. Legal Hist. 190, 210–15 (1993) (discussing the dominance of the "scientific" view of law on both sides of antebellum debates about whether judges should be elected).

[140] For an illustration of this shift in emphasis, consider the writings of Zephaniah Swift. His 1795 treatise about Connecticut's "system of laws" puts noticeably more stress on the external sources of the common law than the revised version of the treatise that he published in 1822. Compare, e.g., 1 Swift, supra note 64, at 44 (asserting that if Connecticut courts confront a question that they have not yet analyzed, and if the English rule on the subject is not "reasonable and applicable," they must "decide the question on such principles, as result from the general policy of our code of jurisprudence, and which are conformable to reason and justice"), with 1 Zephaniah Swift,

become less deductive and more inductive:[141] The primary objects of its study became the current of past decisions and the principles that could be derived from them.[142]

Mainstream lawyers in antebellum America still spoke of the common law as having some external sources. As Chief Justice Lemuel Shaw of Massachusetts asserted in 1854, its principles were "founded on reason, natural justice, and enlightened public policy."[143] These "general considerations," however, were "too vague and uncertain for practical purposes" to provide determinate answers in all of "the various and complicated cases" that arose each day.[144] Even the usage of the community did not always isolate a single right answer. What really made the common law's general principles "precise, specific, and adapted to practical use" was "judicial precedent"—which Shaw defined as "judicial exposition" that had been "well settled and acquiesced in."[145]

Shaw conceded that cases would arise for which no settled principles were directly on point. While courts in such cases "must be governed by the general principle[] applicable to cases most nearly analogous," they would have to "modif[y] and adapt[]" it for application to the new circumstances, and there might be some doubt

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A Digest of the Laws of the State of Connecticut 9–10 (New Haven, S. Converse 1822) [hereinafter Swift, Digest] ("When cases occur, that are new, *primæ impressionis*, judges must resort to the principles of analogous cases for their determination.").

[141] For a recent discussion of changing notions of legal "science," see Howard Schweber, The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education, 17 Law & Hist. Rev. 421 (1999).

[142] The increasingly inductive approach to the common law eventually led to the "case method" of legal education, pioneered by Christopher Columbus Langdell in 1870. Compare, e.g., Bates v. Relyea, 23 Wend. 336, 341 (N.Y. Sup. Ct. 1840) (asserting that court decisions are "the same to the science of law, as a convincing series of experiments is to any other branch of inductive philosophy"), with Eugene Wambaugh, Professor Langdell—A View of His Career, 20 Harv. L. Rev. 1, 2 (1906) (calling Langdell's plan "an extremely early attempt to apply the inductive method of the laboratory to matters foreign to the natural sciences"). See also Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 16–21 (1983) (analogizing Langdell's view of legal science to late nineteenth-century views of geometry, which treated axioms "as especially well-confirmed inductive generalizations about the physical world").

[143] Norway Plains Co. v. Boston & Me. R.R., 67 Mass. (1 Gray) 263, 267 (1854); see also id. (asserting that the common law "has its foundations in the principles of equity, natural justice, and that general convenience which is public policy").

[144] Id.

[145] Id.

about how to do so.[146] Still, any "controversy and litigation" would soon die down, as the new questions—like previous ones—"come to be settled by judicial exposition."[147] Thus, Shaw put great emphasis on the capacity of precedents to liquidate unsettled areas of the common law.

Joseph Story expressed similar views. He continued to speak of "natural justice" and "natural reason" as forming the "basis" of much of the common law;[148] in a variety of speeches and articles, he celebrated great jurists of the past who had rejected unsystematic thinking and had recognized principles that put various areas of the law on "the foundation of reason and justice."[149] But even after these "general principles" had been recognized, courts still had to decide how to *apply* them to "the circumstances of particular cases,"[150] and these questions of application would always produce "immeasurable uncertainties."[151] Like Shaw, Story relied upon

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[146] Id. at 267–68.

[147] Id. at 268; see also, e.g., Claflin v. Wilcox, 18 Vt. 605, 610–13 (1846) (discussing the "exposition of the common law" in decided cases, and suggesting that governing rules emerge as "the principle evolved from all the cases").

[148] E.g., Report of the Commissioners Appointed to Consider and Report upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts, or Any Part Thereof 9 (Boston, Dutton & Wentworth 1837) [hereinafter Story Commission Report] (asserting that "the principles of natural justice . . . constitute the basis of much of the common law"); Joseph Story, The Value and Importance of Legal Studies (speech delivered Aug. 25, 1829), *reprinted in* The Miscellaneous Writings of Joseph Story 503, 524 (William W. Story ed., Boston, Charles C. Little & James Brown 1852) (describing the common law as "a system having its foundations in natural reason").

[149] Joseph Story, An Address Delivered Before the Members of the Suffolk Bar (Sept. 4, 1821), *reprinted in* 1 Am. Jurist 1, 6 (1829) [hereinafter Story, Address] (discussing Lord Holt's contributions to commercial law); see also, e.g., id. at 7 (praising Lord Mansfield for articulating doctrines that cause contracts to "be expounded upon the eternal principles of right and wrong"); Joseph Story, Course of Legal Study, 6 N. Am. Rev. 7 (1817) (book review), *reprinted in* The Miscellaneous Writings of Joseph Story, supra note 148, at 67 (similar) [hereinafter Story, Course of Legal Study]; Story, Law, Legislation, and Codes, supra note 24, at 330 (asserting that during the period of Holt and Mansfield, many doctrines were "reduc[ed] . . . to systematical accuracy, by rejecting anomalies, and defining and limiting their application by the test of general reasoning").

[150] Story Commission Report, supra note 148, at 21. I am grateful to G. Edward White for focusing my attention on this point.

[151] Story, Course of Legal Study, supra note 149, at 70–71; see also Story Commission Report, supra note 148, at 21–22 (noting that the settled principles of the common law "are rather recognized than promulgated in our courts of justice," but that the settled *applications* of those principles to particular cases "can rarely be as-

court decisions to resolve those uncertainties and liquidate the law. Once courts had fully settled how to apply a recognized principle in a particular context, the doctrine became an "established" part of the common law, and judges were not free to reject it "to suit their own views of convenience or policy."[152]

Story explicitly linked this rule with the need to "control[] the arbitrary discretion of judges."[153] If judges were not "hemmed round by authority," cases might be decided according to "the peculiar opinions and complexional reasoning of a particular judge."[154] As it was, however, "'the progress of jurisprudence'" could be seen as "'withdrawing every case, as it arises, from the dangerous power of discretion'" and "'gradually contracting within the narrowest possible limits the domain of brutal force and of arbitrary will.'"[155] Even in new cases, the need for judges to derive the governing principles "from other analogies of the law" imposed a "very strong restraint[] upon the judgment of any single judge."[156]

In sum, the common law's internal sources picked up the slack left by the indeterminacy or incompleteness of its external sources. The less confidence people had in the ability of the law's external sources to point out the judges' duty in particular cases, the more they emphasized *stare decisis* as a way to avoid fluctuations in the governing rules. Indeed, a commission that Story chaired in 1836 went so far as to suggest that "[t]he whole of the judicial institutions in England and America rest upon [*stare decisis*] as their only solid foundation."[157] As the Supreme Court of Pennsylvania de-

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certained with perfect exactness from any other sources [than judicial decisions]"); cf. 1 Swift, Digest, supra note 140, at 3 ("Though the general rules may be so well ascertained, that there will be little doubt, or uncertainty concerning them in the abstract; yet so infinite is the diversity of shades in cases nearly resembling each other, that the application of them in particular instances, may be a matter of great nicety and difficulty.").

[152] Story Commission Report, supra note 148, at 28.

[153] Story, Law, Legislation, and Codes, supra note 24, at 359.

[154] Id.

[155] Story, Address, supra note 149, at 33 (quoting Sir James Mackintosh, A Discourse on the Study of the Law of Nature and Nations 57 (1799)); cf. Story Commission Report, supra note 148, at 15 (noting the Continental tradition of using the term "jurisprudence" to refer to applications of settled principles to particular circumstances).

[156] Story, Law, Legislation, and Codes, supra note 24, at 359.

[157] Story Commission Report, supra note 148, at 29; cf. White, supra note 26, at 151 ("By the 1830s Story had come to identify the common law, and even American law

clared in 1853, without *stare decisis* "we are without a standard altogether," and the law would depend "on the caprice of those who may happen to administer it."[158]

To be sure, the "mere blunders" of prior courts should not be consecrated.[159] To the extent that a past decision was demonstrably erroneous, courts continued to assume that it should ordinarily be overruled.[160] As one of Chief Justice Shaw's predecessors put it, "when a whole bench shall be unanimous in their opinion, that any former decision of their own, or of others, is wrong; the duty is as imperative to overrule it, as it is to adhere, where there may only be doubts of its correctness."[161] The Ohio Supreme Court agreed that "[i]nfallibility is to be conceded to no human tribunal," and that "[a] legal principle, to be well settled, must be founded on *sound reason*, and tend to the *purposes of justice*."[162]

But where those external sources of law left off, *stare decisis* was essential to prevent judges from manufacturing variable rules "out of [their] own private feelings and opinions."[163] The external

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generally, with judicial declarations."); see also, e.g., Palmer's Adm'rs v. Mead, 7 Conn. 149, 158 (1828) (assuming that without *stare decisis*, each successive bench would enshrine its own "opinion[s]," and a never-ending cycle of reversals would result); Francis Hilliard, The Elements of Law 2 (Boston, Hilliard, Gray & Co. 1835) (asserting that if common-law decisions did not form binding precedents, "there could in fact be no such thing as law, [and] the rights and obligations of individuals must be involved in absolute confusion and uncertainty").

[158] McDowell v. Oyer, 21 Pa. 417, 423 (1853).

[159] Id.

[160] See, e.g., id. ("A palpable mistake, violating justice, reason, and law, must be corrected . . . .").

[161] Guild v. Eager, 17 Mass. (17 Tyng) 615, 622 (1822); see also, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) (noting that individual court decisions "are often reexamined, reversed, and qualified . . . whenever they are found to be either defective, or ill-founded, or otherwise incorrect"); Haines v. Dennett, 11 N.H. 180, 184–85 (1840) (declaring that a prior decision "cannot be held to be law" if the reasoning on which it rested "be unsound").

[162] Leavitt v. Morrow, 6 Ohio St. 71, 78 (1856).

[163] *McDowell*, 21 Pa. at 423; see also Callender's Adm'r v. Keystone Mut. Life Ins. Co., 23 Pa. 471, 474 (1854) (rejecting both the "conservatism" under which "all reasoning [about the correctness of past decisions] becomes illegal" and the "radicalism" under which each new court measures the governing rules "by its own idiosyncracies").

