Popular Sovereignty and the Judicial Duty to Examine the Rationality of Statutes

Saturday, 12:45 – 1:45 p.m.

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As evidenced by the first great constitutional case, *Chisholm v. Georgia*, at least some of the Founders held an individualist conception of popular sovereignty that was highly compatible with their commitment to inalienable natural rights. Given that the laws enacted pursuant to a constitution are, at best, supported only by "supposed" or "presumed" consent, like form contracts that are supported by *actual* consent, laws restricting liberty must be judicially scrutinized for fundamental fairness. Until 1955, this meant ensuring that statutory restrictions on liberty were within the proper scope of legislative authority by assessing whether such restrictions were irrational, arbitrary or discriminatory. The lower court opinion in *Lee Optical v. Oklahoma* provides an instructive example of such scrutiny.

Selected Reading:

Amicus Brief for *Lawrence v. State of Texas*

Randy Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical,* 19 GEO MASON L. REV. 845 (2012).

Suggested Follow-up Reading:

Randy Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty,* 93 VA. L. REV. 1729 (2007).

Randy Barnett, *Does the Constitution Protect Economic Liberty?* 35 HARV. J. L. & PUB. POL'Y 5 (2012).

Randy Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002).

No. 02-102

In The
Supreme Court of the United States

JOHN GEDDES LAWRENCE AND
TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Texas Fourteenth District

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is filing this brief in support of the petitioners. The parties in the case have consented to the filing of this *amicus* brief.[1]

SUMMARY OF THE ARGUMENT

This case is about the proper scope of and limits on government power more than it is about homosexuality or homosexual conduct. Texas asserts that it may criminalize a noncommercial, nonpublic, non-harmful activity between consenting adults in the privacy of their home for the sole reason that it believes that activity immoral. This brief asserts that Texas' statute exceeds the police power.

The petitioners and other *amici* will undoubtedly demonstrate that the lower court's decision should be reversed because the law in question is irrational, gives effect to private biases, and violates the right to privacy. This brief, however, addresses a different issue – the limits on government power. The brief urges this Court to ask not whether the defendants had the right to engage in their specific sexual activity but instead whether the

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

government has the power to prohibit it. We suggest that even before analyzing state action under one of the constitutional amendments, the Court first ask whether the contested government action falls within the police power. This approach provides an alternative to substantive due process analysis and is consistent with the approach of both our Founders and the leading Western jurists whose ideas underlay our political system.

The primary purpose of police power regulation is to protect individuals from harm. Even the government's purported interest in protecting public morality does not extend government power into the realm of private moral or immoral conduct. Indeed, legislative declarations demanding that people behave in certain ways in their private lives based on majority perceptions of what is moral destroy individual liberty.

Finally, Texas' statute cannot survive rational basis review. Bearing in mind the limits on the police power, the statute has no legitimate government purpose. Nor is it possible to show, or even inquire how, the statute relates to a legitimate government interest. With only a stark assertion of a moral claim, there are no facts and no relationship for a court to examine. The statute fails both prongs of the rational basis test and thus violates equal protection guarantees.

ARGUMENT

I. REGULATION OF CONSENSUAL, NONCOMMERCIAL, NONPUBLIC, NON-HARMFUL CONDUCT EXCEEDS THE POWER OF GOVERNMENT IN THIS COUNTRY.

A. This Court Should Ask Whether the State's Police Power Extends This Far, Not Whether the Defendants Have a "Right" to Engage in the Conduct at Issue.

This Court's decisions have long recognized that there is a private sphere beyond which no state may intrude.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (quoted in, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 758 (1985)).

Although it has recognized that there must be a realm of individual autonomy beyond state power, this Court has struggled to find a proper method and textual basis for defining that sphere. At different times, the Court has treated a person's interest in conducting his or her own affairs as aspects of the First Amendment, Fourth Amendment, and Fourteenth Amendment. *See, e.g.*,

Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) (freedom of intimate association protected by First Amendment); *Katz v. U.S.*, 389 U.S. 347, 350-51 (1967) (Fourth Amendment protects reasonable expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (discussing many possible bases for a right to privacy, including Fourteenth Amendment).

There is certainly a reasonable argument to be made for each of these textual bases.[2] Yet each seems somehow to miss the mark. The First Amendment analysis depends on the exact nature of the private activity at issue, while the Fourth Amendment inquiry usually turns on the government's investigative techniques.[3] Substantive due process depends largely on whether the liberty interest at

[2] We expect that other briefs will address these issues directly.

[3] Some scholars argue that the Ninth Amendment is the appropriate textual basis for the protection of private activity. *See* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1, 41-42 (1998) (analyzing relationship of Ninth Amendment to state regulation and arguing that state governments may not violate unenumerated rights). For a discussion of the application of the Ninth Amendment to state regulation of private sexual activity, see Mark Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. Rev. 85, 125-34 (2000); *see also Griswold*, 381 U.S. at 491-95 (Goldberg, J., concurring) (privacy rights may reside in Ninth Amendment). Our police power analysis does not require the Court to directly apply the Ninth Amendment. The limits on the police power – a power nowhere mentioned in the text – precede, underlie, and continue after the drafting of our Constitution and the Fourteenth Amendment. Here, we urge this Court to look at whether the state action falls within its police power before even attempting to place the legal challenge within the framework of a particular constitutional provision. If it fails this analysis, further inquiry is unnecessary.

issue has historically been treated as a "fundamental" right. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (expressing reluctance to add to the Court's short list of fundamental rights); *see also Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (commission of homosexual sodomy not a fundamental right, protected by time-honored tradition, and the government can therefore prohibit it).

The problem with these approaches, and particularly with the fundamental rights inquiry, is that there are countless private activities that are protected by no tradition or express constitutional provision. It would be unimaginable that they could be prohibited in a free society, even if some objection could be raised to them – cooking unhealthy meals, staying up too late, spending a slothful day drinking coffee and doing puzzles instead of accomplishing something productive. Indeed, almost anything that an ordinary person might spend his or her weekend doing, from gardening to cleaning to touching up house paint, would probably not qualify as a "fundamental" right. *See, e.g.*, Glen Reynolds & David Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 Hastings Const. L.Q. 511, 536 (2000) (criticizing approach of evaluating affirmative rights, rather than limits on government power). Yet such private activities, in the aggregate, are the essence of ordered liberty.

As detailed in the following section, our Founders and leading scholars throughout Western history all believed that there were limits on the power of government to intrude into the private activities of citizens. That basic understanding preceded, underlay, and continued after our Constitution. It is woven into the fabric of liberty in this country. This brief urges that this Court ask first whether

a government action falls within the legitimate scope of the police power, before it examines the nature of the liberty interest at issue.

B. In Our Political and Constitutional Tradition, Government Power Is Limited While the Number of Private Liberties Is Not.

Every political and legal scholar in our philosophical tradition has written about the need for limits on government power and the importance of preserving personal liberty. "Jefferson, Burke, Paine, Mill, compiled different catalogues of individual liberties, but the argument for keeping authority at bay is always substantially the same . . . to preserve our personal freedom." Isaiah Berlin, *The Proper Study of Mankind* 198 (Farrar Straus Giroux 1997).

Legislators are perfectly capable of invading liberty, and that is why government is limited:

> [T]he community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they should be so foolish or so wicked to carry on designs against the liberties and properties of the subject.

John Locke, *Two Treatises on Government* 197 (Hafner 1947) (1690).

The Founders fully adopted this view of the limits on government power and the broad scope of individual liberty. As Jefferson wrote:

> An elective despotism was not the government we fought for; but one which should not only be

> founded on free principles, but in which the power of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

Thomas Jefferson, *Notes on the State of Virginia* (*quoted in The Federalist* No. 48 (Madison) at 278-79 (Clinton Rossiter ed., 1961)). The Founders believed the only way to prevent the danger of overreaching government action was to limit government power and give the judiciary the power to check legislative excesses. As Hamilton explained in Federalist 78, limitations on the legislative power:

> can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing.

The Federalist No. 78, *supra*, at 437. Indeed, that is the essential function of the federal judiciary as envisioned by the framers.

Rather than identify a long list of liberties to be protected from infringement by government, the drafters of the original Constitution advocated protecting liberty by establishing a government of limited and enumerated powers. When opponents to the proposed constitution objected that it lacked a bill of rights, defenders argued vociferously that any effort to enumerate rights would be both unnecessary and dangerous.

For example, James Wilson, a member of the Constitutional Convention, future member of the Supreme

Court, and professor of jurisprudence at the University of Pennsylvania, exclaimed "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." *Elliot's Debates*, Vol. II at 454 (Dec. 4, 1787) (2d ed., 1937) (1836-45); *see also id*., Vol. IV at 316 (Jan. 18, 1788) (Charles Pinckney explaining that the drafters did not "delegate[] to the general government a power to take away such of our rights as we had not enumerated").

Future Supreme Court Justice James Iredell, speaking to the North Carolina ratification convention, cheerfully invited "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id*., Vol. IV at 167 (July 29, 1788).

As the debates on the Constitution show, the Founders were deeply concerned about the risks of delineating their liberties with specificity. During the debate on whether to adopt the Bill of Rights, Madison said that:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but I conceive, that it may be guarded against.

James Madison, "Discussion of Drafts and Proposals to the Constitution," 1 Cong. 1789 (*quoted in The Complete Bill of*

Rights, 55 (Neil Cogan ed., Oxford 1997)). Madison responded to this objection by adding the Ninth Amendment and building the limited power of government into our constitutional structure.

The leading theorists of the 19th century also agreed that the police power had its limits. John Stuart Mill regarded each individual as having "a certain sphere of activity in his sole and exclusive possession. Within this sphere he is to exercise perfect freedom, unimpeded by the free action of any other human creature." J.S. Mill, *On Social Freedom* 40 (Columbia University Press 1941) (1873).

In his seminal work interpreting and explaining the Fourteenth Amendment, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the United States of the American Union* (Little, Brown and Company 1868), Thomas Cooley, then a justice on the Michigan Supreme Court and the Jay Professor of Law at the University of Michigan, sought to address the question of "whether the State exceeds its just powers in dealing with the property and restraining the actions of individuals." *Id.* at 572. His answer turned on the content of the police power, which he defined in light of previous judicial opinions as follows:

> The police of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is

> reasonably consistent with a like enjoyment of rights by others.

Id.

Whereas the protection afforded common-law rights by adjudication occurs after they have been violated, police power regulations seek to facilitate the exercise of these rights and prevent their infringement before the fact. Thus damage actions compensate for past rights violations, while police power regulations *prevent* rights violations from occurring.

Because the police power of a state is its power to protect the liberties of the people, the proper scope of that power is a function of and limited by those same liberties. There is no enumeration or list of specific state powers for much the same reason the founders thought rights could not be comprehensively listed. Just as all the ways that liberty may be exercised rightfully cannot be enumerated in advance, neither can all the specific ways that people may transgress upon the rights of others:

> It would be quite impossible to enumerate all the instances in which this power is or may be exercised, because the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others, or may be detrimental to the public order or safety, are infinite in number and in variety.

Id. at 594.

Like the modern doctrine that views content-neutral time, place, and manner regulations of speech to be consistent with the First Amendment, the police power permits the states the authority "to make extensive and

varied regulations as to the time, place, and circumstances in and under which parties shall assert, enjoy, or exercise their rights, without coming into conflict with any of those constitutional principles which are established for the protection of private rights or private property." *Id.* at 597. The police power, then, can best be viewed as the legitimate authority of states to *regulate rightful* and *prohibit wrongful* acts.

After Cooley, the leading nineteenth century theorist of the police power was Christopher Tiedeman. In his *Treatise on the Limitations of Police Power in the United States* (F.H. Thomas 1886), he repeatedly relied on the power to prevent rights violations to identify reasonable and therefore constitutional exercises of the police power.

Like Locke, Tiedeman defines the legitimate purpose of government as the protection of rights. "The object of government is to impose that degree of restraint upon human actions, which is necessary to the uniform and reasonable conservation and enjoyment of private rights. Government and municipal law protect and develop, rather than create, private rights." *Id*. at 1-2. Government protects and develops these rights by preventing people from violating the rights of others. "The conservation of private rights is attained by the imposition of a wholesome restraint upon their exercise, such a restraint as will prevent the infliction of injury upon others in the enjoyment of them. . . . The power of the government to impose this restraint is called POLICE POWER." *Id*.

C. Prevention of Harm Is the Prime Justification for Invoking the State's Ability to Use the Police Power.

Adam Smith wrote that "the first and chief design of all government is to preserve justice amongst the members of the state and prevent all encroachments on the individual in it, from others of the same society." Adam Smith, *Lectures on Jurisprudence* 7 (Oxford 1978) (1762-63). Mill was even more emphatic:

> [The principle of human liberty] requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

J.S. Mill, *Autobiography and Essay On Liberty* 206 (Harvard University Press 1963) (1859).

Christopher Tiedeman concurred that the police power allowed the regulation of citizens' activities in order to prevent harm:

> Any law which goes beyond that principle [preventing harm] which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice.

Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* 4-5 (1886).

Following Tiedeman, a leading jurist of the early twentieth century, Ernst Freund, wrote that:

> Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests.

Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 511 at 546-547 (1904).

Even today, the prevention of harm is still the prime justification for the use of the police power. "In the absence of preventing harm . . . it is difficult to understand the assertion that [social] conformity is a value worth pursuing notwithstanding the misery and sacrifice of freedom which it involves." H.L.A. Hart, *Law, Liberty and Morality* 57 (Stanford University Press 1962).

Consistent with these jurists, the prevention of harm has been the traditional way that this Court has justified the State's use of the police power:

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894).