Even when courts did find "demonstrable error" in a past decision, they gave signs of the decline in the perceived determinacy and completeness of the common law's external sources. Courts came to find demonstrable error most often when they concluded that a past decision conflicted with the common law's *internal* sources. See, e.g., id. at 474–75 (asserting that a past decision was a "mistake" and therefore "ought

sources of the law were not sufficiently complete to provide such restraints on their own. As Daniel Chipman of Vermont explained, in the absence of case reports, "the discretion of the Judge" would "in a great degree" be "unlimited."[164]

A comparison of two antebellum commentators helps confirm the link between the perceived centrality of *stare decisis* and the perceived indeterminacy of external brakes on judicial discretion. Timothy Walker, a protégé of Joseph Story,[165] thought that the common law had no real external sources at all; despite the fictional stories about its origins, "it has been made from first to last by judges."[166] Correspondingly, he urged judges to treat past decisions as "absolutely binding."[167] While conceding that judges sometimes "overrul[ed] former principles, and substitut[ed] new ones," Walker asserted that "this . . . kind of discretion always produces evil . . . ."[168] In contrast, James Kent continued to describe judicial decisions as mere "evidence" of the common law, and as "the application of the dictates of natural justice, and of cultivated

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not to be followed," but finding this "plain error" only because the precedent had "diverge[d] from the beaten path of the law" and had disturbed a "well established doctrine"); Graham v. M'Campbell, 19 Tenn. (Meigs) 52, 55–58 (1838) (similar); cf. Aud v. Magruder, 10 Cal. 282, 291–92 (1858) (noting that the commercial law "is not local," and overruling an idiosyncratic state decision because it conflicted with "a principle recognized . . . for many years everywhere else in the commercial world"); McFarland v. Pico, 8 Cal. 626, 631 (1857) ("We would not disregard a decision of this Court, deliberately made, unless satisfied that it was clearly erroneous. But the highest regard for the doctrine of *stare decisis* does not require its observance when a plain rule of law has been violated. The decision in *Toothaker v. Cornwall*, is in direct conflict with the law, as to presentation and notice [of commercial paper], as settled by all the authorities, both of England and the United States.").

[164] Chipman, supra note 24, at 30–31; see also id. (asserting that in cases of first impression, "[t]he Judge has a discretion in ascertaining what the law is," but thereafter the judge "is bound by [that decision]"); cf. Cranch, supra note 24, at iii ("Every case decided is a check upon the judge. He cannot decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public.").

[165] See, e.g., Walter Theodore Hitchcock, Timothy Walker: Antebellum Lawyer 231 (1990).

[166] Timothy Walker, Introduction to American Law 53 (Phil., P.H. Nicklin & T. Johnson 1837); see also id. (describing the common law as "the stupendous work of *judicial legislation*").

[167] Id. at 54.

[168] Id. at 649.

reason, to particular cases."[169] Kent saw correspondingly less room for *stare decisis* to operate. "It is probable," he wrote,

> that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.[170]

The bottom line is simple. As the nineteenth century wore on, the legal community's rhetoric tended to put increasing emphasis on the importance of *stare decisis* in common-law cases.[171] By 1835, indeed, Alexis de Tocqueville could make a trenchant observation about the practice of law in common-law countries: "The English and American lawyers investigate what has been done, the French advocate inquires what should have been done; the former produce precedents, the latter reasons."[172] But the reason for the American legal community's increased emphasis on *stare decisis* had less to do with changes in the framework for *stare decisis* than with changes in people's conceptions of the common law itself. The less people believed that the external sources of the common law would specify the judges' duty in each case, the more they looked to *stare decisis* to avoid "ceaseless and interminable fluctuations" in judicial decisions.[173] In sum, antebellum Americans embraced *stare decisis* for precisely the reason suggested by Part I: The broader the range of indeterminacy left by the external sources of the unwritten law, the more *stare decisis* was necessary to keep each new court from giving effect to its own whims.

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[169] 1 Kent, supra note 124, at 439; see also John H. Langbein, Chancellor Kent and the History of Legal Literature, 93 Colum. L. Rev. 547, 569 (1993) (describing Kent's belief that the principles embodied by the common law were "universal").

[170] 1 Kent, supra note 124, at 444; see also id. at 443 ("If . . . any solemnly adjudged case can be shown to be founded in error, it is no doubt the right and the duty of the judges who have a similar case before them, to correct the error.").

[171] Cf., e.g., Kempin, supra note 16, at 50 (asserting that "[t]he formative period of the doctrine . . . was in the years from 1800 to 1850").

[172] 1 Alexis de Tocqueville, Democracy in America 276 (Phillips Bradley ed. & Francis Bowen trans., Knopf 1945) (1835).

[173] Palmer's Adm'rs v. Mead, 7 Conn. 149, 158 (1828).

4. Stare Decisis *and the Radical Codifiers*

The common law's Benthamite opponents[174] insisted that even *stare decisis* could not save the common law. According to these reformers, precedents would be just as indeterminate and manipulable as the external sources of the unwritten law, and so they would not effectively restrain judicial discretion.[175] In any event, reformers were troubled by what they saw as a paradoxical attempt to control the discretion of current judges by enshrining the discretionary choices of past judges.[176] The reformers therefore urged Americans to abandon the common law altogether and to replace it with statutory codes. Robert Rantoul explained that such codes would restrain judges' "arbitrary power, or *discretion*," by giving them "a positive and unbending text" to apply.[177]

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[174] See supra text accompanying notes 130–36.

[175] See, e.g., Rantoul, supra note 135, at 279 (noting that in order to favor or disfavor a particular litigant, the common-law judge "has only to *distinguish*, and thereby make a new law"). In a sign of the salience of this objection, the Ohio Supreme Court took an unusual step to reduce the manipulability of its precedents. In the 1850s, it announced that when it decided a case, it would prepare a syllabus setting forth the precise rules that it thought it was deciding. See Note, 6 Ohio St. iii (1857); Rule of Court VI, 5 Ohio St. v, vii (1858). To this day, the Court's members join only in the syllabus; to the extent that the accompanying opinion goes beyond the syllabus, it is technically only the dictum of its author. See Ohio Supreme Court Rules for the Reporting of Opinions, Rep. Rule 1(B) (2000); see also, e.g., World Diamond, Inc. v. Hyatt Corp., 699 N.E.2d 980, 985–86 (Ohio Ct. App. 1997) (applying this rule); cf. Thomas R. McCoy, Note, Deceptive "Certainty" of the Ohio Syllabus, 35 U. Cin. L. Rev. 630 (1966) (urging change).

[176] The desire to avoid enshrining the results of judicial discretion inspired a well-publicized proposal in Louisiana (a state whose civil-law influences put it well ahead of the other states in codification). Louisiana's codifiers recognized that statutory codes would not be able to provide firm rules for every unforeseen set of facts. Under Edward Livingston's proposed Civil Code of 1825, judges would therefore rule as they thought justice demanded in all cases not governed by the code. But such "discretionary judgments" would "have no force as precedents, unless sanctioned by the legislative will." Letter from William Sampson to Thomas Cooper, *in* Sampson's Discourse, supra note 132, at 61 (praising Livingston's proposal); accord Livingston et al., supra note 135, at 10. Instead, the judges would be required to give the legislature a report of every case in which "they have thought themselves obliged to recur to the use of the discretion thus given," and the legislature could use this information to pass new statutes to "supply deficiencies" and "explain ambiguities" in the code. Id. In this way, judicial decisions "may be the means of improving legislation, but will not be laws themselves." Id.

[177] Rantoul, supra note 135, at 278.

As this comment suggests, the reformers tended to have considerable faith in the determinacy of their proposed codes.[178] The advocates of total codification thus give us an opportunity to test the link between the perceived determinacy of the law's external sources and the perceived need for *stare decisis*. To the extent that these reformers expected their codes to provide determinate answers to the questions that courts faced, the theory laid out in Part I suggests that they would see little role for *stare decisis*: They would expect that after codification, precedents would no longer be necessary to provide many rules of decision, because the codes themselves would point out the judges' duty.

This is precisely what many reformers envisioned. William Sampson asserted that instead of resorting to "[p]articular cases," judges would simply consult the relevant statutory language; "[t]he law will govern the decisions of judges, and not the decisions the law."[179] Charles Watts agreed that a code "leads to the decision of every suit on the principles and rules of law applicable to it, and but little attention is paid to decided cases."[180]

Indeed, advocates of total codification saw the common law's growing reliance on precedents as one of the signs that the common law was corrupt. Sampson made fun of the legal system reflected in the case reports, "where the arguments of counsel are reported by clouds of cyphers, indicating nothing but the pages of books most commonly cited as law for both sides."[181] Watts added that common-law judges stressed precedents in order to cover up

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[178] Indeed, some reformers expected codification to make the law clear to laymen as well as to lawyers. Jeremy Bentham touted codification as a means of making "[e]very man his own lawyer," Bentham, supra note 130, at 115, and newspaper correspondents agreed that codification would enable "the people at large . . . to comprehend the provisions of the law necessary for the security of property and person." Charleston Courier, Sept. 9, 1825, *quoted in* Cook, supra note 131, at 91; see also Romilly, supra note 130, at 222–23 (observing that "the plain text of a comprehensive ordinance" would be "open to all men to consult"). But cf. Thomas S. Grimké, An Oration, on the Practicability and Expediency of Reducing the Whole Body of the Law to the Simplicity and Order of a Code 22 (Charleston, A.E. Miller 1827) (disagreeing with the idea that codification would make "the people at large . . . better acquainted with the laws," but advancing other reasons for the reform).

[179] Sampson, supra note 132, at 38.

[180] Letter from Charles Watts to William Sampson (c. 1824), *in* Sampson's Discourse, supra note 132, at 91.

[181] Sampson, supra note 132, at 39.

the defects in the common law. In contrast to a codified system, which set forth general rules and principles in great number, the principles of the common law were "so wholly insufficient to serve as the means of regulating the affairs of life" that judges had to cite precedents "to give their decisions the appearance of being predicated on some existing rule of law."[182]

People who had less faith in the determinacy of the written laws saw much more need for courts to rely upon their predecessors' decisions. One newspaper correspondent, for instance, argued that any sensible written code would undoubtedly leave "a great deal . . . to the breast of the judge"; according to the correspondent, the codified system therefore would produce "endless uncertainty" unless each judge were "bound to follow the decisions of his predecessors."[183] Again, this argument reflects the link between *stare decisis* and the perceived indeterminancy of external sources of law.

C. Is the Theory Counterintuitive?

Cynics and public-choice theorists might find my historical argument counterintuitive. My argument suggests that Americans embraced *stare decisis* as a way to limit the discretion that the perceived indeterminacy of the underlying sources of law would otherwise have given judges. But the doctrine of *stare decisis*, even if advocated by people outside the judiciary, was implemented chiefly by judges. Why would judges have embraced a device to restrict their own discretion?

There are a variety of obvious responses to this objection. Among other things, judges may be more public-spirited than the objection assumes. But even if one were to embrace the cynic's premise, one could offer various stories to explain why restraints on judicial discretion are consistent with judges' self-interest. Perhaps judges are less concerned with maximizing their discretionary power than with maximizing some function in which their popular-

[182] Letter from Charles Watts to William Sampson, supra note 180, at 91.
[183] N.Y. Statesman, Apr. 7, 1825, *quoted in* Cook, supra note 131, at 116.

ity and prestige play major roles,[184] and perhaps the harmful effects of excessive judicial discretion tend to reduce people's regard for judges. Or perhaps judges are willing to accept some restrictions on their ability to overrule their predecessors' discretionary choices in exchange for the promise that their own discretionary choices in cases of first impression will bind future courts.[185] Or perhaps voters, legislators, or other groups outside the judiciary have an interest in restraining judicial discretion, and perhaps judges have an interest in responding to some such outside pressures.[186] One can tell a variety of stories about why it is in judges' self-interest to accept some constraints on their discretion.[187]

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[184] For speculations along these lines, see, e.g., Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1 (1993).

[185] For commentary focusing on this trade-off, see, e.g., Richard A. Posner, Economic Analysis of Law 589 (5th ed. 1998); William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & Econ. 249, 273 (1976); Erin O'Hara, Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis, 24 Seton Hall L. Rev. 736 (1993).

[186] During the first half of the nineteenth century, many states were moving to shorten judicial terms, with the result that incumbent judges may have had to worry about winning reappointment from governors, legislatures, or (by the end of the period) voters. See Francis R. Aumann, The Changing American Legal System: Some Selected Phases 185–86 (1940). More direct forms of pressure were also possible. In 1858, for instance, the Georgia legislature enacted a statute declaring that the unanimous decisions of all three judges of the state supreme court "shall not be reversed, overruled or changed" by any Georgia court, including the state supreme court itself. Kempin, supra note 16, at 42 (quoting An Act to Make Uniform the Decisions of the Supreme Court of this State; to Regulate the Reversals of the Same, and for Other Purposes, No. 62, 1858–1859 Ga. Acts 74).