D. The Police Power Does Not Extend to the Promotion of Private Morality.

1. Traditionally, the police power allows regulation only of *public* morality.

We acknowledge that the promotion of public morality has been included as a part of the police power. But even under this description, the power extends only to *public* morality. *See, e.g.*, *Nashville, Chattanooga & St. Louis Ry. v. Walters,* 294 U.S. 405, 429 (1935) ("police power embraces regulations designed to promote *public* convenience or the general welfare, and not merely those in the interest of *public* health, safety, and morals") (emphasis added). The State promotes public morality by providing for such things as education, lauding good conduct, and rewarding public service. In addition, the State is the guardian of public spaces such as streets and parks and may constrain conduct there, such as public fornication or intoxication. Such actions, though permitted behind closed doors, wrongfully interfere with the use and enjoyment of the public sphere by reasonable members of the community.

There is a crucial difference, however, between promoting public morality and protecting the sensibilities of reasonable members of the community while in the public sphere – something that falls under the police power of state – and criminalizing private consensual conduct that harms neither the individuals involved nor the general public – something that is outside the bounds of the police power. The State's power to promote public virtue and govern conduct in public spaces ends when individuals conduct their private lives behind closed doors in ways that harm no one. *Cf. People v. Onofre*, 415 N.E.2d 936, 941 (N.Y. 1980) (holding that law prohibiting sodomy by any unmarried persons did not advance public morality

and instead "impose[d] a concept of private morality chosen by the State").

Legal scholars of the police power agree that it is limited to the protection of public, not private, morality. Certainly, as discussed above, scholars like Cooley and Tiedeman rejected the notion that government could regulate private morality. More contemporary scholars agree. Prominent legal scholar H.L.A. Hart is certainly not known for his narrow view of government power. Yet he concluded that legislation like Texas' prohibition on private, consensual, noncommercial, non-harmful sexual conduct exceed the police power of government. "[T]he fundamental objection to coercing moral standards in private is that a right to be protected from the bare knowledge that others act immorally cannot be acknowledged by anyone who recognizes liberty as a virtue." Hart, *supra*, at 46. Isaiah Berlin, another respected scholar, explained "no public end can be promoted by restricting purely private conduct." Isaiah Berlin, *J.S. Mill and The Ends of Life* 192 (Oxford University Press 1969).

Indeed, even well-known conservative scholar John Finnis agrees that criminalizing such private sexual conduct lies outside the power of government. Finnis testified for the government at the trial court level in the case that became *Romer v. Evans* and believes that homosexuality is immoral, yet he concludes that, when conducted in private, it is a *private*, not public, moral issue.

> [I]t is one thing to maintain that the political community's managing structure, the state, should deliberately and publicly identify, encourage and support the truly worthwhile (including moral virtue) . . . It is another thing to maintain that that rationale requires or authorizes the

> state to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state's laws.

John Finnis, *Law, Morality, and Sexual Orientation*, 69 Notre Dame L. Rev. 1049, 1076 (1994). Private morality simply lies beyond the police power.

2. In practice, government rarely attempts to legislate private morality.

Given that the police power traditionally extends only to the prevention of harm and the protection of morality in the public sphere, it is not surprising that instances of government attempts to regulate purely private, but purportedly immoral, conduct are few and far between. Indeed, the only other laws that appear to prohibit private, consensual, noncommercial, non-harmful activity are those prohibiting "fornication" or sex between unmarried persons and those prohibiting possession of obscenity.[4] While the Court has declined to rule on the constitutionality of fornication laws as applied to adults, *see Carey v. Population Services Int'l*, 431 U.S. 678, 694 n.17 (1977), we believe that fornication laws, like sodomy laws, exceed the boundaries of the police power.

The Court's treatment of obscenity plainly illustrates its skepticism on the extent of government power into the

[4] Other morally grounded restrictions involve commercial conduct (prostitution, sale of sexual devices), public conduct (public nudity, public sex), conduct with harmful effects (drug use), or conduct that violates a contract (adultery).

arena of purely private conduct. Obscenity receives very little protection by the First Amendment; indeed, it receives none at all within the public sphere. Commercial distribution of obscenity is not protected by the First Amendment, and states may lawfully prohibit its sale and distribution. *Roth v. United States*, 354 U.S. 476, 485 (1957). However, the Court struck down a prohibition against the mere possession of obscene material. *See Stanley v. Georgia*, 394 U.S. 557, 564-66 (1969). The Court held that what a person did in his home, without harm to others and with no commercial element, was immune from government regulation. *Id.* at 564 ("also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy"). In other words, the challenged statute was beyond the police power.

While premarital sex and possession of obscenity both occur within the private sphere, the prohibition against polygamy, discussed in the dissent to *Romer*, addresses *public* issues. *See Romer v. Evans*, 517 U.S. 640, 644-45 (1996) (Scalia, J. dissenting). It is legal in nearly every state, including Texas, for an unmarried man to live with more than one woman and even to engage in sexual relations with them.[5] Indeed, it does not become illegal polygamy until he seeks or asserts state sanction of more than one marriage. *See, e.g.*, Tex. Pen. Code § 25.01(a)(1)(B) & (b) (person commits bigamy by marrying

[5] Only a handful of states prohibit unmarried people from living together in a relationship. *See, e.g.*, Miss. Code Ann. § 97-29-1; N.D. Cent. Code § 12.1-20-10; Va. Code Ann. § 18.2-345. Texas does not prohibit such relationships.

another person or living with another person "under the appearance of being married," which is defined as "holding out that the parties are married"). It is the *holding oneself out to the public* and thus claiming that one has received government approval and all its attendant legal consequences that changes an otherwise legal arrangement into a criminal one.[6]

Polygamy may also give rise to various other harms, including difficulties with child and family support, complex problems of entitlement to state financial and tax benefits, and messy issues of inheritance and estate law. Even if each of these problems might be surmountable, they still necessitate the involvement of state enforcement and judicial action. Marriage intersects with the public sphere in innumerable ways, and thus laws applying to it are not solely an expression of pure moral sentiments.

While the police power may be broad, it extends only so far as an individual's actions have a deleterious, concrete impact on themselves or others. It does not extend to purely private, non-harmful activities that may be matters where there are moral disputes or different views, but no concern of the body politic as a whole. *Cf. Pennsylvania v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) (rejecting criminalization of certain private heterosexual conduct because enforcing "a majority morality on persons

[6] All states prohibit marrying another when one is already married. Some have laws stating simply that. *See, e.g*, Idaho Code § 18-1101. Some states have laws like Texas', while other states prohibit "purporting" to marry or cohabiting with another person when one is already married. *See, e.g.*, Georgia Code Ann. § 16-6-20; Utah Code Ann. § 76-7-101.

whose conduct does not harm others . . . . is not properly in the realm of the temporal police power").

E. A Free Society Cannot Allow a State to Forbid Private Behavior Based Solely on a Majority Opinion of Proper Moral Conduct, Like the One at Issue in this Case.

The lower court held that the Texas legislature "found homosexual sodomy to be immoral." *Lawrence v. State of Texas*, 41 S.W.3d 349, 356 (Tex. Ct. App. 2001). The court then held that this legislative declaration, alone, provided sufficient basis for the State to criminalize private, non-harmful conduct. *Id.* Texas made no claim that the defendants' activities caused any harm to anyone. Nor did Texas make any effort to explain how the regulation of private, consensual, non-commercial activity affects *public* morality. The lower court decision thus sets a breathtakingly dangerous precedent. If a legislative declaration of morality gives the State the power to invade peoples' homes and demand private conformity to majority norms, liberty can be invaded without any meaningful constraint.

The State, in its briefing below, admitted that the nature of such legislative declarations is capricious. The State declared that "morality is a fluid concept." State's Appellate Brief, Texas Court of Appeals, June 21, 1999 at 8. History is replete with examples of the legislative view of morality as "a fluid concept." Those who killed Socrates and Christ, for example, "perceived them to be purveyors of wicked falsehoods" and plainly immoral. Isaiah Berlin, *Four Essays on Liberty* 185 (Oxford University Press 1969). Such "fluid concepts" of morality are inconsistent with the rule of law and cannot support a wholesale invasion by government into the sphere of private action.

Liberty cannot survive if the legislature demands that people behave in certain ways in their private lives based on majority opinions about what is good or moral. Erasmus noted that "mere numbers in approval do not make for the justness of a measure." Desiderius Erasmus, *The Education of a Christian Prince* 221 (Trans. Lester Born, Norton 1964) (1540). Several centuries later, H.L.A. Hart stated that:

> Mill's essay *On Liberty*, like Toqueville's book *Democracy in America*, was a powerful plea for a clearheaded appreciation of the dangers that accompany the benefits of democratic rule. The greatest of the dangers, in their view, was not that in fact the majority might use their power to oppress a minority, but that, with the spread of democratic ideas, it might come to be thought unobjectionable that they should do so.

H.L.A. Hart, *Law, Liberty and Morality* 77-78 (Stanford University Press 1962). As Hart points out, the Nazi criminal code allowed for the punishment of any act that was contrary to "sound popular feeling." Act of June 28, 1935 (cited in Hart, *supra*, at 12).

And of course, the Founders believed wholeheartedly that majorities had no right to impose their beliefs on minorities. In Federalist 10, Madison articulated his concern:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally from friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the

> rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.

The Federalist No. 10 (Madison), *supra*, at 48-49.

If private conduct is subject to majority approval, then there are no limits at all on the police power. Government would have the authority to ban or regulate all private, consensual sexual activities. It could outlaw unconventional sexual activity by married or unmarried opposite-sex couples.[7] Under the exact same justification as this law, it could ban same-sex hugging and hand-holding. *See Schochet v. Maryland*, 541 A.2d 183, 206 (Md. 1988) (Wilner, J. dissenting), *rev'd*, 580 A.2d 176 (Md. 1990). It could ban actions considered by nearly everyone to be immoral, like behaving as if nothing is wrong while planning to desert or infidelity in a nonmarital but purportedly monogamous relationship. It could ban other sexual activities considered by many to be immoral, like premarital sex. And it could ban activities considered by a minority of people (though perhaps a majority in some towns) to be immoral like singing, dancing, card-playing, or unmarried men and women socializing without their parents present.

Such prohibitions may sound unlikely, but the hope for government restraint and prudence has never been

[7] While perhaps this Court would find the prohibition, as applied to married couples, to impinge unduly on marital relations, the prohibition would not actually fall outside the police power if the Court adopts the idea that the police power encompasses the ability to enforce moral opinions.

thought to be a sufficient safeguard for liberty. Certainly the Founders did not believe that.

> It is vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The Federalist No. 10 (Madison) at 48.

Rather than rely on the "vain" hope of government self-restraint, or "fluid concepts" of government power in the name of morality, this Court should determine whether this prohibition is within the police power of the State of Texas. To be within this power, the prohibited activity must have some tangible, real-world public effects. The statute must be shown to prevent harmful conduct or protect morality in the public sphere.

Here, the State of Texas may not ban purely private, noncommercial, non-harmful, consensual activity on the sole grounds that it doesn't like such activity. The state cannot simply redefine as "public" what is otherwise obviously private. That is what Texas has tried to do here, and for this reason, its statute exceeds the power of government.

II. TEXAS' STATUTE CANNOT SURVIVE RATIONAL BASIS REVIEW.

As explained above, this Court can and should hold that the Texas statute lies outside the police power. That ruling would eliminate the necessity to even examine the law under the rubric of rational basis review. A law can exceed the police power while still advancing a legitimate government interest. For example, both stress and poor eating habits have a negative effect on public health, which is typically considered a legitimate government interest. Yet under our earlier analysis, regulations requiring daily relaxation and healthy home cooking would exceed the limits of government power.

However, the police power analysis can also inform the application of the rational basis test.[8] In our political system, the police power extends to the prevention of harm and the protection of public morality. Texas' statute advances neither of those goals and no legitimate government interest. It is instead an attempt to impose a moral code on private behavior. Moreover, Texas' law has no factual relationship to any interest within the police power of government. For both of these reasons, it violates equal protection.

[8] Rational basis scrutiny is traditionally associated with the Equal Protection Clause of the Fourteenth Amendment and this clause is indeed implicated by the differential treatment by this statute of persons of the same sex as compared with persons of different sexes. However, a rational basis for legislation must always exist, so this analysis applies also to, for example, Due Process and Commerce Clause cases as well.

A. The Texas Statute Does Not Advance a Legitimate Governmental Interest.

This Court has broadly defined what constitutes a legitimate government interest. Yet it also has recognized that there are some interests that a government may not lawfully pursue.[9] The overriding theme to all of these seemingly disparate rulings is that it is illegitimate to use the power of government to accomplish what are essentially private ends – whether those ends involve financial gain or the vindication of personal, private beliefs or prejudices. A law must have a legitimate *governmental* interest to survive constitutional scrutiny.

Legislation supported by a moral position alone, with no other justification, has no connection to the public interest. It simply enshrines a particular moral view.

[9] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (government bodies may not seek to force some people to pay for a public benefit when that burden should be borne by public as a whole); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (tax statute that discriminated against out-of-state insurers violated equal protection because "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (cities may not enact laws in order to cater to the prejudices of local citizens); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Zobel v. Williams*, 457 U.S. 55, 63 (1982) ("to reward citizens for past contributions . . . . is not a legitimate state purpose"); *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (government officials may not make crucial decisions affecting the rights of others when that decision may be colored with personal or institutional gain); *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) (bare desire to harm a politically unpopular group not a legitimate government interest).

Without any connection to the public sphere, the law becomes simply an exercise of *private* moral judgment. The question then becomes which faction will gain sufficient influence to convince the legislature to force others to comply with the particular moral view to which the faction ascribes. The whole structure of our society and Constitution is designed to prevent political war of faction against faction.

While certainly the judiciary should not judge between competing moral positions, a legislature also cannot make private choices for a minority of its citizens, unless their private moral choices cause some harm or have some impact on the public sphere. *Cf. Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (government does not have "the right to control the moral content of a person's thoughts").

As *Loving v. Virginia*, 388 U.S. 1 (1967), starkly demonstrates, majority sentiment cannot be the sole basis for legislation. Prior to the *Loving* decision, the majority of states in the United States had laws banning interracial marriage and a majority of people supported such laws. *See Naim v. Naim*, 87 S.E.2d 749, 754 (1955), *vacated on other grounds*, 350 U.S. 891 (1955). The fact that a majority holds a particular moral belief or that the belief has been consistent in our history cannot, without more, serve to sustain a law. Forcing private compliance with a particular moral position, even one of a majority of citizens, simply is not a legitimate purpose of government.

B. It Is Impossible to Analyze Whether the Texas Statute is Rationally Related to its Goals.

Even in the absence of finding a fundamental right, this Court still requires that there be an actual connection, grounded in facts, between a legitimate governmental purpose of a regulation and the real world. *See Romer v. Evans*, 517 U.S. 620, 633-35 (1996). Looking at that connection allows courts to evaluate if the law is rational. This analysis of the factual connection between a law and its purpose appears in all rational basis cases, whether the Court upholds or strikes down the law in question. This Court applied the same type of rational basis analysis in both *Glucksberg* and *Cleburne*, but it was unable to perform that analysis in *Bowers* and it cannot apply it here.

In *Washington v. Glucksberg*, 521 U.S. 702 (1997), this Court first rejected the notion that there is a fundamental right to assisted suicide and then analyzed whether Washington's prohibition against assisted suicide survived rational basis analysis. The Court identified a number of specific state interests including preserving and protecting life, *id.* at 728-29, protecting the integrity and ethics of the medical profession, *id.* at 731, protecting vulnerable groups from pressure and prejudice, *id*. at 732, and preventing any potential movement toward euthanasia, *id*. at 733. It also discussed how, *as a factual matter*, the prohibition against assisted suicide related to these legitimate government interests, referring to various studies and other materials. *Glucksberg* thus follows the classic pattern of the rational basis test: identifying the legitimate governmental interest and then connecting the prohibition to those interests.

Examining the connection of the law to its purpose also allows the Court to make sure that the law was not enacted for an improper purpose. In *Cleburne*, for instance, while the government claimed at least some legitimate purposes, promoting certain zoning and safety regulations, the fact that the city permitted all sorts of other similar businesses in the same area but attempted to ban only this one indicated that the motives were in fact dislike toward a particular group of people, rather than the purported legitimate interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-6 (1985).

There is no way to evaluate the rationality of a law without some kind of connection to facts. *Bowers v. Hardwick*, 478 U.S. 186 (1986) perfectly illustrates the dilemma caused by legislation that is grounded solely on assertions about private morality. The rational basis analysis takes up a single paragraph of the opinion. It states that "majority sentiments" are an appropriate basis for legislation and concludes that the statute survives rational basis analysis.[10] *See id.* at 196. The only inquiry in *Bowers* was whether the legislature could legitimately condemn homosexual sodomy. Once the Court decided that "majority sentiments" were a valid basis for legislation, that

[10] The *Bowers* majority opinion also asserts that there are many laws that represent moral choices. *Id*. However, the opinion earlier identifies only the prohibitions against adultery, incest, and other sexual crimes. *Id*. at 196. Adultery breaches a marriage contract and harms another party. Sexual crimes like rape or sex with children of course also harm another person, and, as discussed in the *Bowers* dissent, even adult incest is prohibited because the closeness of family relationships make true consent almost impossible. *Id*. at 209 n.4 (Blackmun, J., dissenting).

ended the inquiry. Moral sentiment is an interest incapable of refutation. It isn't falsifiable, at least not in a court of law.

The *Bowers* court did not, and indeed could not, examine "the relation between the classification adopted and the object to be attained." *See Romer v. Evans*, 517 U.S. 620, 631 (1996). The Texas appellate court followed the same rubric, holding that morality was a legitimate basis for legislation and not attempting to look at the relationship of the law to its purpose. *Lawrence v. State of Texas*, 41 S.W.3d 349, 356 (Tex. Ct. App. 2001). The conflation of the two parts of the rational basis test, while improper, is certainly understandable. There are no facts to which a court could refer, because the legislation has no goal other than the codification of majority sentiment. If there is no objective way to determine where state power ends other than what the majority wants, then the law is self-justifying. It is not possible to subject such a law to rational basis analysis, and thus laws like this one avoid judicial scrutiny altogether.

In contrast, objective judicial analysis can occur when the government must assert a legitimate governmental interest – an interest in preventing harm or governing activity in the public sphere – and must use facts to support a rational relationship between the law and its purpose. Legislation with an exclusively moral purpose is impervious to rational basis analysis, and that fact in itself indicates that the law is not legitimate.

CONCLUSION

We urge that the Court begin by looking at whether the contested government action falls within the police power. If the law does not address an activity that causes harm or impacts the public, it is beyond the power of the government to regulate, regardless of whether the specific liberty interest is deemed fundamental. Texas' statute attempts to regulate purely private morality and thus exceeds the police power. Furthermore, we ask this Court to find that the imposition of private moral beliefs is not a legitimate basis for legislation. Because such legislation cannot be tested in any objective fashion under the rational basis test, it is unconstitutional and cannot survive.

Respectfully submitted,

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January 16, 2003

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KEYNOTE REMARKS: JUDICIAL ENGAGEMENT THROUGH THE LENS OF *LEE OPTICAL*

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It is my great pleasure to be the keynote speaker at this symposium on "Judicial Engagement and the Role of Judges in Enforcing the Constitution." This is a subject of enormous importance and also enormous confusion. I consider it my job to get this conference off on the right foot by describing what judicial engagement is and is not. And just so you don't dismiss this as just the opinion of one idiosyncratic law professor, I am going to take as my role model the judicial opinion in the 1954 case of *Lee Optical of Oklahoma, Inc. v. Williamson*.[1] This is not to be confused with the opinion in the 1955 case of *Williamson v. Lee Optical of Oklahoma, Inc.*[2] The opinion I wish to consider is that of the three-judge panel in the United States District Court for the Western District of Oklahoma, not the Supreme Court opinion of Justice William O. Douglas. The opinion of these three federal judges illustrates how judicial engagement can work in practice. But before I describe their approach, let me digress for a few minutes to provide some background so we can understand the significance of the Supreme Court's reversal of their decision.

I. THE TWO ROADS TO SCRUTINY LAND

In my previous writings, I have described a place called "Scrutiny Land."[3] In Scrutiny Land, the government needs to justify to a court its restrictions on the liberties of the people.[4] Pretty much everyone today believes in Scrutiny Land. For example, there are very few who would deny that, when Congress enacts a statute restricting the freedom of speech or the free exercise of religion, a person whose liberty is affected may seek to have the statute nullified by a federal court because it is unconstitutional. To evaluate this claim, the court needs to ascertain the objective or purpose of the statute, whether that purpose is a proper one, and also to assess the

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1 120 F. Supp. 128 (W.D. Okla. 1954), *rev'd*, 348 U.S. 483 (1955).

2 348 U.S. 483 (1955).

3 Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008).

4 *See id.*

degree of fit between the means chosen and the end being sought. What people today disagree about is exactly *when* a court may employ judicial scrutiny to nullify a properly enacted statute. In short, they disagree about the proper route to Scrutiny Land.

In describing the traditional routes to Scrutiny Land, permit me to offer a short and dirty version of a long and complex story. The traditional road to Scrutiny Land was to assess the scope of the power being asserted by the legislature as well as the appropriateness of the means chosen to execute such a power. For example, in the 1798 case of *Calder v. Bull*,[5] Justice Samuel Chase opined that he could not "subscribe to the *omnipotence* of a *State Legislature*, or that it is *absolute and without controul*; although its authority *should* not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State."[6] Chase affirmed that "[t]he people of the *United States* erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their *persons* and *property* from violence."[7] Therefore, "[t]he 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 what are the *proper* objects of it."[8] He summarized this proposition as follows: "The *nature*, and *ends* of *legislative* power will limit the *exercise* of it."[9]

Chase's opinion is usually characterized as founded on natural rights, probably because of the contrasting opinion of Justice James Iredell, who derided the view of those "speculative jurists [who] have held, that a legislative act against natural justice must, in itself, be void."[10] But Chase based his approach not on the doctrine of natural rights, at least not explicitly or directly. Instead, his focus was on the scope of the legislative powers to which the people have presumably given their consent. "There are acts which the *Federal*, or *State*, Legislature cannot do," he wrote, "*without exceeding their authority*."[11] Among the examples of such laws, Chase listed the claim of power to "take[] *property* from A. and give[] it to B."[12]

The reason Chase offers for why such a law was improper is revealing. "It is against all reason and justice," he said, "for a people to entrust a Legislature with SUCH powers; and, therefore, *it cannot be presumed that they have done it*."[13] Chase's analysis is therefore based directly on the notion of presumed consent, and only indirectly and silently on natural rights. When

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5 3 U.S. (3 Dall.) 386 (1798).

6 *Id.* at 387-88 (opinion of Chase, J.).

7 *Id.* at 388.

8 *Id.*

9 *Id.*

10 *Id.* at 398 (opinion of Iredell, J.).

11 *Calder*, 3 U.S. at 388 (opinion of Chase, J.).

12 *Id.*

13 *Id.* (emphasis added).

the legislature claims a power that has not expressly been granted to it by the people, such an unenumerated power cannot be presumed. Today, we call this sort of approach a "clear statement" doctrine.[14] Just seven years after *Calder*, Chief Justice John Marshall adopted a very similar clear statement rule with respect to presumed legislative intent in the case of *United States v. Fisher*:[15] "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."[16]

To be sure, natural justice or natural rights lurks in the background. But only as a way of interpreting a claim of implied power. The "due process of law" came to be thought to include a judicial examination of whether a particular statute was within the authority or power of a legislature to enact. In other words, it is part of the "*process* of law" that the judicial branch ensure that a particular statute enacted by the legislative branch was within its power and therefore a "*law*."

At issue here was the relevant default rule. In Justice Iredell's opinion in *Calder*, he contended that if a government "were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void."[17] In other words, when the written constitution is silent, legislatures have unlimited power. To this, Chase responded that "[t]o maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained; would, in my opinion, be a *political heresy*, altogether inadmissible in our *free republican governments*."[18] For Chase, the legislature only has those powers that are expressly delegated, together with those implied powers that are not fundamentally unjust or, as it later came to be put, exercised in a manner that is "unreasonable, arbitrary or discriminatory." This choice of default rules is of greatest importance when the legislature is exercising implied powers rather than those that were expressly delegated. In the absence of a clear statement, it asks would a free and rational person have consented to *that*?

For 150 years, this traditional police powers jurisprudence allowed for judicial scrutiny of legislation to ensure that the purpose of legislation was genuinely to serve the public welfare, rather than any particular faction or

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14 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406-07 (2010) ("Beginning in the last quarter of the twentieth century, the Supreme Court has displayed a growing fondness for construing statutes in light of constitutionally inspired "clear statement rules," which insist that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a constitutionally inspired value.").

15 6 U.S. (2 Cranch) 358 (1805).

16 *Id.* at 390.

17 *Calder*, 3 U.S. at 398 (opinion of Iredell, J.).

18 *Id.* at 388 (opinion of Chase, J.).

class of persons.[19] Such was the method of analysis employed by the Supreme Court in *Lochner v. New York*.[20] In *Lochner*, the Court took as given that states had the power to promote the health and safety of its citizens.[21] For this reason, the numerous detailed regulations of the Bakeshop Act regulating the bakery business were never under any cloud. The only question considered by the Court was whether the maximum hours restriction was a genuine health and safety regulation of liberty.[22] Finding no reason to single out bakers for this sort of protection, the Court concluded that the law must have been enacted for "other motives," namely the desire of the legislature to serve the partial interests of the bakers' union who pushed for the measure and the large unionized bakery companies, at the expense of small non-union bake shops, rather than serve the general welfare.[23]

In his dissenting opinion, Justice Harlan did not deny that the Court was entitled to engage in such scrutiny of state laws. Indeed, he granted "that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment."[24] Instead, he quarreled with the burden of proof employed by the majority: "the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power."[25] Harlan contended that, "[i]f there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation."[26] He summarized his approach this way: "when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional."[27]

In contrast, in his solo dissenting opinion Justice Holmes took a markedly different approach. "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," he wrote, "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fun-

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19 *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWER JURISPRUDENCE (1993) (describing the longstanding tradition of police powers jurisprudence).

20 198 U.S. 45 (1905).

21 *Id.* at 53 ("There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare . . . .").

22 *Id.* at 52-53.

23 *Id.* at 63-65. For much more on the factual context of *Lochner*, see DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

24 *Lochner*, 198 U.S. at 68 (Harlan, J., dissenting).