[187] See, e.g., Jonathan R. Macey, The Internal and External Costs and Benefits of Stare Decisis, 65 Chi.-Kent L. Rev. 93, 111–12 (1989). Macey emphasizes that "following precedent . . . allows judges to maximize leisure time"—a modernized version of Cardozo's classic observation that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . ." Cardozo, supra note 1, at 149. If it is true that enforcing a (rebuttable) presumption against overruling past decisions saves time for judges, a system without this presumption might either impinge upon judges' leisure time (by requiring individual judges to work harder) or dilute their prestige (by requiring more judgeships to be created). See Macey, supra, at 111–12; Posner, supra note 184, at 37–38. As Tom Lee points out, however, advocates of this theory have not explored how it applies to courts of last resort that have discretionary jurisdiction and can therefore control how many cases they hear. See Thomas R. Lee, Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent, 78 N.C. L. Rev. 643, 649–50 (2000).

Whatever psychological stories one tells, this Part has sought to establish that the link between *stare decisis* and perceptions of legal indeterminacy is not a mere matter of armchair theory, but instead is a historical fact. Far from seeming counterintuitive, this connection strikes me as perfectly natural. Assuming that people want to avoid the "intertemporal cycling" of judicial decisions,[188] it is natural to indulge a presumption against overruling past decisions that reflect permissible exercises of discretion, even when current courts would make different discretionary choices. Many people will not find it so natural, however, to indulge a presumption against overruling precedents that are "demonstrably erroneous." And the more determinate one considers the underlying rules of decision in a particular area, the more likely one may be to conclude that a past decision in that area is "demonstrably erroneous."

I do not contend that the link between *stare decisis* and perceptions of legal indeterminacy is inevitable or that it has held true for all people at all moments in our history. But the link identified in this Part does have some continuing relevance on today's Supreme Court. Of the Court's current members, Justices Scalia and Thomas seem to have the most faith in the determinacy of the legal texts that come before the Court.[189] It should come as no surprise

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[188] See Stearns, supra note 14, at 1357.

[189] See, e.g., Antonin Scalia, Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 45 (Amy Gutmann ed., 1997) (asserting that the original meaning of constitutional provisions "usually . . . is easy to discern and simple to apply"); Clarence Thomas, Judging, 45 U. Kan. L. Rev. 1, 2 (1996) (criticizing the view that the Constitution and federal statutes leave judges "great latitude within which to express their personal preferences"); id. at 5 ("My vision of the process of judging is unabashedly based on the proposition that there are right and wrong answers to legal questions.").

The Court's current composition should not mislead people into thinking that faith in the Constitution's determinacy is always confined to conservatives. Although this faith is currently associated with Justices Thomas and Scalia, in a previous era it was associated with Hugo Black, one of the Court's great liberals. See, e.g., Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 801 n.204 (1999). Tellingly, Justice Black's approach to precedent in constitutional cases resembled the approach now taken by Justice Scalia. According to Michael Gerhardt, in fact, "no two justices in this century have called for overruling more precedents than Justices Black and Scalia." Michael J. Gerhardt, A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia, 74 B.U. L. Rev. 25, 33 (1994).

that they also seem the most willing to overrule the Court's past decisions.[190]

To be sure, this fact *does* come as a surprise to some. According to Andrew Jacobs, Justice Scalia's "view that law creates one correct answer" is in "deep tension" with his willingness to overrule precedents.[191] Prominent journalists and other commentators suggest that there is some contradiction between these Justices' mantra of "judicial restraint" and any systematic re-examination of

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[190] See, e.g., Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 916 (2000) (Thomas, J., dissenting) ("[O]ur decision in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976),] was in error, and I would overrule it."); Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (suggesting willingness to overrule the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)); Mitchell v. United States, 526 U.S. 314, 341–43 (1999) (Thomas, J., dissenting) (suggesting willingness to overrule Griffin v. California, 380 U.S. 609 (1965), and Carter v. Kentucky, 450 U.S. 288 (1981)); Cedar Rapids Cnty. Sch. Dist. v. Garret F., 526 U.S. 66, 79 (1999) (Thomas, J., dissenting) ("Because [Irving Independent School District v. Tatro, 468 U.S. 883 (1984),] cannot be squared with the text of [the relevant statute], the Court should not adhere to it...."); E. Enter. v. Apfel, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring) (expressing willingness to reconsider Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)); Campbell v. Louisiana, 523 U.S. 392, 404 (1998) (Thomas, J., concurring in part and dissenting in part) (calling for the Court to overrule Powers v. Ohio, 499 U.S. 400 (1991)); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 609–40 (1997) (Thomas, J., dissenting) (suggesting that the Court should repudiate its "'dormant' Commerce Clause" jurisprudence and overrule Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869)); M.L.B. v. S.L.J., 519 U.S. 102, 130–39 (1996) (Thomas, J., dissenting) (indicating willingness to overrule Griffin v. Illinois, 351 U.S. 12 (1956), and its progeny); Lewis v. Casey, 518 U.S. 343, 365 (1996) (Thomas, J., concurring) (suggesting willingness to overrule Bounds v. Smith, 430 U.S. 817 (1977)); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518–28 (1996) (Thomas, J., concurring in part and concurring in the judgment) (urging rejection of the balancing test adopted in Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980)); Missouri v. Jenkins, 515 U.S. 70, 123–33 (1995) (Thomas, J., concurring) (urging reappraisal of the equitable powers of federal courts); United States v. Lopez, 514 U.S. 549, 584–85 (1995) (Thomas, J., concurring) (suggesting willingness to return in the direction of the original understanding of the Commerce Clause); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting) (calling for the Court to overrule Southland Corp. v. Keating, 465 U.S. 1 (1984)); Holder v. Hall, 512 U.S. 874, 936–45 (1994) (Thomas, J., concurring in the judgment) (calling for the Court to overrule Thornburg v. Gingles, 478 U.S. 30 (1986)); see also Gerhardt, supra note 189, at 34 (providing a similar citation list for Justice Scalia).

[191] Andrew M. Jacobs, God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric, 63 U. Cin. L. Rev. 1119, 1178 n.320 (1995).

precedents.[192] But if one believes in the determinacy of the underlying legal texts, one need not define "judicial restraint" solely in terms of fidelity to precedent; one can also speak of fidelity to the texts themselves. We already acknowledge that the Justices' views of legal indeterminacy will affect the scope that they see for *Chevron* deference in administrative law.[193] When we use *Chevron*'s insights to refine our understanding of *stare decisis*, we can appreciate how the Justices' views of legal indeterminacy may also affect the pull of *stare decisis*.

III. SOME NORMATIVE SPECULATIONS

To say that a connection exists is not to say that it is desirable. My argument thus far has been primarily descriptive: I have tried to show that the theory set forth in Part I can help explain patterns in the growth of *stare decisis* in America, and I have suggested that it continues to have some relevance today. But my description raises some obvious normative issues. Even if the development of *stare decisis* has in fact been consistent with the theory described above, do we want courts to think about *stare decisis* in these terms?

The conventional academic wisdom suggests that we do not. Suppose that the current court, if not bound by precedent, would reach a different conclusion than the one announced by its prede-

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[192] See, e.g., Linda Greenhouse, Judicious Activism: Justice Thomas Hits the Ground Running, N.Y. Times, Mar. 1, 1992, § 4, at 1 (implying that Justice Thomas's professed belief in "judicial restraint" is inconsistent with "a wholesale reexamination of recent precedents"); Anthony Lewis, Beware, Judicial Activistl, N.Y. Times, June 2, 1997, at A15 (suggesting that conservative critics of "judicial activism" are hypocritical because "some of the most radical, precedent-breaking ideas these days come from judges called conservative"); cf. Christopher E. Smith, The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution, 79 Ky. L.J. 317, 338 (1990–91) (suggesting that Justice Scalia is not "a true judicial conservative" because "he is concerned with advancing his own views of the Constitution regardless of contrary case precedents"). I should disclose that I am not an entirely disinterested observer of the current Court and its critics: I had the honor of clerking for Justice Thomas from 1994 to 1995.

[193] See, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretation of Law, 1989 Duke L.J. 511, 521 (1989) ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.").

cessor. Under the version of *stare decisis* suggested by today's conventional academic wisdom (which I will call the "stronger" version), the current court will not ask whether the precedent is demonstrably wrong about the underlying law. Instead, the court will follow the precedent unless the precedent has proved unworkable or is causing other problems. Only these sorts of practical disadvantages would justify overruling the precedent.

Under the "weaker" version of *stare decisis* suggested by Parts I and II, by contrast, the court would begin by asking whether the past decision reflects a permissible or an impermissible view of the underlying law. If the court deems the precedent a permissible discretionary choice (albeit a different one than it would have made), it will proceed as under the stronger version: It will follow the precedent unless there is some practical reason for overruling. But if the current court concludes that the precedent is demonstrably erroneous, it will overrule the precedent unless there is some practical reason for *adhering* to it.

The essential difference between these two versions of *stare decisis* is simple. Under both approaches, courts can overrule precedents when there are practical reasons for doing so. The "weaker" version, however, recognizes an additional ground for overruling: Courts can also overrule precedents when they deem the precedents demonstrably erroneous and see no special reason for adherence.

Given modern views of the common law, this additional ground for overruling is unlikely to make much difference in common-law cases. In one way or another, most modern lawyers take a policy-oriented view of the common law: We judge common-law rules by their practical results. But if we take this view, the same facts that make a rule seem "demonstrably erroneous" will also provide practical justifications for overturning it. For instance, if we think that common-law rules should promote economic efficiency, and if we believe that a particular common-law rule is demonstrably erroneous because it is inefficient, we are also likely to see practical reasons to abandon it. Whether we apply the "weaker" or the "stronger" version of *stare decisis*, then, the outcome will be the same.

The difference between the two versions of *stare decisis* is more likely to matter in cases involving the written law, where a past in-

terpretation of a statute or constitutional provision might be deemed "demonstrably erroneous" even though its practical results are not noticeably worse than those that the "correct" interpretation would produce. Accordingly, this Part focuses on the written law rather than the common law.

My goal in this Part is relatively modest: I hope to persuade readers that *if* one accepts certain jurisprudential assumptions (of the sort commonly identified with the current Supreme Court's more "conservative" Justices), then one might sensibly favor the weaker version of *stare decisis* over the stronger version. Section III.A explains how those assumptions might lead one to expect the weaker version of *stare decisis* to produce considerable benefits. Section III.B explains why one might think that those benefits justify the costs that the weaker version of *stare decisis* will also produce. Section III.C considers whether this cost-benefit analysis can sensibly be applied to cases of statutory interpretation, where some commentators have advocated especially strong doctrines of *stare decisis*. Finally, Section III.D considers two likely objections to the basic premises of the weaker version of *stare decisis*.

A. The Potential Benefits of the Weaker Version of Stare Decisis

Assume, for the moment, that the concept of "demonstrable error" is not an illusion: Some interpretations of statutory or constitutional provisions are objectively wrong. Even with this assumption (which we will refrain from questioning until Section III.D), one might still find it hard to believe that anyone could favor the weaker version of *stare decisis* over the stronger version. After all, the weaker version is likely to have significant costs, which are worth absorbing only if it will also produce some offsetting benefits. The weaker version is *supposed* to have the benefit of substantially reducing the number of demonstrably erroneous precedents on the books. But there are at least two reasons why one might doubt that it will actually do so.