25 *Id.*

26 *Id.*

27 *Id.*

damental principles as they have been understood by the traditions of our people and our law."[28] In other words, for Justice Holmes, in the absence of a traditionally grounded fundamental right, only a *hypothetical* rational basis is required. As he concluded with respect to the Bake Shop Act, "[i]t does not need research to show that . . . . [a] reasonable man *might* think it a proper measure on the score of health."[29] Nor does it matter that the measure is inconsistent with the regulation of other similar forms of labor. "Men whom I certainly could not pronounce unreasonable," he asserted, "would uphold it as a first instalment [sic] of a general regulation of the hours of work."[30]

In 1931, it was Harlan's position rather than Holmes's that was adopted by a majority of the Supreme Court in the case of *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[31] in which the Court refused to strike down an insurance regulation because "the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."[32] As Justice Brandeis explained, "[i]t does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy."[33] In short, "[t]he record is barren of any allegation of fact tending to show unreasonableness."[34]

But note that, under the burden of proof favored by Justice Harlan and adopted by Justice Brandeis, it was still permissible for a person to challenge a legislative restriction on liberty by showing that it *was* unreasonable, arbitrary, or discriminatory. This was made abundantly clear by the New Deal Court in the landmark 1938 case of *United States v. Carolene Products Co.*[35] Although this case is known for the most famous footnote in the history of the Supreme Court—the celebrated Footnote Four[36]—in the less well-studied body of the case, Justice Stone reaffirmed judicial scrutiny of the reasonableness of a statute was still available. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice," he wrote, "such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."[37]

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28 *Id.* at 76 (Holmes, J., dissenting).

29 *Id.* (emphasis added).

30 *Lochner*, 198 U.S. at 76.

31 282 U.S. 251 (1931).

32 *Id.* at 257-58.

33 *Id.* at 258.

34 *Id.*

35 304 U.S. 144 (1938).

36 *See id.* at 152 n.4.

37 *Id.* at 153 (citation omitted).

Earlier in his opinion, Justice Stone was emphatic about the availability of this type of scrutiny.

> We may assume for present purposes that no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.[38]

Of course, Footnote Four established that:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[39]

But it should now be clear that this was a claim about burdens of proof. Absent an express prohibition, it was challengers to the rationality who bore the burden of showing that a law was irrational, arbitrary, or discriminatory.

In short, according to the New Deal Supreme Court, there were not one, but two, routes to Scrutiny Land: challengers might present a factual record establishing the irrationality of the legislation; or alternatively, a challenger might assert the violation of an express prohibition in which case the burden of proof would shift to the government to establish the propriety of its legislation.

It is not my purpose here to critique the constitutionality of the doctrine adopted by the Court in Footnote Four. As I have explained elsewhere, this doctrine appears to violate one of the very few express rules of construction in the text of the Constitution—that of the Ninth Amendment, which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[40] Whether or not the Ninth Amendment warrants the judicial protection of unenumerated rights, it does bar any construction that would "deny or disparage" the liberties of the people on the ground that "certain rights" were "emumerat[ed] in the Constitution."[41] Footnote Four's preference for "express prohibitions" over other liberties does precisely this.

But when read together with the body of Justice Stone's opinion in *Carolene Products*, the New Deal Supreme Court only "disparaged" the other rights retained by the people by its differential allocation of the bur-

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38 *Id.* at 152.

39 *Id.* at 152 n.4.

40 U.S. CONST. amend. IX; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 224-52 (2004).

41 *See* U.S. CONST. amend. IX.

den of proof. It did not "deny" them altogether. That feat was to be left to the Warren Court.

II. HOW TRADITIONAL RATIONAL BASIS REVIEW WORKED

We now come to *Lee Optical of Oklahoma v. Williamson*, the District Court decision in 1954, not the Supreme Court decision one year later. In *Williamson*, the district court considered a challenge to a statute that restricted the activities of opticians in a several ways. First, it barred anyone but a "licensed optometrist or ophthalmologist, 'To fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person . . . .' or 'to duplicate or attempt to duplicate or to place or replace into the frames, any lenses'" without a written prescription from an Oklahoma licensed ophthalmologist or optometrist.[42] In the words of the Court, the "unambiguous language" of the statute "makes it unlawful . . . for either a dispensing or laboratory optician to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eyeglass wearer except upon written prescription from a qualified eye examiner."[43]

Second, the statute made it unlawful "to solicit the sale of . . . frames, mountings . . . or any other optical appliances."[44] Third, it barred any "person, firm, or corporation engaged in the business of retailing merchandise to the general public" from "rent[ing] space, sub-leas[ing] departments, or otherwise permit[ting] any person purporting to do eye examination or visual care to occupy space" in their retail store.[45]

Lee Optical of Oklahoma was a subsidiary of a Texas company that owned a national chain of eyeglass retailers.[46] Lee Optical was founded by Theodore Shanbaum.[47] Born to Russian immigrants who had settled in Chicago, Shanbaum graduated from the University of Chicago before earning his law degree from DePaul in the late 1930s.[48] His entry into the eyeglass industry came when he visited his brother-in-law, an optometrist, at his home in Dallas.[49] But when he went into business, he chose another optometrist, Dr. Ellis Carp (one of the named plaintiffs in the suit to which Lee Optical most famously lends its name), to partner up with under the obliga-

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42 Lee Optical of Okla. v. Williamson, 120 F. Supp. 128, 135 (W.D. Okla. 1954) (alteration in original) (quoting the Oklahoma statute), *rev'd*, 348 U.S. 483 (1955).

43 *Id.* (emphasis omitted).

44 *Id.* at 139 (alterations in original) (internal quotation marks omitted).

45 *Id.* at 142 (internal quotation marks omitted).

46 *See* Joe Simnacher, *Rites Held for Theodore Shanbaum: Lee Optical Founder, 87, Was Pioneer in Selling Low-Cost Eyewear*, DALL. MORNING NEWS, Oct. 6, 1999, at 29A.

47 *Id.*

48 *Id.*

49 *Id.*

tion of a Texas law requiring an optometrist to be employed by dispensing opticians.[50] Shanbaum minimized his start-up costs by purchasing a used business sign with the name "Lee Optical"; the name "Lee" has no other connection to the enterprise or its participants.[51]

Lee Optical did business the way LensCrafters® does today. It should come as no surprise that local ophthalmologists and optometrists were none too keen on out-of-state chain competitors advertising lower prices on glasses. Indeed, most of the famous economic liberty cases involved legislation siding with some firms in competition with others. In *Lochner*, the statute promoted by the bakeshop union favored large union-organized bakeries at the expense of small ethnic, nonunion bakeshops.[52] In *Nebbia v. New York*,[53] the regulation raising the retail price of milk sought to protect big milk distributors from competition from small mom and pop retailers.[54] *Carolene Products* protected the powerful dairy farmer constituency from competition from lower-priced "filled" milk.[55]

As was common practice when considering challenges to the constitutionality of legislation, the case was heard by a three-judge panel, which here included a Circuit Court Judge, the Chief Judge of the District, and a District Court Judge. The panel quite consciously adhered to the post-New Deal allocation of the burden of proof. District Judge Wallace's restatement of the New Deal Court's law is worth quoting in its entirety:

> It is recognized, without citation of authority, that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.[56]

In short, in the absence of an "express prohibition," the court employed the presumption of constitutionality and proceeded to analyze whether the restrictions imposed on opticians were "arbitrary, unreasonable or discriminatory" in light of the arguments and evidence presented at trial.[57] As the court summarized its approach, when "the public welfare is involved, the effect of the statute must bear a reasonable relation to the purpose to be accom-

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50 *Id.*

51 *Id.*

52 *See* BERNSTEIN, *supra* note 23, at 23-29.

53 291 U.S. 502 (1934).

54 *See generally id.*

55 *See generally* United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

56 *Lee Optical*, 120 F. Supp. at 132.

57 *See id.*

plished and must not discriminate between two similarly circumstanced groups, regulating one group but exempting the other."[58]

To see how this approach works in practice, let me describe how the court assessed the restrictions on optician's replacing broken lenses. The statute made it unlawful for an optician to take old lenses and place them in new frames and then fit the completed glasses to the face of the eyeglass wearer except upon written prescription from a qualified eye examiner.[59] This served to prohibit consumers "from exchanging their frames either to obtain more modern designs or because the former frames are broken, without first visiting an ophthalmologist or optometrist."[60] As the court noted, this "diverts from the optician a very substantial, as well as profitable, part of his business."[61]

The court began by noting that written prescriptions contain no instructions on how glasses are "to be fitted to the face of the wearer."[62] On the basis of the evidence, the court concluded that "the knowledge necessary to" fit glasses to the face "can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist."[63] For this reason, although "the legislature can regulate the artisan, the merchant, or the professional where the regulated services embrace issues of public health and welfare, the services under consideration [bore] no real or rational relation to the actual vision of the public."[64] After all, to make use of this service, a consumer must already have a pair of glasses, the prescription for which was obtained after examination by an ophthalmologist or optometrist.[65] "The evidence establishes beyond controversy" wrote the court, "that a skilled artisan (such as an optician) can accurately ascertain the power of a lense, or fragment thereof, without the aid of a written prescription, and can thus duplicate or reproduce the original pair of spectacles without adversely affecting the visual ability of the eyeglass wearing public."[66] "This process requires no unusual professional judgment, peculiar to the licensed professions of ophthalmology and optometry but is strictly artisan in character."[67]

My favorite part of the opinion is the court's discussion of the "mechanical device known as the lensometer," a device that "scientifically

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58 *Id*. at 134 (footnote omitted).
59 *Id*. at 135.
60 *Id*.
61 *Id*.
62 *Lee Optical*, 120 F. Supp. at 135.
63 *Id*.
64 *Id*.
65 *Id*.
66 *Id*. at 136.
67 *Id*.

measures the power of the existing lense and reduces it to prescriptive terms."[68] The court found that:

> The operation of the lensometer does not rise to the need or dignity of exclusive professional supervision. A qualified witness demonstrated and testified that any reasonably intelligent person can be taught to operate the lensometer and become qualified to accurately learn the power of existing lenses, or fragments thereof, within several hours. As further demonstrated by the evidence, the opticians, as a class, have for a number of years used the lensometer in their trade and the optometrists and ophthalmologist use this same device when wishing to check the power of lenses; and, although only a minority of licensed ophthalmologists require a patient to return to the examiner's office to check the accuracy with which the original prescription has been filled, even in such instances the lensometer is not operated by the physician but by a clerk in the office.[69]

As a result of this evidence, the court found that "[i]t is absolutely unnecessary to delegate to professional men the control of and responsibility for the just-mentioned artisan tasks, where the opticians, as a group possess adequate skill to fully protect the vision of the public in accurately duplicating existing lenses."[70] Therefore, it held that "[a]lthough on this precise issue of duplication, the legislature in the instant regulation was dealing with a matter of public interest, the particular means chosen are neither reasonably necessary nor reasonably related to the end sought to be achieved."[71] In this regard:

> The legislature has been guilty of undue oppression in failing to set up qualifying standards for the opticians, if such standards be necessary for the public protection, and at the same time arbitrarily legislating many of the skilled artisans out of a long recognized trade, by delegating the sole control of their skills and business to a professional group, when the public can be completely protected without taking from the optician this valuable property right. . . . The means chosen by the legislature does not bear ''a real and substantial relation'' to the end sought, that is, better vision, inasmuch as although admittedly the professional eye examiners are specially trained in regard to eye examination, they possess no knowledge or skill superior to a qualified practicing optician insofar as the artisan tasks in view are concerned, and in fact the two professional groups, as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.[72]

In a footnote, the court noted that the effect of this restriction "is to place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling."[73] The "ophthalmologists will pointedly refer their business to a limited number of channels, thus denying all other opticians the opportunity

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68 *Lee Optical*, 120 F. Supp. at 136.

69 *Id.* at 137.

70 *Id.*

71 *Id.*

72 *Id.* at 137-38 (footnote omitted).

73 *Id.* at 137 n.20.

to follow their trade regardless how competently the remaining opticians are qualified."[74]

According to the court, "[t]he rule is clear that where the police power is ushered into play it must be exercised in an undiscriminating manner in relation to all persons falling within the same class or circumstance."[75] But here, "not only is the 'relation to the object of the legislation' questionable . . . but 'all persons similarly circumstanced' pointedly have not been treated alike."[76] After stressing an additional irrationality that the public is allowed to buy ready-to-wear reading glasses from retail establishments without any prescription, the court declared that "[t]he legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear (convex spherical lenses) eyeglasses."[77] Employing the same method of analysis, the court also concluded that the restrictions on advertising and allowing eye exams by doctors on the premises were also arbitrary, irrational, and discriminatory.[78]

The most noteworthy aspect of this analysis is that the court spends no time discussing the origin, scope, or fundamentality of the right at issue, which is simply the right to pursue a lawful occupation. Indeed, the court never even specifically identifies the right in question other than a passing reference to "a long recognized trade" and its characterization of the "skills and business" of the optician as a "valuable property right."[79] The issue is not *whether* this right can reasonably be regulated, but *how*, and an analysis of the right does none of the work.

All the emphasis is upon the practical operation of the statute to see if its discrimination against opticians is warranted, even after adopting a presumption in the legislature's favor. The court was simply following the injunction affirmed by the Supreme Court in *Carolene Products*:

> [N]o pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.[80]

But as we all know, the Supreme Court reversed.

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74 *Lee Optical*, 120 F. Supp. at 137 n.20.

75 *Id.* at 138.

76 *Id.* at 138-39 (quoting F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

77 *Id.* at 139.

78 *See id.* at 139-42 (analysis of advertising restrictions); *id.* at 142-43 (analysis of on-premises eye exams).

79 *See Lee Optical*, 120 F. Supp. at 137.

80 United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

III. GUTTING RATIONAL BASIS REVIEW

The Supreme Court decision in *Williamson v. Lee Optical* is not as famous as such landmark cases as *Marbury*,[81] *Dred Scott*,[82] *Plessy*,[83] *Brown*,[84] or *Roe*[85]—cases so familiar we typically refer to them by one party's name. But it is repeatedly relied upon by the court as the authoritative treatment of rational basis scrutiny of economic legislation.[86] It is a fixed point of reference for all attorneys practicing constitutional law. While most academics attribute the judicial withdrawal from policing economic legislation to the New Deal Court, as the previous analysis shows, the true credit should go to the Warren Court and, in particular, to Justice William O. Douglas.

Justice Douglas's approach is easy to characterize. In place of the opportunity to present evidence showing that a particular restriction was arbitrary, unreasonable, or discriminatory, Justice Douglas held that legislation would be upheld if the court could conceive of any hypothetical reason why the legislature *might* have enacted the restriction.[87]

For example, although it "appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription," the "legislature *might* have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses."[88] "Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature *might* have concluded that one was needed often enough to require one in every case."[89] "Or the legislature *may* have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert."[90] Justice Douglas conceded that "the present law does not require a new examination of the eyes every time the frames are changed or

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81 5 U.S. (1 Cranch) 137 (1803).

82 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

83 163 U.S. 537 (1896).

84 347 U.S. 438 (1954).

85 410 U.S. 113 (1973).

86 *See, e.g.*, Levin v. Commerce Energy, Inc., 130 S. Ct. 2323, 2333 (2010) ("When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism [that] due respect for legislative choice demands." (footnote omitted) (citing, among others, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488-89 (1955))).

87 *See infra* notes 88-95 and accompanying text.

88 *Lee Optical*, 348 U.S. at 487 (emphasis added).

89 *Id.* (emphasis added).

90 *Id.* (emphasis added).

the lenses duplicated. For if the old prescription is on file with the optician, he can go ahead and make the new fitting or duplicate the lenses."[91] But to this he replied in what has now become canonical words: "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[92]

Whereas the lower court looked to the unequal treatment of opticians as compared with ophthalmologists and optometrist, Justice Douglas did away with such scrutiny with yet more hypothetical justifications: "Evils in the same field *may* be of different dimensions and proportions, requiring different remedies. *Or so the legislature may think*."[93] Alternatively, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others."[94] So the differential treatment of one group as compared with another, a tip off that laws are rent-seeking and not serving the public interest, is to be disregarded. "The prohibition of the Equal Protection Clause," wrote Justice Douglas, "goes no further than the invidious discrimination."[95]

In sum, whereas the New Deal Court had adopted the approach of Justice Harlan's dissent in *Lochner*—employing a presumption of constitutionality in favor of the constitutionality of regulations that can be rebutted by evidence showing that the restriction on liberty was arbitrary, unreasonable, or discriminatory—the Warren Court enshrined the approach of Justice Holmes's dissenting opinion. For all practical purposes, what had once been a true presumption that was rebuttable by evidence and reasoning would henceforth be an irrebuttable presumption, which is not truly a presumption at all.

But the Warren Court was not done changing the requirements of "due process of law." Ten years later, in the 1965 case *Griswold v. Connecticut*,[96] the Court invalidated a law banning the sale and possession of contraceptives.[97] Writing for the Court, Justice Douglas refused to reconsider the reasoning of *Williamson v. Lee Optical*.[98] Instead, he purported to stay within the confines of Footnote Four by finding a fundamental right of privacy in

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91 *Id.*

92 *Id.* at 487-88.

93 *Id.* at 489 (emphases added).

94 *Lee Optical*, 348 U.S. at 489 (citation omitted).

95 *Id.*

96 381 U.S. 479 (1965).

97 *Id.* at 480, 485-86.

98 *See id.* at 481-82 ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation as we did in [*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and] *Williamson v. Lee Optical Co.* . . . .").

the specific guarantees of the Bill of Rights. To accomplish this, he was compelled to write one of the most ridiculed sentences in the annals of Supreme Court decisions: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[99] To support this conclusion Justice Douglas relied on other so-called *Lochner*-era Due Process Clause cases as *Pierce v. Society of Sisters*[100] and *Meyer v. Nebraska*.[101] And, although Justice Douglas avoided exclusive reliance on the Due Process Clause of the Fourteenth Amendment, eventually the right of privacy was so grounded.

By creating a fundamental unenumerated right of privacy akin to the other "express prohibitions" in the text, in essence, Justice Douglas and the Warren Court were widening the lane to Scrutiny Land provided by Footnote Four to avoid reviving the other traditional route via a police-power rational basis analysis. And thus was born the idea that such "personal" liberties as privacy were to be given heightened scrutiny while mere economic "liberty interests" were subject to *Lee Optical* hypothetical rational basis scrutiny, which is to say no scrutiny at all. The rest, as they say, is history.

CONCLUSION: BEYOND FUNDAMENTAL RIGHTS

Thus, by this circuitous route did we end up with the modern debate between so-called judicial "conservatives," who in essence cling to the four corners of the New Deal's Footnote Four, and so-called judicial "activists," who hew to the Warren Court's approach of Footnote Four-Plus—with the plus being certain additional unenumerated rights deemed fundamental by the Supreme Court; or what is sometimes called "preferred freedoms." One camp consists of *un*reconstructed New Deal jurisprudes; the other of *re*constructed New Deal jurisprudes. If, however, the New Deal represented a genuine revolutionary moment of constitutional change,[102] rather than a restoration of the Constitution's original meaning from the *Lochner* Court's deviation,[103] then neither side of today's debates over judicial engagement can claim the mantle of originalism.

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99 *Id*. at 484.

100 268 U.S. 510 (1925).

101 262 U.S. 390 (1923); *see Griswold*, 381 U.S. at 481 (citing *Pierce* and *Meyer*, among other cases).

102 *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 255-420 (1998) (contending that the New Deal was revolutionary); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (same); GILLMAN, *supra* note 19 (same).

103 *See generally* WALTON HALE HAMILTON & DOUGLASS ADAIR, THE POWER TO GOVERN: THE CONSTITUTION—THEN AND NOW (1937) (contending that the New Deal represented a restoration of

But reading the traditional Due Process analysis with post-New Deal eyes distorts that practice. Under the modern "fundamental rights" approach: first, one only gets to Scrutiny Land if one identifies a fundamental right, whether enumerated or unenumerated. Second, when a fundamental right is at stake, laws must be strictly scrutinized. Third, because scrutiny must be strict, only a small number of fundamental rights can be recognized lest all governmental power be undermined. Finally, it is easy to ask, just what makes judges competent to identify and define unenumerated fundamental rights, when even philosophers disagree?

But the lower court opinion in *Lee Optical* makes clear that a court need not speculate about fundamental rights; it need only identify what today would be called a "liberty interest." All the emphasis is on identifying the proper scope of the legislature's power, be it an enumerated power of Congress or the police power of states to protect the health and safety of the public. To identify legislation that is not in the general interest, but serves to benefit some class or faction at the expense of others, a court need not concern itself with the precise nature of the liberty or right at issue. It need only examine the fit between the purported end and the means chosen to see if the restriction might have been pre-textual.

Twenty years after *Lee Optical*, the Court would once again engage in "rational basis scrutiny" to ferret out an improper motive for a legislative discrimination. In *City of Cleburne v. Cleburne Living Center, Inc.*,[104] it examined the rationales denying a permit for group home for the mentally retarded, without first finding that the mentally retarded were a specially protected class under the Equal Protection Clause.[105] This approach drew a sharp reproach from Justice Marshall who thought it was in direct conflict with *Lee Optical*: "[U]nder the traditional and most minimal version of the rational-basis test, 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'"[106] To this he added, the "suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational-basis review—a small and regrettable step back toward the days of *Lochner v. New York*."[107] Yet *Cleburne* is still good law.

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original meaning); 1-2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953) (same).

104 473 U.S. 432 (1985).

105 *Id*. at 435, 442-47.

106 *See id*. at 458 (Marshall, J., concurring in part and dissenting in part) (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955)).

107 *Id*. at 459-60.

While I would prefer that courts adopt a "presumption of liberty" of the sort the Court seemed to employ in *Lochner*,[108] *Lee Optical* shows the power of rational basis scrutiny even when Justice Harlan's rebuttable "presumption of constitutionality" is applied. That which actually exists is possible to exist, and the lower court analysis in *Lee Optical* shows realistic or *actual* rational basis scrutiny about the potentially improper motivation behind some economic legislation is both possible and realistic. By contrast, the hypothetical rational basis approach of Justice Douglas and the Warren Court is a highly unrealistic and formalist irrebuttable presumption that all restrictions on liberty are really in the public interest if any possible rationale for the restriction can be imagined by a judge.

The modern rational basis approach adopted by the Warren Court in *Lee Optical* represents a judicial abdication of its function to police the Constitution's limits on legislative power. It accomplished this by combining its formalist irrebuttable presumption of constitutionality with a judicially-invented distinction between economic and personal liberties found nowhere in the Constitution—a distinction that runs afoul of one of the few rules of construction in the Constitution itself: "The enumeration in the Constitution of certain rights *shall not be construed* to deny or disparage others retained by the people."[109] The lesson of *Lee Optical* is that protection of these retained rights requires neither their discovery and definition, nor what today would be called "substantive" due process. It requires only the recognition that the "due process of law" includes a judicial assessment of whether a restriction on either personal or economic liberty is genuinely rationally related to an end that is within the proper scope of **federal or state legislative** powers, or whether **the restriction** is instead irrational, arbitrary, or discriminatory. In short, the protection of these rights requires judicial engagement.

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108 *See generally* BARNETT, *supra* note 40.

109 U.S. CONST. amend. IX (emphasis added).

ESSAYS

THE PEOPLE OR THE STATE?: *CHISHOLM V. GEORGIA* AND POPULAR SOVEREIGNTY

Randy E. Barnett[*]

CHISHOLM v. Georgia *was the first great constitutional case decided by the Supreme Court. In* Chisholm*, the Court addressed a fundamental question: Who is sovereign? The people or the state? It adopted an individual concept of popular sovereignty rather than the modern view that limits popular sovereignty to collective or democratic self-government. It denied that the State of Georgia was a sovereign entitled, like the King of England, to assert immunity from a lawsuit brought by a private citizen. Despite all this,* Chisholm *is not among the canon of cases that all law students are taught. Why not? In this Essay, I offer several reasons: constitutional law is taught by doctrine rather than chronologically; law professors have reason to privilege the Marshall Court; and the Court's individualist view of popular sovereignty is thought to have been repudiated by the adoption of the Eleventh Amendment. I explain why the Eleventh Amendment did not repudiate the view of sovereignty expressed in* Chisholm *by comparing the wording of the Eleventh with that of the Ninth Amendment. I conclude by suggesting another reason why* Chisholm *is not in the canon: law professors follow the lead of the Supreme Court, and, like the Ninth Amendment, the Supreme Court has deemed its first great decision too radical in its implications.*

INTRODUCTION

Constitutional law professors know two things that their students often do not: John Marshall was not the first Chief Justice of the

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United States, and *Marbury v. Madison*[1] was not the first great constitutional case decided by the Supreme Court. That honor goes to *Chisholm v. Georgia*,[2] decided some ten years earlier when John Jay was Chief Justice. Students may be unaware of these facts because most basic courses in constitutional law begin with *Marbury*, which, along with Chief Justice Marshall's opinions in *McCulloch v. Maryland*[3] and *Gibbons v. Ogden*,[4] are the earliest cases that are emphasized. The opinions in *Chisholm* are never read; at most, the case is mentioned in passing to explain the origin of the Eleventh Amendment, which reversed its holding.

In *Chisholm*, the Supreme Court, by a vote of four to one, rejected Georgia's assertion of sovereign immunity as a defense against a suit in federal court for breach of contract brought against it by a citizen of another state. The fundamental nature of the issue presented by the case was aptly characterized by Justice Wilson:

> This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this—"do the people of the United States form a Nation?"[5]

In *Chisholm*, the Justices of the Supreme Court rejected Georgia's claim to be sovereign. They concluded instead that, to the extent the term "sovereignty" is even appropriately applied to the newly adopted Constitution, sovereignty rests with the people, rather than with state governments. Their decision is inconsistent with both the modern concept of popular sovereignty that views democratically elected legislatures as exercising the sovereign will of the people and the modern claim that states are entitled to the same immunity as was enjoyed by the King of England. The Justices in *Chisholm* affirmed that, in America, the states are not

[1] 5 U.S. (1 Cranch) 137 (1803).
[2] 2 U.S. (2 Dall.) 419 (1793).
[3] 17 U.S. (4 Wheat.) 316 (1819).
[4] 22 U.S. (9 Wheat.) 1 (1824).
[5] *Chisholm*, 2 U.S. (2 Dall.) at 453 (Wilson, J.) (emphasis omitted).

kings, and their legislatures are not the supreme successors to the Crown.

I. WHY WE SHOULD TEACH *CHISHOLM*

The judicial opinions in *Chisholm* are interesting for several reasons. First, the opinions exemplify the early reliance by the courts primarily on first principles, or what Justice Wilson referred to as "general principles of right,"[6] and only secondarily on the text of the Constitution. *Chisholm* is typical in this regard. This is not to claim that courts ever countenanced using first principles to ignore or contradict a pertinent text. Rather, *Chisholm* well illustrates how first principles were used to interpret the meaning of the text, such as Article III, Section 2, which specifies that "[t]he judicial power of the United States shall extend to . . . controversies, between a state and citizens of another State."[7]

In *Chisholm*, Georgia contended that this text needed to be qualified by the extratextual doctrine of sovereign immunity. The Court did not reject Georgia's claim due to its reliance on first principles. Instead, it rejected the first principles Georgia asserted in favor of others. Justice Wilson began his analysis of Georgia's claim of sovereign immunity by contesting the appropriateness of the very term "sovereignty" with regard to the new Constitution:

> To the Constitution of the United States the term Sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "Sovereign" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.[8]

Wilson then identified possible alternative meanings of the term "sovereign." First, "the term sovereign has for its correlative, subject[.] In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Con-

[6] Id. at 456.
[7] U.S. Const. art. III, § 2.
[8] *Chisholm*, 2 U.S. (2 Dall.) at 454 (emphasis omitted).

stitution there are citizens, but no subjects."[9] Indeed, Wilson noted that the "term, subject, occurs . . . once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed."[10] Wilson rejected the concept of "subject" as inapplicable to states because he knew "the Government of that State to be republican; and my short definition of such a Government is,—one constructed on this principle, that the Supreme Power resides in the body of the people."[11] Furthermore, Wilson argued that

> the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the "People of the United States," did not surrender the Supreme or sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.[12]

In other words, according to Justice Wilson, to the extent one wishes to use the word "sovereignty" at all, sovereignty lies in the people themselves, not in any government formed by the people.