First, even if one accepts the theoretical possibility of "demonstrably erroneous" precedents, one might think that few such precedents will really exist. As Frederick Schauer notes, "it seems highly unlikely that, where there is a clear answer, there will be

cases refusing to recognize it."[194] Indeed, where there is a clear answer, there may be relatively few cases, period. Both parties to the case will recognize the right answer, and they will settle the matter (or simply drop it) rather than spending money to have courts tell them what they already know. In cases that are litigated all the way to a court of last resort, then, the underlying rules of decision are unlikely to provide clear answers.[195]

Second, even if "demonstrable errors" are more common than this argument suggests, one might expect later courts to make them just as often as earlier courts. Later courts will be no more competent, on average, than their predecessors.[196] Some commentators therefore suggest that if later courts give precedents no binding force and treat all previously decided questions as being open, "decisions overruling prior precedents will be about as likely to be wrong as the earlier precedents themselves."[197]

This Section responds to these objections. It explains why, if one accepts certain assumptions about the nature of law and of legal argument, one might expect the weaker version of *stare decisis* to eliminate a significant number of demonstrably erroneous precedents.

1. The Advantages of Later Courts

Frederick Schauer is certainly correct that if a particular legal question has a "clear" answer, we can expect courts to arrive at it. But sometimes the right answer to a legal question will not be clear. This does not automatically mean that no right answer exists;

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[194] Frederick Schauer, Precedent and the Necessary Externality of Constitutional Norms, 17 Harv. J.L. & Pub. Pol'y 45, 48 (1994).

[195] See Posner, supra note 185, at 588–89 (suggesting that cases with only one correct outcome are likely to be settled); cf. Lawrence C. Marshall, "Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis, 88 Mich. L. Rev. 177, 232 (1989) ("There appears to be a consensus that the majority of statutory interpretation cases the Supreme Court deals with yield no objectively correct answers.").

[196] See Geoffrey R. Stone, Precedent, the Amendment Process, and Evolution in Constitutional Doctrine, 11 Harv. J.L. & Pub. Pol'y 67, 71 (1988) (stressing that later courts "have no greater interpretive authority than their predecessors").

[197] Daniel A. Farber, Statutory Interpretation, Legislative Inaction, and Civil Rights, 87 Mich. L. Rev. 1, 12 n.45 (1988). Professor Farber goes on to qualify this conclusion. See id. ("If courts overrule precedents only when there are *strong reasons* to believe that the early precedents were wrong, they can increase the chances that in the long run statutes will be correctly interpreted.") (emphasis added).

some legal questions may simply be more difficult than others. A particular statutory provision, for instance, may have a single best interpretation, but identifying that interpretation might require some specialized knowledge or analytical abilities; courts might need to understand some sophisticated terms of art, or to be familiar with the problem that Congress was addressing, or to appreciate how the relevant provision fits into the background of other statutes. It is quite possible, then, that a law will have a determinate meaning even though that meaning is not easy to discern.

Different judges have different specialties and different levels of ability. There is no guarantee that the first set of judges to address an issue will have the specialized knowledge or abilities necessary to analyze the issue correctly. To the contrary, judges often will *not* be well positioned to decide cases of first impression; the judges who happen to confront an issue first may have only average abilities and be relatively unfamiliar with the relevant body of law. In theory, the adversary system can help bring these judges up to speed. But the lawyers involved in the case may themselves be nonspecialists of only average ability, and they may fail to recognize all the arguments at their disposal. Alternatively, the lawyers on one side may be much better than the lawyers on the other side; even though this disparity may be unrelated to the merits of the particular issue in question, it may well affect the court's thinking. Given all these considerations, it would be surprising if courts did *not* make some mistakes in cases of first impression.

Of course, these considerations are not confined to cases of first impression; they apply to the litigation process in general. Later cases are just as likely to come before judges who are not especially able and who are not specialists in the relevant field. But the greater the number of judges who have addressed an issue in the past, the more likely it is that the issue has been addressed by some specialists or especially competent judges. The opinions written by those judges may well explain arguments that other judges would miss, and those opinions are then available as resources for all subsequent judges. To the extent that judges are exposed to prior analyses of the relevant issue, they can take advantage of their own

wisdom and expertise while simultaneously benefiting from the wisdom and expertise of their predecessors.[198]

In order to think that these extra resources matter, one must make certain assumptions about the nature of legal argument. But these assumptions tend to go hand in hand with the general concept of "demonstrable error." The people who believe most strongly in that concept, and who think that most legal questions have a relatively narrow set of right answers, are likely to believe that reasoned analysis can demonstrate which answers are right and which are wrong. Such people are also likely to believe that one can meaningfully distinguish between "good" arguments (demonstrating the permissibility of a correct answer or the impermissibility of an erroneous answer) and "bad" arguments (purporting to demonstrate the permissibility of an answer that is actually erroneous or the impermissibility of an answer that is actually permissible). Finally, they are likely to believe (1) that judicial opinions can be reasonably effective at communicating good arguments to future judges and (2) that good arguments, by their very nature, will tend to be more persuasive in the long run than bad arguments.

If one accepts these premises, one may well think that courts' preferred decisions are significantly more likely to be erroneous in

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[193] Cf. Macey, supra note 187, at 102–03 (discussing the advantages of drawing on other judges' opinions). Professor Macey presents this point as an advantage of *stare decisis*; he argues that "the practice of *stare decisis* permits judges to 'trade' information among one another, thereby enabling them to develop areas of comparative advantage." Id. at 95. This argument, however, does not rely upon presumptively giving binding effect to precedents; it relies only on giving judges access to each other's opinions. Indeed, the more strongly judges feel bound to follow the first decision on any issue, the less well the process that Macey discusses will work.

In another sign that there is nothing new under the sun, critics of the common law made essentially this point more than 180 years ago. "[I]t must necessarily happen," one advocate of total codification noted, "that even the most learned and experienced lawyers will not have had occasions, in the course of the longest study and practice, to make themselves complete masters of every portion of [the law]." Romilly, supra note 130, at 231. If one wanted to create a statutory code setting forth the governing rules in each area, "the subject would probably be divided into its different branches, and each would be assigned to those who were understood to have devoted to it almost exclusively their attention and their care." Id. at 232. Under the common law's system of "legislation[] by means of judicial decisions," however, "the duty of legislation must often be cast on those, who are ill qualified to legislate upon the particular subject which accident may allot to them." Id. at 231–32.

cases of first impression than in later cases. Even in cases of first impression, of course, courts often will be exposed to good arguments and will reach permissible results. But when that happens, the courts' opinions will tend to communicate those arguments effectively to future judges, and future judges will tend to recognize that the past decision was at least permissible. By contrast, when the first court relies on bad arguments to reach an erroneous result, its opinion will be less persuasive; the workings of the adversary process,[199] coupled with the reasoning abilities of future judges, will tend to expose its errors. On these assumptions, good arguments will tend to perpetuate themselves even under the weaker version of *stare decisis*, while bad arguments will have less staying power.

The mere fact that current courts can double-check their conclusions against those of their predecessors is also a considerable advantage. When the first court to decide a case makes a mistake, it will not be alerted to think twice about its conclusion by the fact that five prior courts have reached the opposite decision. Later courts, by contrast, will find it easier to identify opinions that may be idiosyncratic.[200] In this respect as in others, judges have fewer resources to draw upon in cases of first impression.

Admittedly, these effects are likely to be more pronounced in *true* cases of first impression (involving issues that *no* court has ad-

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[199] The adversary process itself may tend to work better in later cases than in cases of first impression. Precedents are resources for lawyers as well as judges: Both the courts' opinions and the records of prior lawyers' approaches may well prompt thoughts that the current lawyers would not otherwise have had. In addition, even if the lawyers on one side of the current case happen to be better than the lawyers on the other side, the arguments raised in prior opinions may help offset the distorting effects of this disparity. Judges may be more swayed by such disparities in cases of first impression, simply because judges in such cases have fewer other sources of information.

[200] Cf. Macey, supra note 187, at 102 (noting the benefits of letting judges "check their results against the results reached by similar judges"). Again, Professor Macey presents this argument as one of the benefits of *stare decisis*, and as a reason why using *stare decisis* helps judges avoid errors; Macey suggests that the prevailing view on a particular issue is more likely to be correct than an individual court's contrary opinion. As discussed in Part II, however, this suggestion is true only if courts conduct some independent analysis before deciding to follow a past decision. If the prevailing view simply reflects the view of the first court to decide the question (and if subsequent courts follow this view without regard to whether it was erroneous), then the chance that the prevailing view is wrong is identical to the chance that the first court was wrong. See supra text accompanying note 126.

dressed) than in cases that have made it up to courts of last resort. By the time an issue reaches the United States Supreme Court, it typically has percolated through a number of lower courts, and the Court's members therefore have the benefit of seeing how some other judges analyzed it.[201] This fact, indeed, may help explain why the Supreme Court follows stricter notions of precedent than the federal district courts, which do not apply *any* formal presumption against overruling their own prior decisions.[202]

But even though the Supreme Court can draw upon lower-court opinions when it confronts issues for the first time, its successors are still likely to be in a better position to analyze those issues. The Court's successors will have the benefit of subsequent commentary and briefing about whatever opinion the Court releases, and this subsequent commentary and briefing may well expose flaws in that opinion. The prior lower-court opinions will not always prevent such flaws from cropping up. Lower-court opinions will be more helpful in some cases of first impression than in others, in part because the identity of their authors is largely a matter of chance. In any event, the Supreme Court does not always confine itself to matters that the lower courts have discussed; instead of precisely tracking the analysis in the briefs or in some lower-court opinion, the Court may well make an unanticipated move. Despite its eminence, the Supreme Court is not always well positioned to make such moves.

Quite apart from these considerations, later courts often have the benefit of experience; they have more information about how the rule chosen by their predecessors has worked in practice.[203] While this experience will not always be relevant to whether a

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[201] See, e.g., Marshall, supra note 195, at 231–32 (stressing the thoroughness of the Supreme Court's deliberative process).

[202] See, e.g., United States v. Cerceda, 172 F.3d 806, 812 n.6 (11th Cir. 1999) ("The opinion of a district court carries no precedential weight, even within the same district."); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority.").

[203] See Frank H. Easterbrook, Stability and Reliability in Judicial Decisions, 73 Cornell L. Rev. 422, 423 (1988) ("Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects . . . and improve on the treatment of the earlier case."); Richard A. Posner, The Constitution as an Economic Document, 56 Geo. Wash. L. Rev. 4, 36 (1987) (noting that "the overruling decision is somewhat more likely to be correct than the overruled one, if only because the former will be based on more experience than the latter").

precedent is demonstrably erroneous,[204] it sometimes will highlight issues that the prior court overlooked. In at least some cases, this additional experience will help expose an error.

In sum, later courts have a variety of advantages over their predecessors. If judicial opinions can shed light on a court's reasons for deciding a legal question in a particular way, and if good reasons tend to be more persuasive (and better able to withstand subsequent objections) than bad ones, we can expect decisions preferred by the current court to be erroneous less often than decisions preferred by the past court.

2. The Possibility of Selection Bias

Suppose, however, that this conclusion is wrong: The decisions preferred by current courts are just as likely to be demonstrably erroneous as the decisions preferred by their predecessors. Even so, one might still expect the weaker version of *stare decisis* to improve the accuracy of case law.