Wilson then considered another sense of sovereignty that relates it to the feudal power of English kings. "Into England this system was introduced by the conqueror: and to this æra we may, probably, refer the English maxim, that the King or sovereign is the fountain of Justice. . . . With regard to him, there was no superior power; and, consequently, on feudal principles, no right of jurisdiction."[13] Wilson characterized this as "only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in England, and prosecuted with unwearied assiduity and care."[14]

Wilson rejected this feudal notion of sovereignty as inconsistent with "another principle, very different in its nature and operations [that] forms . . . the basis of sound and genuine jurisprudence."[15] This is the principle that "laws derived from the pure source of

[9] Id. at 456 (emphasis omitted).
[10] Id. (citing U.S. Const. art. III, § 3) (emphasis omitted).
[11] Id. at 457.
[12] Id. (emphasis omitted).
[13] Id. at 458 (emphasis omitted).
[14] Id. (emphasis omitted).
[15] Id.

equality and justice must be founded on the CONSENT of those, whose obedience they require. The sovereign, when traced to his source, must be found in the man."[16] In other words, obedience must rest on the consent of the only "sovereign" from which justice and equality rest: the individual person who is asked to obey the law. Wilson believed that the only reason "a free man is bound by human laws, is, that he binds himself. Upon the same principles, upon which he becomes bound by the laws, he becomes amenable to the Courts of Justice, which are formed and authorised by those laws."[17]

State governments are simply the product of these very same people, themselves bound by laws, who have banded together to form a government. As such, states are as bound by the law as are the ultimate sovereign individuals that establish them. "If *one free man*, an *original sovereign*, may do all this; why may not an aggregate of free men, a collection of original sovereigns, do this likewise? If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired."[18]

From this analysis Wilson reached the following conclusion about Georgia's claim of sovereign immunity against a suit for breach of contract:

> A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, wilfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a Sovereign State? Surely not.[19]

That Justice Wilson was the author of this opinion is significant. James Wilson was as crucial a member of the Constitutional Convention as any other, including James Madison. His defense of the Constitution in the Pennsylvania ratification convention was

[16] Id. (emphasis omitted).
[17] Id. at 456 (emphasis omitted).
[18] Id. (emphasis added and omitted).
[19] Id. (emphasis omitted).

lengthy and influential,[20] and that state's early ratification set the stage for the Constitution's eventual adoption in other key states.[21] Wilson was also among the most theoretically sophisticated of the Founders, as his lectures on law given as a professor from 1790 to 1792 at the College of Pennsylvania demonstrate.[22] Indeed, one reason why his opinion in *Chisholm* may be overlooked is that it may seem too long and theoretical to be a good *judicial* opinion.

Justice Wilson was not alone in locating sovereignty in the individual person. Chief Justice Jay, in his opinion, referred tellingly to "the joint and equal sovereigns of this country."[23] Jay affirmed the "great and glorious principle, that the people are the sovereign of this country, and consequently that *fellow citizens and joint sovereigns* cannot be degraded by appearing with each other in their own Courts to have their controversies determined."[24] Denying individuals a right to sue a state, while allowing them to sue municipalities, "would not correspond with the equal rights we claim; with the equality we profess to admire and maintain, and with that *popular sovereignty* in which every citizen partakes."[25] Neither Wilson nor Jay's individualist view of sovereignty fits comfortably into the notion of popular sovereignty as a purely "collective" concept.[26]

[20] Given that Wilson's lengthy speeches were virtually the only ones reported in Elliott's debates for the Pennsylvania ratification convention, it would seem that he was thought to have been a crucial member of that convention. See 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 415–542 (photo. reprint 1974) (Jonathan Elliott ed., 2d ed. n.d.) (records of Pennsylvania debates).

[21] Ratifying a week after Delaware, Pennsylvania was just the second state—and the first large one—to ratify the Constitution. 2 The Documentary History of the Constitution of the United States of America 27 (photo. reprint 1965) (Washington, U.S. Dep't of State 1894).

[22] See Mark David Hall, The Political and Legal Philosophy of James Wilson 1742–1798, at 27–29 (1997) (describing the importance of Wilson's lectures on law).

[23] *Chisholm*, 2 U.S. (2 Dall.) at 477 (Jay, C.J.).

[24] Id. at 479 (emphasis added).

[25] Id. at 473 (emphasis added).

[26] Professor Elizabeth Price Foley captures the individualist concept of popular sovereignty by calling it "residual individual sovereignty." See Elizabeth Price Foley, Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality 42 (2006) ("[O]ne of the foundational principles of American law—at both the state and federal level—is residual individual sovereignty."). Professor William Casto has coined the phrase "the people's sovereignty" to convey this idea. See William R. Casto, James Iredell and the American Origins of Judicial Review, 27 Conn. L. Rev. 329, 330 (1995) ("[T]he idea of the people's sovereignty should not be confused with

Even Justice Iredell, the sole dissenter in *Chisholm*, did not rest his dissent on a rejection of the joint and individual sovereignty of the people. Instead, he devoted the bulk of his opinion to the question of whether the Supreme Court has jurisdiction to hear a breach of contract case in the absence of express authorization either by the Constitution itself or by Congress. Because he concluded that such authorization was both required and lacking, Iredell contended that the suit should have been dismissed. Had this reasoning prevailed, there would have been no need to reach the issue of sovereignty, which Justice Iredell addresses only in passing.[27]

Justice Wilson and Chief Justice Jay's individualist concept of sovereignty was later passionately expanded upon by John Taylor in response to the Supreme Court's opinion in *McCulloch*:

> I do not know how it has happened, that this word has crept into our political dialect, unless it be that mankind prefer mystery to knowledge; and that governments love obscurity better than specification. The unknown powers of sovereignty and supremacy may be relished, because they tickle the mind with hopes and fears; just as we indulge the taste with Cayenne pepper, though it disorders the health, and finally destroys the body. Governments delight in a power to administer the palatable drugs of exclusive privileges and pecuniary gifts; and selfishness is willing enough to receive them; and this mutual pleasure may possibly have sug-

popular sovereignty, which carries connotations of democracy and universal suffrage."). But it may well be anachronistic to concede the term "popular sovereignty" actually used by Chief Justice Jay to the modern collective reading.

[27] On the nature of sovereignty, Justice Iredell says,

> Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as compleatly sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.

Chisholm, 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting) (emphasis omitted).

> gested the ingenious stratagem, for neutralizing constitutional restrictions by a single word . . . .[28]

In his lengthy treatment of the subject Taylor notes,

> Sovereignty implies superiority and subordination. It was therefore inapplicable to a case of equality, and more so to the subordinate power in reference to its creator. The word being rejected by our constitutions, cannot be correctly adopted for their construction . . . . It would produce several very obvious contradictions in our political principles. It would transfer sovereignty from the people, (*confining it to mean the right of self-government only*,) to their own servants. It would invest governments and departments, invested with limited powers only, with unspecified powers. It would create many sovereignties, each having a right to determine the extent of its sovereignty by its own will. . . . Our constitutions, therefore, wisely rejected this indefinite word as a traitor of civil rights, and endeavored to kill it dead by specifications and restrictions of power, that it might never again be used in political disquisitions.[29]

While Justice Iredell would have afforded to states the sovereignty of kings, Taylor identifies whence kings appropriated the term. He observed that "the term 'sovereignty,' was sacrilegiously stolen from the attributes of God, and impiously assumed by kings."[30] He then condemned the importation of the concept into a republican system. "Though [kings] committed the theft, aristocracies and republicks have claimed the spoil."[31] Taylor denied that the U.S. Constitution included the concept:

> By our constitutions, we rejected the errors upon which our forefathers had been wrecked, and withheld from our governments the keys of temporal and eternal rights, by usurping which, their patriots had been converted into tyrants; and invested them only with powers to restrain internal wrongs, and to resist foreign hos-

[28] John Taylor, Construction Construed, and Constitutions Vindicated 25 (The Lawbook Exchange, Ltd. 1998) (1820).
[29] Id. at 26 (emphasis added).
[30] Id.
[31] Id.

> tility; without designing to establish a sovereign power of robbing one citizen to enrich another.[32]

By omitting *Chisholm* from the canon, students learn none of this. They are left unexposed to the radical yet fundamental idea that if anyone is sovereign, it is "We the People" as individuals, in contrast with the modern view that locates popular sovereignty in Congress or state legislatures, which supposedly represent the will of the people.

Another reason for teaching *Chisholm* is that it represents the "road not taken" with respect to constitutional amendments. Congress and the states chose to follow the advice of Justice Blair. "If the Constitution is found inconvenient in practice in this or any other particular," he wrote in his opinion, "it is well that a regular mode is pointed out for amendment."[33] Precisely because its holding was reversed two years later by the ratification of the Eleventh Amendment, *Chisholm* represents an opportunity to consider how the practice of constitutional interpretation by courts might have been different if the tradition of correcting Supreme Court decisions by express amendment had taken hold.

The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[34] As I discuss below, there are two distinctly different ways by which this language "reversed" the Court's decision in *Chisholm*. The first is the assumption of modern so-called Eleventh Amendment cases: the enactment of the Eleventh Amendment could imply that the Supreme Court had incorrectly interpreted the Constitution, and the Amendment therefore restores its original meaning. But, second, the enactment of the Eleventh Amendment could imply instead that the Court was correct in its interpretation of Article III, but the states were so unhappy with this implication of the original meaning of the Constitution that they sought successfully to change the original meaning by using Article V. Somewhere in between these two implications lies the

[32] Id. at 26–27.
[33] *Chisholm*, 2 U.S. (2 Dall.) at 468 (Blair, J.).
[34] U.S. Const. amend. XI.

possibility that the Court's decision was within the range of permissible interpretations of the original text, as was the Eleventh Amendment, in which case, once again, the Court was not mistaken about the original meaning of the Constitution.

In any case, if written amendments were socially accepted as a more normal reaction to an objectionable Supreme Court decision, the need perceived by some for the Supreme Court to engage in creative "interpretation" might be obviated. The rapid adoption of the Eleventh Amendment suggests that Article V constitutional amendments can be practical, provided the legal and political culture views amendments as a natural response *either* to a Supreme Court misinterpretation of the Constitution or to a correct interpretation of our imperfect Constitution with which there is widespread dissatisfaction. Today, lacking a culture of written amendment, correct but objectionable interpretations of the Constitution have to be treated as misinterpretations to justify judicial intervention.

II. WHY WE NEGLECT *CHISHOLM*

Before addressing what the Eleventh Amendment should be understood to imply about the correctness of the decision in *Chisholm*, it is worth pausing for a moment to ask why *Chisholm* and the adoption of the Eleventh Amendment are usually omitted from the canon—the set of cases almost always covered in the basic course on constitutional law. There are at least three plausible reasons. First, constitutional law is ordinarily taught doctrine by doctrine, rather than chronologically. If one organizes the course by modern doctrines, there is no obvious or natural place in which to include *Chisholm* because the nature of "sovereignty" is not among the doctrines normally taught in either the structures or the rights portions of constitutional law.

True, *Chisholm* and the Eleventh Amendment *could* be taught in a traditional "structures" course, and some professors surely do. Because, however, professors do not traditionally cover the concept of "sovereignty" in constitutional law and consider the doctrine of sovereign immunity an additional doctrinal topic—and a complex one at that—*Chisholm* itself is typically omitted. By the same token, when teaching constitutional law doctrine by doctrine, there is no natural place in which to cover the case of *Prigg v.*

Pennsylvania,[35] which concerns the meaning of the Fugitive Slave Clause. Even the pivotal case of *Dred Scott v. Sanford*[36] does not fit neatly into introductory courses devoted mainly to structural issues.

Were constitutional law taught chronologically rather than doctrine by doctrine, it would be an open invitation to begin the course by studying the first great constitutional controversy—the debate in Congress and within the Washington administration over the first Bank of the United States—and follow that with the question that occupied the Supreme Court in *Chisholm*, its first major decision: the nature of sovereignty in the United States. And it would be equally natural to move from there to coverage of the Marshall Court's famous decisions—*Marbury v. Madison*, *McCulloch v. Maryland*, and *Gibbons v. Ogden*—followed by the infamous slavery decisions of the Taney Court.

An opening sequence such as this would convey to students an entirely different impression of the subject of constitutional law than does the more typical approach that is organized by doctrine and often begins with *Marbury*. It would also make far more meaningful to students both Chief Justice Marshall's views on the nature of sovereignty that he articulates in *McCulloch*,[37] which otherwise seem superfluous, and Chief Justice Taney's views of sovereignty expressed in *Dred Scott*.[38] In other words, *Chisholm* is just the first of several landmark Supreme Court treatments of the nature of sovereignty, but dropping it from the canon distorts the teaching of this subject, as the Marshall Court opinions are studied out of context.[39]

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[35] 41 U.S. (16 Pet.) 539 (1842).

[36] 60 U.S. (19 How.) 393 (1856).

[37] See 17 U.S. at 404–05 ("The government of the Union, then . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

[38] See 60 U.S. at 404 ("The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.").