This claim seems paradoxical. But a court applying the weaker version will not automatically overrule precedents with which it disagrees. Even if the current court would prefer a different decision, precedents that it deems "permissible" will continue to benefit from the presumption against overruling. If we assume (plausibly enough) that courts are more likely to deem a precedent "permissible" if it is in fact permissible than if it is demonstrably erroneous, then the weaker version incorporates a useful form of selection bias: The precedents that the current court selects for overruling will come disproportionately from the group of erroneous decisions. It follows that even if the two courts have identical error rates for their initially preferred decisions, the current court is more likely to be correct than the prior court *in the cases in which the current court opts to substitute its preferred decision for*

[204] If a court interprets a statute or constitutional provision to establish a rule that ends up producing bad results, it need not follow that the original decision was impermissible. On many theories of statutory and constitutional interpretation, the bad consequences of a prior decision bear less on whether the decision was permissible than on whether there are practical reasons for replacing it with some other permissible interpretation.

that of the prior court.[205] For this reason too, the weaker version of *stare decisis* is likely to reduce the number of erroneous decisions on the books.

B. Some Questions About the Weaker Version's Potential Costs

Once we have established that people who accept certain assumptions about the nature of legal argument might expect the weaker version of *stare decisis* to have some benefits, we are close to establishing that they might sensibly prefer the weaker version of *stare decisis* to the stronger version. To be sure, the weaker version of *stare decisis* is likely to have costs too: More decisions will be overruled under the weaker version of *stare decisis* than under the stronger version, and change can be costly. But it is hard to prove that the costs of the weaker version of *stare decisis* will outweigh the benefits, because the costs and benefits involve incommensurable values.

Someone who accepts the premises of the weaker version of *stare decisis*, and who believes that the weaker version will substantially reduce the number of demonstrably erroneous decisions on the books, is likely to claim that the weaker version promotes

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[205] A numerical example may help illustrate this point. Suppose that the past court heard 1000 equally difficult cases and reached erroneous decisions in 50 of them. By hypothesis, we are assuming that when the current court revisits the 1000 cases, its own preferred decisions will not be affected by its predecessor's opinions; the current court will also have a 5% error rate, and the fact that the past court reached a permissible decision in a particular case will not make the current court any less likely to prefer an erroneous decision in that case. We will suppose, however, that the current court is fairly likely to think that erroneous precedents really are erroneous; the current court deems 40 of the 50 erroneous decisions to be demonstrably erroneous, and it reaches this conclusion about "only" 160 of the 950 permissible decisions.

For simplicity, assume that the current court never identifies any practical reasons to *adhere* to decisions that it deems erroneous or to *overrule* decisions that it deems permissible. On these assumptions, the current court will substitute its own preferred decisions in 200 cases, and it will let the past court's decisions stand in the remaining 800 cases. Many of the current court's changes will admittedly be unnecessary; the current court will simply be switching from one permissible decision to another. In addition, because we are assuming that 5% of the current court's preferred decisions are "demonstrably erroneous" (and that this error rate is independent of whether the past court reached a permissible decision), the 200 changes will introduce 10 new errors. But at the end of the day, there will be only 20 erroneous precedents on the books (counting both the 10 errors that the current court did not detect and the 10 new errors that it introduced). In this example, selection bias alone has more than halved the number of erroneous precedents.

"democratic values" by bringing the law enforced in court closer to the collective judgments that our representatives have authoritatively expressed.[206] Of course, advocates of the weaker version might conceivably claim some other benefits too: They might suggest, for instance, that the weaker version of *stare decisis* will end up producing a more efficient set of legal rules than the stronger version.[207] But the primary reason we want courts to avoid erroneous interpretations of the written law is that we value democracy, not that we value efficiency.

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[206] One might object that this formulation too blithely equates "permissible" interpretations of statutes with the judgments actually reached by our elected representatives. Some textualist theories of interpretation, after all, disclaim reliance upon those subjective judgments. But even for such theories, the constitutional and subconstitutional procedures for producing a statute amount to a mechanism for aggregating those individual judgments into a single bill; the final text reflects a network of compromises and agreements that are influenced both by the subjective policy preferences of individual legislators and by the varying intensities of those preferences. While no such aggregation mechanism is perfect, see Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 814–23 (1982), "permissible" interpretations presumably are more accurate than "erroneous" interpretations at reflecting how we have chosen to aggregate those judgments. If we disagreed with this conclusion—if we thought that "permissible" interpretations were consistently less faithful to the authoritative expressions of our representatives' collective judgments than interpretations that our chosen method of interpretation would reject as erroneous—then we surely would be tempted to adopt a new method of interpretation (or perhaps an entirely different aggregation mechanism).

[207] George Priest and others have argued that even if judges themselves have no particular preference for efficient rules, parties will disproportionately choose to relitigate inefficient rules. As long as judges are open to making changes, then, the very process of selecting cases for litigation may tend to produce a more efficient set of rules. See, e.g., George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977). Strong doctrines of *stare decisis* impede the process that Priest describes. See Lee, supra note 187, at 655; cf. William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 280–84 (1979) (arguing that Priest's analysis ignores the influence of precedent, which may actually cause "the average efficiency of legal rules . . . to decline over time").

As applied to cases involving the written law, Priest's thesis is more concerned with efficiency than with accuracy; it does not focus on whether a precedent reflects a permissible interpretation of the relevant statute or constitutional provision. But if one believes that legislators generally try to promulgate efficient rules, and that legislators are better positioned than judges to decide which rules will promote efficiency, one might advance a different argument about the economic advantages of overruling erroneous precedents. On this view, there might be a correlation between efficiency and accuracy: Case law adopting permissible interpretations of statutes might tend to produce more efficient outcomes than case law adopting erroneous interpretations.

The costs of change, on the other hand, are much more readily expressed in economic terms. When a court overrules a particular precedent, it frequently generates some transition costs; among other things, public and private actors must make investments to understand and conform to the new rule, and money may have to be spent on litigation to refine and clarify it.[208] To the extent that a court's general willingness to overrule precedents increases uncertainty about which rules the court will apply, it may also generate more systemic costs—costs that cannot be identified with any particular change, but that are no less real. For instance, increased uncertainty may produce inefficient allocations of resources: People might devote too little attention to certain types of long-range planning, or they might spend too much money relitigating issues that the judiciary has already decided.[209]

If we think that the weaker version of *stare decisis* will trigger these economic costs but will also promote "democratic values," then we must make a difficult calculus: We must compare the harms of instability (triggered by making changes) to the harms of inaccuracy (triggered by perpetuating erroneous decisions). To borrow a phrase from Justice Scalia, seeking to compare these two different sorts of harm may be like asking "whether a particular line is longer than a particular rock is heavy."[210] But assuming that this comparison is possible at all,[211] reasonable people can disagree about its outcome. In particular, this Section argues that someone who accepts the premises of the weaker version of *stare decisis* could sensibly conclude that its benefits justify its costs.

1. Which Version of Stare Decisis *Will Really Produce More Uncertainty?*

Some advocates of the weaker version of *stare decisis* may be tempted to deny that it will produce much uncertainty, and hence that it will have many costs. At least in some circumstances, they

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[208] See, e.g., Lee, supra note 187, at 651–52.

[209] See id. at 650–51.

[210] Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (criticizing the balancing test used in Dormant Commerce Clause cases).

[211] For a general discussion of incommensurability in the law, see Cass R. Sunstein, Incommensurability and Valuation in Law, 92 Mich. L. Rev. 779 (1994).

will contend, it will become fairly clear that a precedent is demonstrably erroneous. Once this fact has become clear (whether through scholarly commentary or through the emergence of further information), people will not necessarily be uncertain about the governing legal rule. After all, people's expectations will be partly shaped by their knowledge of the courts' rules of *stare decisis*: If people know that courts apply the weaker version, they might be fairly sure that the relevant court will overrule its discredited decision at the next opportunity.

No matter how strongly one believes in the premises of the weaker version of *stare decisis*, however, people surely will not be able to anticipate each and every decision to overrule a precedent. Encouraging people to predict such overrulings, moreover, may do more harm than good: For many of the same reasons that we do not want lower courts to engage in "anticipatory overruling" of Supreme Court decisions,[212] we may not want private actors to do so either. In any event, as Frederick Schauer reminds us, a decision's error will rarely be clear from the moment the Court announces the decision, or else the Court would not reach the decision in the first place.[213] Even advocates of the weaker version of *stare decisis*, then, should concede that their approach will produce some uncertainty.

Still, they might plausibly argue that it will produce no *more* uncertainty than the stronger version of *stare decisis*. It is certainly true that the weaker version encourages courts to overrule more decisions: When the current court deems a precedent "demonstrably erroneous" but does not see special justifications either for overruling it or for adhering to it, the weaker version favors overruling and the stronger version does not. Even courts applying the stronger version, however, will not be very enthusiastic about applying precedents that they deem demonstrably erroneous. If courts are not allowed to overrule such precedents forthrightly, they might well draw fine distinctions that minimize the prece-

[212] See, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989); cf. Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817 (1994) (discussing various justifications for doctrines of hierarchical precedent).

[213] See supra text accompanying note 195.

dents' impact. In the long run, those fine distinctions might produce more uncertainty than a clean break from precedent.[214]

In sum, people concerned about the costs of change should not assume that change can occur only through frank overruling, or that a single dramatic change is always more costly than a series of incremental changes. It is at least conceivable that the stronger version of *stare decisis*, while failing to achieve the full benefits of the weaker version,[215] nonetheless imposes *more* total costs of change.

2. *Will the Errors that the Weaker Version of* Stare Decisis *Eliminates Justify the Unwarranted Changes that it Produces?*

Having acknowledged this ironic possibility, let us set it aside. The remainder of this Section assumes that the weaker version of *stare decisis* will generate more total costs of change than the stronger version. On that assumption, the weaker version will be attractive only if one expects the benefits of increased accuracy to outweigh the costs of increased instability. As I explain below, however, someone who accepts the premises of the weaker version might well think this trade-off worth making. The same assumptions that make one expect the weaker version to produce significant benefits will also make one more sanguine about its costs.

Courts applying the weaker version will overrule some decisions that courts applying the stronger version would keep in place. The benefits of the weaker version (if any) result from the fact that some of those decisions *should* be overruled: They are demonstrably erroneous and there is no special reason to adhere to them. But other changes produced by the weaker version would not be made

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[214] This argument goes far back. See, e.g., Du Ponceau, supra note 43, at xvi ("[I]t is in vain to say that the law is so established and that it is better that it should be certain than that it should be just; I answer that no laws can be certain that are not founded on the eternal and immutable principles of right and wrong; that false theories and false logic lead to absurdities, which being perceived, lead to endless exceptions and to numerous contradictions, and that from the whole results that very uncertainty which is so much wished to be avoided.").

[215] To the extent that courts applying the stronger version of *stare decisis* manage to narrow the scope of demonstrably erroneous precedents, they achieve some of the same benefits as courts applying the weaker version. But this effect is incomplete; even after distinctions have been drawn, the erroneous precedents remain applicable to some cases.

if courts were applying the theory perfectly. We can divide these "unwarranted" changes into two categories: (1) cases in which the precedent being overruled is indeed demonstrably erroneous, but the court has overlooked some special reasons to follow it, and (2) cases in which the precedent being overruled is really permissible, but the court mistakenly believes that it is demonstrably erroneous.

The first category of unwarranted changes might not concern us very much. To be sure, the first category does reflect a real problem: Courts conducting a case-by-case inquiry into transition costs (or into the other marginal costs produced by an extra change) will fail to identify some costs that really do exist. Still, even though the changes in this category do more harm than good, they at least have *some* benefits to offset against their costs: The changes in this category do increase the accuracy of our case law, even though they do so at too high a price. The stronger version of *stare decisis*, moreover, has its own counterpart to this sort of mistake: Even when a precedent is demonstrably erroneous and there are special justifications for overruling it, courts applying the stronger version will sometimes overlook those justifications and adhere to the precedent. It is not clear, then, that the first category of unwarranted changes gives the stronger version much of an advantage over the weaker version.