[39] To this sequence I also add the discussion of sovereignty articulated in James Madison's *Report to the Virginia House of Delegates*. See James Madison, Report on

The second reason we lead with *Marbury* rather than with *Chisholm* is that, until relatively recently, constitutional law professors in the post-Warren Court era viewed judicial review as an engine of social justice. Although enthusiasm for judicial review has waned in recent years—as witnessed by the recent interest in "judicial minimalism,"[40] "taking the Constitution away from the courts,"[41] and "popular constitutionalism"[42]—this current intellectual trend has yet to affect the organization of the basic courses in constitutional law. So judicial review still kicks off most casebooks that were devised years before interest developed in "the constitution outside the courts."[43]

A third reason for omitting *Chisholm* is that, according to "modern" Supreme Court decisions dating back to the 1890 case of *Hans v. Louisiana*,[44] the Eleventh Amendment repudiated *Chisholm*'s view of sovereignty, and, therefore, the decision itself is a dead letter. Even when professors include the Eleventh Amendment in the basic constitutional law course, they cover it well after *Marbury* and usually relegate *Chisholm* to a passing footnote in the coverage of the modern Eleventh Amendment cases.

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the Alien and Sedition Acts, *reprinted in* Writings 608, 611 (Jack N. Rakove ed., 1999) ("The constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. . . . The states then being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated . . . .").

[40] See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999).

[41] See Mark Tushnet, Taking the Constitution Away from the Courts (1999).

[42] See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

[43] See Mark Tushnet, Constitutional Interpretation Outside the Courts, 37 J. Interdisc. Hist. 415, 415 (2007) ("By the late twentieth century, the Constitution had become the property of lawyers and, especially, judges. When the public paid attention to constitutional issues, it focused on the Supreme Court. In the 1990s, however, several scholars in law and political science turned their attention to 'the Constitution outside the courts.' Much of their concern was normative. The hopes that they may have had for a liberal, reformist Supreme Court on the model of Chief Justice Earl Warren's had been decisively dashed. But they could draw support for their claim that legislatures had an important role in constitutional interpretation by gesturing toward the past, citing prominent examples of congressional and executive constitutional interpretation.").

[44] 134 U.S. 1 (1890).

This last reason for ignoring *Chisholm*—that the adoption of the Eleventh Amendment repudiated it—is the subject of the balance of this Essay. I contest the modern Court's claim that the Eleventh Amendment repudiated the view of sovereignty the Court had previously adopted in *Chisholm*. Although I am hardly the first person to question this claim,[45] I hope to add to the current discussion by offering a comparison of the wording of the Ninth and Eleventh Amendments that undercuts the claim that the Eleventh Amendment repudiated the individualist concept of sovereignty the Court relied upon in *Chisholm*. Consequently, I join a diverse group of other scholars who have concluded that the modern Supreme Court's so-called Eleventh Amendment line of cases is based on a faulty reading of the Eleventh Amendment dating back to *Hans* and is fundamentally misconceived.

III. WHY THE ELEVENTH AMENDMENT DID NOT REPUDIATE *CHISHOLM*'S APPROACH TO POPULAR SOVEREIGNTY

To assess the relationship between the Eleventh Amendment and *Chisholm*, it is useful to identify clearly the two alternative readings of the Amendment. First, the Amendment could be read narrowly as simply reversing the holding of *Chisholm* that states may be sued by citizens of other states in federal court. Of course, by also immunizing states from suits by subjects of foreign nations, the Amendment does more than this, which may be significant, as we shall see. According to this interpretation, the Eleventh

[45] See, e.g., Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515 (1978) (arguing that sovereign immunity is a common law doctrine and not constitutionally compelled); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 Stan. L. Rev. 1033 (1983) (arguing that the Amendment does not cover federal question or admiralty jurisdiction); John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983) (arguing from a historical standpoint that the Amendment's passage was primarily secured as part of a bargain to enforce the peace treaty); Vicki C. Jackson, Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity, 75 Notre Dame L. Rev. 953, 1010 (2000) (arguing that "sovereign immunity is in some respects unjust" and "the Eleventh Amendment need not be understood to have endorsed that injustice as a general proposition"); James E. Pfander, History and State Suability: An "Explanatory" Account of the Eleventh Amendment, 83 Cornell L. Rev. 1269 (1998) (arguing that the Amendment represented a compromise on fiscal policy between the states and the federal government).

Amendment leaves entirely intact the underlying individualist concept of popular sovereignty upon which the Court rested its holding. The Amendment merely negates one constitutional implication of this more general concept of popular sovereignty.

A second reading of the Amendment is the one adopted by the Supreme Court in *Hans v. Louisiana* that continues to be accepted by the Court today. In *Seminole Tribe of Florida v. Florida*, Chief Justice Rehnquist provided a concise summary of this position:

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each State is a sovereign entity in our federal system; and second, that "'[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'"[46]

Chief Justice Rehnquist excoriates the dissent for "relying upon the now-discredited decision in *Chisholm v. Georgia*."[47] And he affirms the Court's conclusion in *Hans* that the views of state sovereignty articulated by Justice Iredell in his dissent "were clearly right,—as the people of the United States in their sovereign capacity subsequently decided" when it enacted the Eleventh Amendment.[48]

The modern Eleventh Amendment doctrine, therefore, rests not on the literal text of the Amendment, but rather on what the Court claims to be its underlying principle—what Chief Justice Rehnquist referred to as the Amendment's "presupposition,"[49] and what Justice Kennedy referred to in *Alden v. Maine* as "fundamental postulates implicit in the constitutional design."[50] Chief Justice Rehnquist is quite forthright about his departure from the text in favor of a more reasonable construction:

> The dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man—we long have recog-

[46] 517 U.S. 44, 54 (1996) (citations omitted).
[47] Id. at 68.
[48] *Hans*, 134 U.S. at 14.
[49] *Seminole Tribe*, 517 U.S. at 54.
[50] 527 U.S. 706, 729 (1999).

> nized that blind reliance upon the text of the Eleventh Amendment is "'to strain the Constitution and the law to a construction never imagined or dreamed of.'" The text dealt in terms only with the problem presented by the decision in *Chisholm* . . . .[51]

As I have already noted, however, this last sentence is not quite true. The text of the Eleventh Amendment goes beyond the narrow problem of a state being sued by a citizen of another state in federal court and extends to suits by "citizens or subjects of any foreign state." Professor John Manning finds this to be significant:

> Indeed, so discriminating is the text that it parses a subcategory from amidst the final head of jurisdiction ("Controversies . . . between a State . . . and foreign States, Citizens or Subjects"), leaving untouched suits between a state and "foreign States" while restricting suits against states by "foreign . . . Citizens or Subjects." As a first cut, this fact suggests at least that the Amendment's framers carefully picked and chose among Article III, Section 2, Clause 1's categories in determining what jurisdictional immunity to prescribe.[52]

From this, Manning concludes that "[t]he Eleventh Amendment's careful inclusion and omission of particular heads of Article III jurisdiction creates at least a prima facie case that the amendment process entailed judgments about the precise contexts in which it was desirable (or perhaps politically feasible) to provide for state sovereign immunity."[53]

It is striking that the Court, beginning with *Hans* and continuing through today, has employed a version of originalism that, in recent years, has been repudiated by most originalists. This version is based on the original intentions of either the framers or ratifiers, rather than upon the original public meaning of the text they

[51] *Seminole Tribe*, 517 U.S. at 69 (quoting *Hans*, 134 U.S. at 15) (citation omitted); see also Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.").

[52] John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1739 (2004).

[53] Id.; see also Jackson, supra note 45, at 1000 ("The precision and specificity of its language lend themselves to (though they do not compel) a narrow reading.").

adopted. By using the principles, "presuppositions," or "postulates" allegedly held by the drafters to override the public meaning of the text itself, the Court in *Hans* employed the same version of original intent originalism that Chief Justice Taney used in *Dred Scott* when interpreting the meaning of "the People" in the Preamble and in the Declaration of Independence.[54]

Justice Bradley's opinion in *Hans* exemplifies a typical feature of original intent originalism: its reliance on the counterfactual hypothetical intentions of the framers.

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States[;] can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.[55]

How similar this sounds to Chief Justice Taney's method in *Dred Scott*.[56]

Given the certitude with which a majority of Justices now believe that the Court's interpretation of the text in *Chisholm* was erroneous and that the Eleventh Amendment merely reestablished

[54] The use of original intent to narrow the meaning of the text of the Reconstruction Amendments was a favorite technique of the Reconstruction Court, beginning as early as the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Although decided after Reconstruction ended, *Hans* exemplifies this interpretive practice. On the other hand, it could be argued that these background presuppositions and postulates informed the public meaning of Article III that four of five members of the Supreme Court in *Chisholm*, including so principal a framer as James Wilson, then proceeded to ignore.

[55] *Hans*, 134 U.S. at 15.

[56] See 60 U.S. at 416 ("It cannot be supposed that [the State sovereignties] intended to secure to [free blacks] rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State.").

the status quo ante, it is useful to remember that Chief Justice John Marshall apparently did not agree. In *Fletcher v. Peck*, he continued to affirm that the Court's reading of the Constitution in *Chisholm* was correct until the text was altered by the Eleventh Amendment.[57] In a much-neglected passage, he described the principle that states were amenable to suit in federal court as

> *originally ingrafted in that instrument*, though no longer a part of it. The constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual States. A state, then, which violated its own contract was suable in the courts of the United States for that violation. . . . This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.[58]

In other words, in *Fletcher*, Marshall explicitly rejected the proposition that *Chisholm* was incorrectly decided—the proposition first asserted in *Hans* some one hundred years after the adoption of the Eleventh Amendment. And, like the Court in *Chisholm*, Marshall rejected an argument "in favour of presuming an intention to except a case, not excepted by the words of the constitution."[59]

In his article, Manning defends the narrow interpretation of the Eleventh Amendment by making an important methodological claim about originalist textualism: specific constitutional text should be interpreted specifically according to its terms and not expanded, contracted, or contradicted by the purposes, original intentions, or underlying principles for which the text was adopted. "Given the heightened consensus requirements imposed by Article V," he writes,

> when an amendment speaks with exceptional specificity, interpreters must be sensitive to the possibility that the drafters were willing to go or realistically could go only so far and no farther with their policy. When such compromise is evident, respect for the minority veto indicates that those implementing the amendment should hew closely to the lines actually drawn, lest they disturb some unrecorded concession insisted upon by the mi-

[57] 10 U.S. (6 Cranch) 87 (1810).
[58] Id. at 139 (emphasis added).
[59] Id. (interpreting the Contracts Clause).

> nority or offered preemptively by the majority as part of the price of assent.[60]

"In short," Manning continues, "when the amendment process addresses a specific question and resolves it in a precise way, greater cause exists for interpreters to worry about invoking general sources of constitutional authority to submerge the carefully drawn lines of a more specific compromise."[61]

Manning suggests that one justification for the conclusion that the original public meaning of the Eleventh Amendment was limited to its precise terms is based on the legal background against which the Amendment was adopted.[62] The most salient background assumption for the Eleventh Amendment was the Court's decision in *Chisholm* in which four of five Justices denied the existence, as a general matter, of state sovereign immunity, with Justices Wilson and Jay specifically "assert[ing] that state sovereign immunity was flatly incompatible with the premises of our republican form of government."[63]

According to the *Chisholm* Court, states may be sued by individuals in federal court to enforce their private contractual rights; and the states' assertion that the text of Article III should be qualified by an unenumerated immunity from suit based on their sovereignty is inconsistent with the fundamental principles of republicanism on which the Constitution rests. The Court's decision in *Chisholm*, therefore, put before Congress, the states, and the people of the nation a proposition concerning the nature of sovereignty that, while it may have been implicit in the text of Article III, might not have been widely apparent. With this issue now unequivocally presented by the decision in *Chisholm*, did Congress respond with an amendment squarely rejecting the Court's view of popular sovereignty as resting in the People as individuals rather than in the states? It did not. Instead, it responded with a very narrow, precisely worded withdrawal of judicial power—subject-matter jurisdiction—in two specific circumstances.

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[60] Manning, supra note 52, at 1735–36.

[61] Id. at 1736.

[62] See id. at 1743 ("[T]o evaluate the Amendment's limited enumeration of exceptions, it is helpful to know the legal baseline against which the adopters acted.").

[63] Id. at 1743–44.

Would the Eleventh Amendment have been ratified so swiftly, or at all, if it had been more broadly worded? Manning contends that we can never know the answer to this question. The wording of the Amendment could well have been a product of compromise within the drafting process or have been drafted in anticipation of potential, but not yet realized, opposition to a broader claim of state sovereignty. To interpret the Amendment more broadly than the language that was actually proposed and ratified is to run a serious risk of overriding the desires of either a majority or *a potential ratification-blocking minority* who would never have consented to a broader claim of state power. Furthermore, it may well have been the case that nationalist Federalists in Congress gave the states the bare minimum needed to mollify them. Again, because it is impossible to know for certain, the Court should adhere to the public meaning of the text actually adopted, rather than overriding specific text by appealing to an allegedly broad underlying purpose or principle.