The second category is more worrisome. Indeed, the tendency of courts applying the weaker version of *stare decisis* to reach "false positives"—to conclude mistakenly that a past court's permissible choice is demonstrably erroneous, and to overrule the past decision for that reason—is the approach's biggest drawback. If we think that courts applying the weaker version will reach nine false positives for every erroneous decision that they correctly overrule, then we will favor the weaker version only if we think that eliminating one erroneous decision is worth absorbing the extra costs associated with ten changes.

The weaker version does take some steps to minimize those costs. Courts applying the approach will not overrule *all* precedents that they deem "demonstrably erroneous"; they will refrain from overruling such precedents if they detect some special justification for adherence. At least where the costs of change are obvious, then, we can expect courts to take account of them. But this safeguard is not perfect. As the first category of unwarranted changes

attests, courts will fail to identify some of the costs of change. The total of all these hard-to-detect costs may be significant.

One might well think that courts applying the weaker version of *stare decisis* will reach "false positives" quite frequently. Even if judges use the same methods as their predecessors to identify and interpret the law, they may fail to appreciate the range of results that those methods permit; judges may have a natural tendency to exaggerate the extent to which their own results are demonstrably superior to all alternative applications of their methods.[216] Perhaps more significantly,[217] the current judges may be committed to an entirely different interpretive method than their predecessors, and they may be too quick to decide that their predecessors' method was illegitimate.

Still, the same assumptions that make one expect the weaker version of *stare decisis* to eliminate a lot of erroneous decisions might also lead one to expect the number of "false positives" to remain tolerable. If one thinks that most legal questions have a relatively narrow set of correct answers, it is somewhat less likely that the current court will disagree with its predecessor's permissible decisions in the first place. In any event, if the past court had good arguments for its position, our working assumptions suggest that the court's opinion will communicate those arguments effectively. Under our assumptions, good arguments tend to be persuasive, in the sense that they help the current court recognize that the precedent is a permissible interpretation of the underlying rules of decision. The assumptions with which we are working, then, suggest that courts will be reasonably good at distinguishing permissible precedents from erroneous ones. The better courts are at this task, the fewer false positives the weaker version of *stare decisis* will generate.

The bottom line is straightforward. If one believes that most legal questions have a relatively narrow set of permissible answers, that courts will not always reach those answers, but that the existence of written opinions (and subsequent commentary and briefing about those opinions) tends to expose bad arguments and

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[216] See, e.g., Lee, supra note 187, at 667.

[217] See Marshall, supra note 195, at 232 (asserting that "[i]n all likelihood," the claim that a prior Supreme Court decision misinterpreted a statute will rest on differences in interpretive methods).

to perpetuate good ones,[218] then one might rationally surmise that the weaker version of *stare decisis* will increase the accuracy of our case law enough to justify the costs of the extra changes it generates.

3. What About Judicial Legitimacy?

Advocates of the stronger version of *stare decisis* might object that I have failed to acknowledge the full costs of change. According to many commentators, frequent overruling jeopardizes public acceptance of the courts' decisions.[219] This argument is now associated with *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[220] where the joint opinion of Justices Souter, Kennedy, and O'Connor declared that "[t]he Court's power lies . . . in its legitimacy"[221] and that the Court should adhere to *Roe v. Wade*[222] in order to avoid "[t]he country's loss of confidence in the Judiciary."[223] But the argument did not originate in the abortion context, and commentators had developed it at considerable length well before *Casey*.[224]

The argument is simply stated. "Our system of constitutional adjudication," Archibald Cox wrote in 1968, "depends upon a vast

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[218] Cf. supra text accompanying note 101 (noting Nathaniel Chipman's expectation that case reports would help judges identify both "what is wrong" and "what is right" in their decisions).

[219] For extended presentations of the argument, see, e.g., Hellman, supra note 4; Note, Constitutional Stare Decisis, 103 Harv. L. Rev. 1344 (1990).

[220] 505 U.S. 833 (1992).

[221] Id. at 865.

[222] 410 U.S. 113 (1973).

[223] *Casey*, 505 U.S. at 867; see also id. at 865–69 (stating that the Court's legitimacy is a matter of "perception" as well as "substance," and suggesting that the decisions reached by the Court should sometimes depend on how the Court thinks the public will perceive them).

[224] Even during the antebellum period, in fact, some people linked *stare decisis* to concerns for the judiciary's appearance. As early as 1828, the Kentucky Court of Appeals noted that overruling a precedent (and thereby treating one litigant differently than another) would shake "the credit and respect due to this court." Tribble v. Taul, 23 Ky. (7 T.B. Mon.) 455, 456 (1828); see also Garland v. Rowan, 10 Miss. (2 S. & M.) 617, 630 (1844) ("If solemn judgments, once made, are lightly departed from, it shakes the public confidence in the law, and throws doubt and distrust upon its administration."); James C. Rehnquist, Note, The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court, 66 B.U. L. Rev. 345, 353–54 n.50 (1986) (quoting a lawyer's argument in the Passenger Cases, 48 U.S. (7 How.) 282, 363 (1849), to the effect that "[d]isrespect follows inconsistency").

reservoir of respect for law and courts."[225] That respect, and the public's concomitant acceptance of judicial decisions, "seems to rest . . . at least partly upon the understanding that what the judge decides is not simply his personal notion of what is desirable but the application of rules that apply to all men equally, yesterday, today, and tomorrow."[226] If members of the Supreme Court were to overrule their predecessors' decisions too often, however, the public would begin to reject this understanding of what judges do. In Earl Maltz's words, people would conclude that instead of "speaking for the Constitution itself," the Court's decisions simply reflect the changing preferences of "five or more lawyers in black robes."[227] This loss of faith in the legitimacy of the Court's decisions would jeopardize the Court's ability to function effectively.

Such claims may be persuasive to people who accept the premises of the stronger version of *stare decisis*. But the legitimacy argument actually has little traction against the weaker version. The same assumptions that would make the weaker version seem attractive in the first place will also tend to make the legitimacy argument seem weak, or even dishonest. Thus, the argument will resonate only with people who would reject the weaker version anyway.

This is true for at least two reasons. First, the legitimacy argument is premised on the idea that the Court cannot adequately explain why it considers a particular precedent erroneous. If the Court could demonstrate that the precedent misinterpreted the provision it purported to construe, then the Justices who voted to overrule the precedent would not be jeopardizing the Court's legitimacy; instead of accusing them of imposing their personal preferences on the country, people would understand that they were following the law (correctly understood). All sensible articulations of the legitimacy argument therefore posit a substantial gap

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[225] Archibald Cox, The Warren Court: Constitutional Decision as an Instrument of Reform 25 (1968).

[226] Id. at 26; see also Archibald Cox, The Role of the Supreme Court in American Government 50 (1976) (suggesting that when a court is constantly overruling precedents, it creates the impression that the judges are "unrestrainedly asserting their individual or collective wills" rather than "following a law which binds them as well as the litigants").

[227] Earl M. Maltz, Some Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467, 484.

between perception and reality: The argument assumes that even when a particular action really *is* principled, it sometimes will not *appear* so to the people who pay attention to the Court.[228] But the people who might be attracted to the weaker version of *stare decisis* will tend to believe that judicial opinions (and reports about such opinions) can communicate good arguments effectively.[229] Of course, no one thinks that the principled nature of good arguments will be apparent to everyone who pays attention to the courts, or even to everyone who is trained in the law. But the more firmly one accepts the premises about legal argument discussed in Section III.A, the more one will think that a court can *appear* principled simply by *being* principled (and providing good explanations of its reasoning).[230]

Second, even if there were a gap between perception and reality, many people who accept the assumptions of the weaker version of *stare decisis* would resist the notion that courts should care. In nearly all versions of the legitimacy argument, the public's acceptance of judicial decisions is premised on the popular belief that judges are more like scientists than like politicians and that legal questions tend to have right and wrong answers. For people who might be attracted to the weaker version of *stare decisis*, however, this belief is not simply a naive fantasy: It is actually true. If one accepts that premise, one might well be surprised—or even "appalled"[231]—by the idea that courts should let concerns about their image influence their decisions.

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[228] See, e.g., *Casey*, 505 U.S. at 865–69 (noting that "not every conscientious claim of principled justification will be accepted as such," and that even a decision based on "principles worthy of profound respect" might appear to be "[no]thing but a surrender to political pressure"); Hellman, supra note 4, at 1124 ("It is because the principled quality of the principled decision is no longer believed to be readily apparent and understandable that the judge must attend to appearance as a discrete element.").

[229] See supra Section III.A.1.

[230] See, e.g., *Casey*, 505 U.S. at 964 (Rehnquist, C.J., dissenting) (suggesting that "faithful interpretation of the Constitution irrespective of public opposition" is the best way for the Court to enhance its legitimacy); cf. William O. Douglas, Stare Decisis 31 (1949) ("A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.").

[231] *Casey*, 505 U.S. at 998 (Scalia, J., dissenting); see also id. at 963 (Rehnquist, C.J., dissenting) ("The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the

At the very least, people who accept the weaker version's assumptions will be troubled by the lack of candor that the legitimacy argument seems to require. Whenever the legitimacy argument makes a difference, the gap between perception and reality will be the crucial factor in the court's decision: The current court will have concluded (1) that overruling a particular precedent would be a principled thing to do, but (2) that it cannot effectively explain its reasons for reaching this conclusion.[232] Yet the court cannot very well acknowledge what is actually driving its decision, or it would be jeopardizing the very legitimacy that it is trying to preserve.

This point requires a little elaboration. The legitimacy argument suggests that when Court #1 reads a statutory or constitutional provision to mean *X* and Court #2 reads it to mean *Y*, and when this happens time after time, people will lose faith either in the law's underlying determinacy or in the judges' willingness to follow the law. Even if Court #2 is usually right, people will fail to understand its legal arguments; they will come to think that the law does not really constrain judges. The legitimacy argument tells Court #2 to avoid shattering the public's faith: Instead of reaching the conclusion that would otherwise be correct, it should adhere to Court #1's decision. But if Court #2 were to explain exactly why it is doing so—"The statute means *Y*, but we will adhere to our prior decision saying that it means *X* because the public will not understand why this decision was erroneous"—it would be opening the very can of worms that the legitimacy argument tells it to avoid.

To be sure, there are some nuanced distinctions between this opinion and an opinion that actually overrules Court #1's decision.[233] But the whole point of the legitimacy argument is that nuanced distinctions may be lost on the public. If frequent overrulings would really jeopardize the courts' legitimacy, can we be sure that equally frequent declarations of error would not? Indeed,

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popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.").

[232] If the current court did not think that overruling the precedent would be principled, then it could simply adhere to the precedent without worrying about the legitimacy argument. Similarly, if the current court thought that it could effectively explain why the precedent was erroneous, then it could overrule the precedent without jeopardizing its legitimacy.

[233] See Hellman, supra note 4, at 1146–48 (speculating that candid recognition of the legitimacy argument would not be "self-defeating").

might not the explicit statement that Court #2 is enforcing something other than what the statute requires, and that it is doing so only because it fears how an overruling decision would be perceived, sometimes undermine the courts' legitimacy *more* than a decision to overrule?

One obvious solution is for Court #2 to refrain from explaining what it is doing. But people who accept the assumptions of the weaker version of *stare decisis* will be suspicious of any doctrine that requires such opacity; in their view, judging is all about reasoned analysis of the law, and an important part of judging is communicating that analysis to others.[234] Lack of candor in opinions, moreover, may itself be a threat to judicial legitimacy. For one thing, it is hard to keep a secret: Clerks or internal communications among the Court's members may well expose the fact that the Court acted as it did so as to avoid acknowledging a past mistake.[235] If the public learns that the courts have been adhering to certain precedents solely out of concerns for the judiciary's image, public respect for the courts may be in *more* danger than if the courts had simply overruled the precedents.

In sum, even if one assumes that courts will not always be able to *appear* principled simply by *being* principled, people who accept the assumptions of the weaker version of *stare decisis* are likely to believe that a court protects its legitimacy best when it acts as if public perceptions did not matter. Given their understanding of the judicial duty, moreover, these people are likely to think that courts should not take prestige into account anyway. Indeed, the legitimacy argument may well strike them as a giant ruse: It concedes that the public's acceptance of court decisions rests on the idea that

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[234] Cf. Eric Talley, Precedential Cascades: An Appraisal, 73 S. Cal. L. Rev. 87, 107–10 (1999) (arguing that opacity increases the likelihood that the process of successive litigation will generate inefficient rules); see also Douglas, supra note 230, at 12 (asserting that it is "vital to the integrity of the judicial process" for the Court to write so that "all could understand why it did what it did").

[235] See, e.g., Paul Gewirtz, Remedies and Resistance, 92 Yale L.J. 585, 671 (1983) (noting that "dishonesty always creates the risk of its detection, and, with detection, harm to the courts' stature"); Hellman, supra note 4, at 1142–46 (acknowledging the advantages of candor); cf. Douglas, supra note 230, at 21 ("Respect for any tribunal is increased if it stands ready (save where injustice to intervening rights would occur) not only to correct the errors of others but also to confess its own.").

judges act like scientists rather than politicians, but it tells courts to act like politicians in order to preserve that idea.

C. Two Special Arguments About Statutory Stare Decisis

Whatever the relevance of this analysis to questions of constitutional law,[236] courts and commentators alike frequently argue that questions of statutory interpretation have some special features that call for strong doctrines of *stare decisis*. This Section considers two arguments to this effect, and asks whether people who would otherwise embrace the weaker version of *stare decisis* should be persuaded.

1. Daniel Farber's Argument About Imaginative Reconstruction

The idea that the weaker version of *stare decisis* promotes "democratic values" rests on the notion that when courts substitute permissible interpretations of statutes for erroneous ones, they are more accurately reflecting the enacting legislature's authoritative expression of its collective judgment.[237] According to an ingenious argument by Daniel Farber, however, concerns for "democratic values" may play out differently in cases of first impression than in later cases.

Accepting the invitation to focus on the collective judgment of our representatives in the enacting legislature, Professor Farber asks what those representatives would think about *stare decisis*. Despite their "initial stake in having a statute correctly interpreted,"[238] he speculates that they would not want courts to overrule whatever mistaken interpretations the courts might adopt. At the time of enactment, Farber explains, "members of the winning coalition have no way of knowing whether judicial mistakes

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[236] Paradoxically, despite the common perception that the language of the Constitution is more open-ended and less determinate than the language of the typical federal statute, *stare decisis* is generally thought to matter less in constitutional cases than in statutory cases. See supra note 6 (citing modern cases to this effect); see also Lee, supra note 22, at 708–33 (discussing the relatively late development of this idea, which did not begin to emerge until after the Civil War). Although there certainly are some counterexamples, current applications of *stare decisis* come far closer to the weaker version in constitutional cases than in statutory cases.

[237] See supra note 206 and accompanying text.

[238] Farber, supra note 197, at 13.

will favor them (giving them more than the original 'bargain') or injure them (giving them less than they bargained for)." Assuming that judicial mistakes are equally likely to go in either direction, legislators "can expect the errors to balance out"; the occasions when the application of *stare decisis* gives legislators *less* than they bargained for will be offset by the occasions when it gives them *more* than they bargained for. Legislators will therefore see few benefits in a general rule of judicial error-correction.[239] But the same legislators will know that "a rule allowing ready judicial correction of prior mistaken opinions creates a variety of social costs." At the time of enactment, then, legislators would agree that courts should "give strong weight to stare decisis in statutory cases, even at the expense of fidelity to the original legislative deal."[240] On this view, applying *stare decisis* to protect erroneous decisions from reversal may actually *promote* democratic values, in that it effectuates what our elected representatives would want.

For a variety of reasons, we may not value such hypothetical reconstructions of legislative "intent." But even if we do, there are at least two flaws in Professor Farber's reconstruction.

First, it rests on an overly simplistic view of the types of mistakes that courts can be expected to make. Professor Farber acknowledges that if a statute reflects a compromise between legislators who wanted more of Policy *A* and those who wanted more of Policy *B*, courts might make mistakes about exactly where the statute strikes the balance. He assumes, however, that judicial mistakes will always remain on the same continuum as the original legislative deals: Courts will not erroneously read the statute to promote Policy *C* (which *no one* in Congress would have wanted). In fact,

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[239] Id. at 12–13. Professor Farber's conclusion on this point seems internally inconsistent. If he were right about how legislators would analyze what he calls the "second round" (when courts are asked to correct an initial mistake), he would be wrong about the stakes in what he calls the "first round" (when courts are asked to interpret a statute for the first time). For precisely the same reasons that (in Farber's view) legislators will be "*ex ante* indifferent to judicial mistakes" when they think about the second round, they would also be indifferent to judicial mistakes when they think about the first round; instead of feeling any "initial stake in having a statute correctly interpreted," they would simply expect errors to balance out. See id. at 12. As explained below, Farber's intuitions about the first round are more plausible than his conclusions about the second round.

[240] Id. at 12–13.

some judicial mistakes surely will depart entirely from the framework of the original deal. Even if one accepts the rest of Farber's analysis, legislators will expect only *the mistakes that stay within the original framework* to cancel each other out; other sorts of mistakes will also occur but will not predictably be offset by anything. The net effect of all judicial mistakes, then, will drive the law *away from* the enacting legislators' preferred policies.

Second, even with respect to judicial mistakes that stay within the same framework as the original legislative deal, Professor Farber's analysis rests on unrealistic assumptions about the nature of legislative "bargains." In his model, the "majority coalition" in Congress will be pleased by judicial mistakes that give it "more" than it bargained for, and it will expect those mistakes to offset mistakes that go in the other direction. But what the majority coalition bargained for was presumably the bargain itself. If the statutory bargain reflects a compromise between Policy *A* and Policy *B*, we should be skeptical that the majority coalition actually wants "more" of either policy than the bargain reflects.[241] After all, if a majority of legislators really wanted "more" of Policy *A*, we might have expected the bargain to reflect that majority desire in the first place. Thus, any judicial mistake—whether in the direction of "more" or "less" of a particular policy—is likely to displease a majority of the enacting legislators, because it drives results away from the majority's preferred bargain.

Admittedly, this conclusion is itself oversimplified. In certain circumstances, the bargain reflected in a statute may reflect concessions that a minority block of legislators was able to extract from a legislative majority. Perhaps most legislators wanted to pursue Policy *A* more vigorously than the statute reflects, but had to scale back their approach in order to get the bill through a key committee, or to end a filibuster in the Senate, or to avoid a presidential veto. Still, the power that these possibilities give minority interests in Congress is all part of the complex mechanism that we

[241] Cf. Frank H. Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533, 541 (1983) ("[I]t is exceptionally implausible to suppose that legislatures, faced explicitly with the task of selecting a background rule, would... charg[e] courts with supplying... 'more in the same vein' as the statute in question. In the case of interest group legislation it is most likely that the extent of the bargain—the pertinent 'vein'—is exhausted by the subjects of the express compromises reflected in the statute.").

use to aggregate individual policy preferences into one collective judgment. If we like this aggregation mechanism—if, for instance, we approve of how it makes majorities take some account of minorities and permits expression of different intensities of preference—then we want courts to enforce the collective judgment reflected in the statutory bargain rather than what they think simple majorities in Congress would "really" have wanted if given free rein. Even if we do *not* like our current aggregation mechanism, the appropriate response has nothing to do with *stare decisis*; we should simply switch to a different aggregation mechanism that more accurately reflects the collective judgment we want to enforce.

Whatever aggregation mechanism we ultimately accept, the bottom line for Farber's analysis will be the same. Judicial mistakes in interpreting the statutes that emerge from that mechanism will not "balance out." To the contrary, *all* mistakes drive the law away from the collective judgment reflected in the statute. If one accepts the premises of the weaker version of *stare decisis*, then, Professor Farber's argument will not dissuade one from applying that approach in statutory cases.

2. The Relevance of Legislative Acquiescence

Proponents of strong doctrines of statutory *stare decisis* frequently advance a second, more obvious argument. If a court has misinterpreted a particular statute, subsequent Congresses are free to pass a new statute overriding the erroneous decision and restoring the original bargain. If Congress fails to do so, we might infer that whatever members of the *enacting* Congress may have thought, our *current* elected representatives approve of the policy reflected in the erroneous decision.

The standard rejoinder to this argument is twofold. First, under our current system for aggregating legislative preferences into an enforceable policy, the failure to pass a bill is not something that can have any legal effect on its own; legislative *in*action does not comply with the constitutional requirements of bicameralism and presentment, and so it is not a valid way for our elected representatives to express their collective judgment. Among other problems, if Congress's inaction were taken as an authoritative ratification of the judiciary's decision, then the President would effectively be cut

out of the policymaking loop; a President who wanted to preserve the original legislative bargain would have nothing to veto, because congressional ratification of the new decision could occur without the enactment of any formal bill.[242]

Second, even if we were prepared to let members of Congress authoritatively express their collective ratification of a judicial decision without using the formal legislative process, the failure to pass an override bill is weak evidence of any such collective ratification. In most cases, it is easy to imagine that Congress would not have overridden the opposite decision either. After all, enacting a new statute is a lot harder than *not* enacting a new statute.[243]

Nonetheless, the current Congress's failure to override a decision is at least *some* evidence that members of Congress are content with that decision.[244] And even if we think that Congress has not *authoritatively* expressed its contentment (because it has not used the mechanisms of bicameralism and presentment), Congress's ability to override erroneous decisions still seems relevant to our assessment of the costs of those decisions. If the policies reflected in those decisions bother Congress enough, our elected representatives can override them. This safeguard is not perfect: The difficulty of passing new statutes will cause members of Congress to override fewer erroneous decisions than they would in a world without transaction costs, and the need to enact override bills may keep Congress from enacting useful laws in some other

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[242] Likewise, even if one House of Congress wanted to override the judiciary's decision, the other House could block this action by refusing to pass the override bill. If we give legal effect to Congress's failure to enact such a bill—if we treat this failure as something that changes the law by authoritatively ratifying the judiciary's decision—we are effectively letting a single House wield legislative power on its own. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989); see also Easterbrook, supra note 203, at 428 ("Inferring legislative authority from inaction is what the one-house veto case was about.") (citing INS v. Chadha, 462 U.S. 919 (1983)).

[243] See *Patterson*, 491 U.S. at 175 n.1 ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation.") (quoting Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting)); see also, e.g., William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1404–05 (1988) (listing "the many possible reasons for legislative inaction").

[244] See Farber, supra note 197, at 10–11; see also William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 334–53 (1991) (presenting empirical evidence about the frequency with which Congress passes bills to override the Supreme Court's interpretation of prior statutes).

area. But while inaccuracy does have some costs, Congress's ability to override inaccurate decisions at least *reduces* those costs. "Democratic values" are less offended by mistakes that our current representatives can override than by mistakes that are beyond Congress's power to correct.

The problem with this argument is that it has no obvious bearing on which version of *stare decisis* we should adopt. Congress's ability to override judicial decisions that it dislikes does reduce the costs of whatever inaccuracy the stronger version might generate. But this very same ability also reduces the costs of whatever instability the weaker version might produce: If judges overlook some social costs associated with overruling a past decision and inadvisedly adopt a new rule, Congress remains free to enact a statute codifying the old rule. Where necessary to protect reliance interests, indeed, Congress often can even act retroactively. Thus, Congress's ability to override harmful decisions reduces the likely costs of *both* versions of *stare decisis*.

Congress's ability to override harmful decisions is obviously a good thing. But it does little to help us choose between the two competing versions of *stare decisis*. In particular, it does not prove that the stronger version is better than the weaker version.

D. Two Fundamental Objections

Ever since Section III.A, we have been making two assumptions that undoubtedly have raised some readers' hackles. First, we have been assuming that the concept of "demonstrable error" has some content: Although we might disagree about how often courts will actually reach demonstrably erroneous decisions, it is possible for interpretations of statutory or constitutional provisions to be objectively wrong. Second, we have been assuming that our formal rules of *stare decisis* matter: They have some effect on how judges actually act.

Because of this Part's modest goals, defending these assumptions is not terribly important to my argument. After all, I am simply trying to show that the weaker version of *stare decisis*, which prevailed for much of our nation's history, is not crazy: People with certain jurisprudential views, including views that remain in common currency today, could sensibly believe that the weaker version is better for society than the stronger version. In this Section, how-

ever, I briefly broaden my focus to consider what one might think about *stare decisis* if one flatly rejects the most basic assumptions of the weaker version.

1. What If One Rejects the Concept of "Demonstrable Error"?

Some readers will scoff at the very concept of "demonstrable error." Indeed, people who believe strongly in the inherent indeterminacy of legal language might conceivably contend that it is not even theoretically possible for interpretations of statutory or constitutional provisions to be demonstrably erroneous. If one takes this view, one will think that the weaker version of *stare decisis* is based entirely on an illusion.

If one believes so strongly in the indeterminacy of legal language, however, *every* version of *stare decisis* is based on an illusion. If statutes and constitutional provisions are incapable of setting out determinate rules for the future, the same is true of judicial opinions; if words are indeterminate when they appear in written laws, they presumably are also indeterminate when they appear as statements of a court's holding. Thus, just as statutes and constitutional provisions cannot really constrain judges, neither can past opinions.[245] For people who believe in the radical indeterminacy of legal language, it is hard to have any meaningful theory of *stare decisis* at all.

Some less radical positions are less vulnerable to this argument. For instance, one might think that legal language in statutes and judicial opinions can be determinate, but that the open-ended language in our Constitution is not. Whatever one thinks of the possibility of "demonstrable error" in the statutory realm, then, one might think that the concept is inapplicable to cases of constitutional interpretation. If one takes this view, one might well reject the weaker version of *stare decisis* in constitutional cases. But it is not clear why one should stop there: If one thinks that the important provisions of the Constitution are essentially indeterminate, why should one support judicial review, and why should there be constitutional cases in the first place? As Frank Easterbrook has

[245] Cf. Easterbrook, supra note 241, at 534 n.2 ("If statutes' words do not convey meaning and bind judges, why should judges' words bind or even interest the rest of us?").

pointed out, "[j]udicial review came from a theory of meaning that supposed the possibility of right answers . . . ."[246] If we reject that theory of meaning (at least as applied to the Constitution), then we need a justification for judicial review different from the one that Chief Justice Marshall offered in *Marbury v. Madison*.[247]

Of course, even if one concedes the theoretical possibility of "demonstrable error" in both statutory and constitutional cases, one might well believe that *in practice* courts will almost never reach demonstrably erroneous results. If an interpretation is plausible enough to be adopted by a court in the first place, one might well doubt that it will be demonstrably erroneous. Section III.A has already acknowledged this contention and has tried to explain why people with certain views about the nature of legal argument might reject it. But if one does not share those views, one might well think that trying to identify "demonstrable errors" will be like looking for needles in a haystack. The fewer "demonstrable errors" actually exist, the more one might think that the benefits of trying to eliminate those errors are outweighed by the risks that courts will reach "false positives." This line of analysis might well lead one toward the stronger version of *stare decisis*.

Still, the *Chevron* doctrine should give one some pause. When an adminstrative agency has authoritatively interpreted the statute that it administers, *Chevron* tells courts to ask whether the agency's interpretation is demonstrably erroneous. We seem to think that courts can conduct this inquiry with acceptable levels of accuracy: They can adequately differentiate between "permissible" and "impermissible" interpretations of statutes. But why do we want courts to conduct this inquiry in the first place? If the agency's trained lawyers, who specialize in the relevant area of law, have adopted a particular interpretation of the statute, shouldn't reviewing courts simply assume that the interpretation is within the range of permissibility? Won't the occasions on which reviewing courts correctly find demonstrable error be dwarfed by the occasions on which they reach "false positives"?

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[246] Frank H. Easterbrook, Alternatives to Originalism?, 19 Harv. J.L. & Pub. Pol'y 479, 486 (1996).

[247] 5 U.S. (1 Cranch) 137 (1803).

At least two of the possible responses to this challenge relate to *stare decisis* as well as to the *Chevron* doctrine. One possibility is that the agency's lawyers will make enough mistakes to justify having courts ask whether the agency's interpretations are permissible. This possibility tends to reinforce the arguments in Section III.A.1: It suggests that legal questions can be hard, and that the people who must answer these questions in the first instance (whether in agencies or in courts) will make a significant number of mistakes.

The second possibility suggests a different argument in favor of the weaker version of *stare decisis*. If agencies knew that courts would accept even demonstrably erroneous interpretations (unless there were practical reasons not to do so), they might feel less bound by the authoritative expressions of Congress's judgment and more free to adopt whatever policies they themselves deemed beneficial. On this view, we encourage courts to review the permissibility of agency interpretations because we fear the incentives that the contrary rule would give agencies. But just as a world of total *Chevron* deference might create bad incentives for agencies, one could plausibly argue that the stronger version of *stare decisis* creates bad incentives for courts. Even if one thinks that few demonstrably erroneous precedents exist *now*, the weaker version of *stare decisis* might be a useful way of maintaining this happy state of affairs.

2. *What if the Formal Rules of* Stare Decisis *Don't Affect How Judges Act?*

Skeptics might contend that efforts to compare the stronger and weaker versions of *stare decisis* are simply beside the point: It makes no real difference which doctrine of *stare decisis* we pick, because our formulation of the doctrine does not really affect how judges act. One recent study concludes that precedent "rarely" causes any members of the United States Supreme Court to embrace "a result they would not otherwise have reached."[248] Other commentators assert that *stare decisis* "has always been a doctrine

[248] Harold J. Spaeth & Jeffrey A. Segal, Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court 287 (1999).

of convenience";[249] instead of conscientiously trying to follow predetermined rules of precedent, judges invoke *stare decisis* only when they favor inertia for other reasons.

If we believe that all judges behave this way, then the weaker version of *stare decisis* is neither better nor worse than the stronger version. After all, our formal doctrines of *stare decisis* make little difference if judges pay no attention to them. Perhaps an ironclad rule of absolute adherence to precedent would make it somewhat easier for us to detect such defiance, and perhaps the threat of detection would have some deterrent effect on judges. But given judges' ability to distinguish past cases, even this "ironclad" rule might do little to restrain judges who want to deviate from it. In any event, no version of *stare decisis* that might plausibly be followed in America comes anywhere close to an ironclad rule. As the radical codifiers suggested more than 160 years ago,[250] prudential doctrines like *stare decisis* are unlikely to have significant restraining effects on courts of last resort that want to manipulate them.

Suppose, however, that our skepticism is more nuanced: We expect *some* judges to try conscientiously to follow our formal doctrine of *stare decisis*, even though we expect other judges to behave opportunistically. This more nuanced form of skepticism may actually affect what we want our formal doctrine to say.

Imagine that "conscientious" judges invoke *stare decisis* in a consistent and principled manner, while "willful" judges invoke it only when it furthers their willful agenda. If our formal doctrines of *stare decisis* are strong, they may maximize the "willful" judges' ability to impose their agenda. As Frank Easterbrook has shown, "[t]hose who always follow earlier cases in an institution that generally does not do so will lose power relative to those who follow earlier cases selectively."[251] If we think that this result would be bad, and if we think that significant numbers of judges will invoke *stare decisis* opportunistically rather than following whatever formal rule we set, then we should hesitate before telling the other judges to use strong versions of *stare decisis*. Other things being equal, then, people who believe that many judges will not follow

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[249] Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 Cornell L. Rev. 401, 402 (1988).

[250] See supra note 175 and accompanying text.

[251] Easterbrook, supra note 206, at 822.

our formal rules of *stare decisis* anyway should tend to prefer weaker versions of *stare decisis* over stronger ones.

CONCLUSION

In a 1989 address to the bar association of New York City, Justice Lewis Powell declared that "the elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."[252] For people who accept the concept of "demonstrable error," however, this criticism misses the mark. To the extent that they are suspicious of *stare decisis*, their suspicions arise precisely because they do *not* always equate the law with judicial decisions; they believe that the underlying rules of decision sometimes have a determinate existence separate and apart from judicial interpretations. Indeed, they might view Justice Powell's criticism as more applicable to his own position than to theirs. Strong doctrines of *stare decisis*, a wag might claim, "represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices *said* it is."

In a sense, Justice Powell's criticism and the wag's response talk past each other. Justice Powell's point assumes that in the absence of *stare decisis*, there would be little check on judicial discretion: Current judges could say whatever they want. The wag's response reflects the opposite assumption: The underlying rules of decision exist with or without judicial decisions, and they themselves dictate the decisions that conscientious judges must reach.

In our post-*Chevron* world, neither assumption seems entirely correct. Statutory and even constitutional provisions surely impose substantial constraints on judges; even in the absence of any binding precedents construing those provisions, the provisions cannot plausibly be read to establish whatever policy judges might like. But while the underlying rules of decision may *constrain* judicial discretion, they do not entirely *eliminate* it; they leave judges with some freedom to pick among permissible interpretations.

I have suggested that *stare decisis* grew in America as a way to restrain exactly this type of judicial discretion—the discretion that

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[252] Lewis F. Powell, Jr., *Stare Decisis* and Judicial Restraint, 1991 J. Sup. Ct. Hist. 13, 16.

occupies the space left by the indeterminacy of the underlying rules of decision. Within this space, it is perfectly sensible for courts to apply a rebuttable presumption against overruling precedents. After all, if Court #1's decision is no less accurate than Court #2's preferred view, and if transitions from one rule to another tend to be costly, then Court #2 should make a change only if there is some special advantage to doing so.

Outside of this space, however, things get murkier. If Court #2 believes that Court #1's decision was demonstrably erroneous, and if Court #2 is probably correct, then it is not so clear why Court #2 should automatically indulge a presumption against change. Transitions still have costs, but compliance with the underlying rules of decision might itself be considered an offsetting benefit. If we fear judicial discretion, moreover, we can take comfort in the (partial) determinacy of those rules; we might think that instead of wielding unauthorized power, Court #2 is simply correcting its predecessor's abuse of discretion.

In sum, the conventional academic wisdom about *stare decisis* may go farther than the basic purpose of *stare decisis* demands. To the extent that the underlying rules of decision would themselves impose some constraints on conscientious judges, we may be able to remove some of the weight that we have been asking *stare decisis* to carry. We unquestionably want the presumption against overruling past decisions to protect "permissible" decisions. But if one accepts the assumptions discussed in Part III, one might rationally decline to extend this presumption to "erroneous" decisions.

To be sure, one might well reject those assumptions and conclude that the stronger version of *stare decisis* is far preferable to the weaker version. The people who are most likely to do so, however, are those who put relatively little stock in the idea of "demonstrable error." Such objections only prove my basic point: Our views of *stare decisis* are linked to our perceptions of the determinacy of the underlying rules of decision.