Manning's summary of his argument here is worth quoting at length:

> Neither Article III nor any other provision of the original Constitution dealt directly with the problem of sovereign immunity, and American society had had no previous occasion to confront the question squarely, one way or the other. When dissatisfaction with *Chisholm* brought the Article V process to bear on that previously unanswered question, the text that emerged quite clearly went so far and no farther in embracing state sovereign immunity. Perhaps the resultant line-drawing merely reflected an inability to secure the requisite supermajorities for a broader Amendment. But if so, that would be fully consistent with the expected play of Article V. Especially in the context of an amendment process designed to protect political minorities, one cannot disregard the selective inclusion and exclusion implicit in such careful specification. If American society for the first time was explicitly confronting the appropriate limitations on potential Article III jurisdiction over suits against states, one should perhaps attach significance not only to what the drafters placed in the Amendment, but also to what they deemed necessary or even prudent to exclude. To do otherwise would risk upsetting

> whatever precise compromise may have emerged from the carefully drawn lawmaking process prescribed by Article V.[64]

Although I find persuasive Manning's argument against using underlying purposes to expand the specific wording of the Eleventh Amendment, he fails to consider another possible defense of the Court's so-called Eleventh Amendment jurisprudence. Constitutional texts not only have a literal grammatical meaning in themselves; they also have what Professor Lawrence Solum has called "constitutional implicature."[65] These implications can be express references in the text to concepts or can be implied affirmances of underlying assumptions that went unmentioned in the text. Shifting the assumptions underlying the text would distort, rather than faithfully adhere to, the public meaning of the text.

An implication of the text is not the same as its purpose. A piece of text can have many purposes, and these purposes are largely extratextual. A particular provision of a text is very likely to be either under- or overinclusive of its underlying purposes, or both. Moreover, while there was a demonstrable consensus concerning the adoption of a particular wording of a text, there may have been no comparable consensus about underlying purposes. In contrast, an implication of the text is a product of its *meaning*, though it may not be expressed in so many words. While saying one thing, it may imply something compatible with, though beyond, what it says. And the original public meaning of the Constitution might be distorted if this implication is later denied or reversed, while the specific expressed meaning of the text is preserved.

A good example of constitutional implicature can be found in the Ninth Amendment, the only other provision of the Constitution explicitly to provide a rule for how the Constitution "shall not be construed." The Ninth Amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[66] Read literally, the Ninth Amendment rejects just one construction of the text: a construc-

[64] Id. at 1748–49.

[65] See Posting of Lawrence Solum to Legal Theory Blog, Sentence Meaning and Clause Meaning, http://lsolum.typepad.com/legaltheory/2006/12/over_at_books_d.html (Dec. 12, 2006, 6:25 a.m.). See generally Paul Grice, Studies in the Way of Words 23–57 (1991) (discussing "conversational implicature").

[66] U.S. Const. amend. IX.

tion that is based on "the enumeration in the Constitution, of certain rights." Its injunction applies only when the enumeration of certain rights in the Constitution is offered as a reason for denying others retained by the people. According to this reading, the Ninth Amendment would have no application whatsoever outside the assertion of this specific misconstruction based on the enumeration of rights.

Before questioning this claim, it is important to stress that even this limited reading of the Ninth Amendment as solely a "rule of construction" in this one circumstance would render it extremely important. Such a reading would specifically negate a key claim of the most important footnote in Supreme Court history that says, in relevant part: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be *within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[67] Footnote Four of *United States v. Carolene Products* is directly asserting that the enumeration in the Constitution of certain "express prohibitions" is reason "to deny or disparage" any constitutional claims based on "other rights retained by the people." Even were the presumption of constitutionality affirmed in *Carolene Products* simply a burden-shifting presumption, it would *disparage* the other rights retained by the people, though perhaps not deny them altogether. But later, in cases such as *Williamson v. Lee Optical*,[68] the "presumption" was rendered effectively irrebuttable, resulting in the effective *denial* of unenumerated rights until *Griswold v. Connecticut*.[69]

Today's judicial conservatives urge a return, not to the original meaning of the Ninth Amendment—even narrowly construed as above—but to the New Deal Court's philosophy of Footnote Four when they disparage the protection by the courts of any unenumerated rights. For example, Justice Scalia, in his dissent in *Troxel v. Granville*, wrote that "the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them,

[67] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (emphasis added).

[68] 348 U.S. 483 (1955).

[69] 381 U.S. 479 (1965).

and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."[70] Notice Justice Scalia's rather blithe identification of the legislature with the people themselves, an equation that was widely rejected at the founding and expressly denied by the Supreme Court in *Chisholm*.

I want to claim, however, that the text of the Ninth Amendment does more than expressly reject the construction of the Constitution provided by Footnote Four; it also implies the *existence* of other rights retained by the people. Why? For one thing, it refers explicitly to these "other[]"[71] rights. While it does not expressly call for the affirmative protection of these rights, the rule of construction it proposes would make absolutely no sense if there were no such other rights. Why else would an entire amendment have been added to the Constitution barring a construction of enumerated rights that would deny or disparage these other rights? Of course, we have overwhelming historical evidence, independent of the text, that the Founders believed that the people possessed individual natural rights. But the Ninth Amendment adds a textual affirmation of this underlying assumption of the text that could otherwise be denied. Therefore, notwithstanding the limits of its express injunction, the existence of the Ninth Amendment's reference to other rights retained by the people provides important textual support for the following conclusion: *any* construction of the Constitution that results in the denial of these rights would violate the Constitution's original public meaning, not merely a construction based on the enumeration of certain rights.

Does my claim that the rule of construction provided by the Ninth Amendment has important implications for the protection of other rights that are not to be denied shed any light on the meaning of the Eleventh Amendment? Could the Supreme Court's invocation of the "presupposition" of state sovereignty likewise be justified as an *implication* of its specific text rather than as a reflection of the underlying *purpose* of the Eleventh Amendment as characterized by John Manning? Just as the Ninth Amendment presupposes and textually affirms the existence of unenumerated rights,

[70] 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).
[71] See U.S. Const. amend. IX.

might the Eleventh Amendment not presuppose and textually affirm the existence of state sovereignty? This seems to be what Chief Justice Rehnquist was suggesting when he dismissed a "blind reliance" on the text of the Amendment in *Seminole Tribe*.[72] A "blind reliance" would be limiting the text to its terms while denying what it implies, whether a blind reliance on the text of the Ninth Amendment that limits it solely to a narrow rule of construction or a blind reliance on the text of the Eleventh Amendment that limits it solely to barring two specific types of plaintiffs suing state governments in federal court.

A careful comparison of the Ninth and Eleventh Amendments, however, undermines, rather than supports, a claim that the text of the Eleventh Amendment implies the rejection of the broad reasoning of *Chisholm*. First, and most obviously, unlike the Ninth Amendment's explicit reference to "others retained by the people," the Eleventh Amendment contains no explicit reference either to a principle of state sovereignty or to a doctrine of state sovereign immunity. The Ninth Amendment's injunction against drawing a particular conclusion from "the enumeration in the constitution of certain rights" contains within it an express reference to—and therefore an implied affirmation of—the "other" rights "retained by the people," coupled with the additional implication that these rights not be "denied or disparaged."

To reach a contrary conclusion about the Ninth Amendment would require acceptance of the proposition that there are no other rights retained by the people or that those rights that do exist may be denied or disparaged at the will of the legislature, provided *only* that such a denial is not justified on the ground that some rights were enumerated. But why foreclose this, *and only this*, justification of denying unenumerated rights by means of a constitutional amendment? Clearly, the denial of unenumerated rights was the general evil to be avoided, and the Amendment was included to guard against a particular source of this evil that was aggravated by the addition of "the enumeration in the Constitution of certain rights." And the source of this evil is the foreseeable assertion of the doctrine of *expressio unius*: to express or include one thing implies the exclusion of the other.

[72] See supra text accompanying notes 46–51.

Although the text of the Eleventh Amendment lacks any comparable textual reference to state sovereignty or state sovereign immunity, would it nevertheless be fair to infer these concepts from what the text does affirm? I think not. To see why, let us imagine a hypothetical amendment dealing with unenumerated rights whose origin would parallel that of the Eleventh. Recall that for two years after the ratification of the Constitution, there was no Bill of Rights, so there was no express prohibition on takings of private property for public use. Suppose that during this period, the federal government took land for the public use of building a post office without making just compensation to the property owner. When the owner brings suit for compensation, the government denies the existence of any such right to compensation.

Now suppose further that, notwithstanding the absence of an express Takings Clause, the Supreme Court holds that the property owner is nevertheless entitled to just compensation. The opinions of the Justices are clearly based, first and foremost, on an extensive analysis of the preexistent natural rights retained by the people that no republican government can properly deny or disparage, including the rights to life, liberty, property, and the pursuit of happiness. One Justice in the majority—call him "Justice Chase"—contends that

> [t]here are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.[73]

Textually, the Court grounds its holding in the Necessary and Proper Clause, reasoning that a law authorizing a taking of private property for public use without just compensation is not a "proper" law. A lone dissenter—call him "Justice Iredell"—protests this reliance on unenumerated rights. In his words, "[i]t is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a

[73] Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (emphasis omitted).

government, any Court of Justice would possess a power to declare it so."[74]

Far from being entirely hypothetical, the Court eventually used just this type of reasoning when it first required states to make just compensation for their takings under the Due Process Clause of the Fourteenth Amendment. In *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, it interpreted the Fourteenth Amendment as barring states from taking property for public use without just compensation, not by "incorporating" or even invoking the expressed Takings Clause of the Fifth Amendment, but because the "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions."[75] Consequently,

> if . . . a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.[76]

Now imagine that Congress, in direct response to this hypothetical "takings" decision of the Court, seeks to "overrule" it by enacting a constitutional amendment. Two versions are proposed. The first reads, "The judicial power of the United States shall not be construed to encompass the power to grant just compensation as a remedy for takings of private property for public use." The second reads, "This Constitution shall not be construed to encompass a judicial power to enforce any right not expressly enumerated herein." Congress then chooses to propose, and the states to ratify, the first rather than the second of these amendments.

A century later it is argued that the enacted text presupposes that no unenumerated rights are ever to be judicially protected. Given this sequence of events, would this be a permissible con-

[74] Id. at 398 (Iredell, J.).
[75] 166 U.S. 226, 235–36 (1897).
[76] Id. at 236.

struction of the amendment actually ratified? Would it be reasonable to claim that the substance of the second proposed version was implied by adopting the text of the first? Or would it instead be more reasonable to conclude, first, that the scope of the amendment actually adopted was limited solely to takings; and, second, that by adopting the first version rather than the second, Congress declined to reverse the broader reasoning of the Court that put the issue of the right to compensation before the Congress? In other words, unlike the broader version, the narrowly worded amendment left the broad reasoning of the Court intact.

Why Congress might have chosen the narrower amendment may be unknowable. Perhaps it accepted the Court's general reasoning about unenumerated constitutional rights but rejected its implication for the particular right to compensation for public takings. Perhaps it disliked the Court's general reasoning but was fearful that the more general amendment would get hung up in the ratification process, and it took what it felt confident it could get. Manning's point is that we cannot know for sure everything that might have led Congress to choose the narrow formulation.

Would it change the analysis if only the narrow version of the amendment had been proposed, so that the broader wording was not directly rejected in favor of the narrower reading? While perhaps reducing our certainty a tiny bit, I think such a change in the hypothetical does not affect the ultimate conclusion. For in the hypothetical story that produced the amendment, it was the notorious assertion by the Court of a general judicial power to protect unenumerated rights that engendered the controversy. Knowing this, Congress nevertheless addressed just one application of this more general power. The conclusion remains that Congress left this judicially claimed power intact. This is not to claim that the original judicial opinion was necessarily a correct interpretation of the Constitution but only that the subsequent hypothetical amendment narrowly reversing its holding did not challenge its interpretive correctness.

The narrowly drafted words of the Eleventh Amendment were adopted by Congress in the face of the Court's open denial of state sovereignty, especially in the opinions of Justice Wilson and Chief Justice Jay. In so doing, Congress turned away from more broadly

worded amendments. For example, Massachusetts Congressman Theodore Sedgwick initially proposed the following amendment:

> That no state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States . . . .[77]

But even this more sweeping grant of immunity speaks in the jurisdictional terms of Article III and concerns the scope of the judicial power, rather than confronting directly the Supreme Court's denial of the concept of state sovereignty itself. The terms of the public debate over *Chisholm* focused primarily on the "suability" of states, not on their "sovereignty."[78] It is not clear whether Chief Justice Rehnquist believed that the Eleventh Amendment should be viewed as a repudiation of the principle that the people and not the states are sovereign. It is, however, certain that he adduced no evidence that those who proposed and ratified the Eleventh Amendment did so in order to establish that the prerogatives of state government equaled those of the English King.

CONCLUSION: THE DANGEROUSNESS OF *CHISHOLM*

Let me conclude by emphasizing what I am *not* claiming in this Essay. Despite the time I have spent discussing the Eleventh Amendment, this is not an essay about its original meaning. A rich

[77] 5 The Documentary History of the Supreme Court 605–06 (Maeva Marcus ed., 1994); see id. at 597 ("The motion was tabled and apparently never taken up again.").

[78] See Pfander, supra note 45, at 1279–80 ("By treating the problem as one of state suability, I have consciously chosen to adopt the usage of the generation that framed and ratified the Eleventh Amendment, and to abandon the language of state sovereign immunity that modern courts and commentators frequently use to characterize the Eleventh Amendment. . . . This modern talk of sovereign immunity suggests that the Eleventh Amendment marked a complete Anti-Federalist victory in the battle over state suability; in truth, the two parties appear to have reached a compromise. In any event, once the Court begins to conceptualize the problem of state suability in terms of a free-standing principle of "sovereign immunity," rather than as a technical problem in the parsing of the language of judicial power, it unleashes a dangerous and unwieldy restriction on the federal courts' power to enforce federal-law restrictions against the states. By returning to the language of state suability, I hope to cabin the influence of this spurious principle of sovereign immunity." (footnotes omitted)).

and challenging literature examining this issue already exists. Nor am I proposing that we start our teaching of constitutional law by examining the scope and meaning of the Eleventh Amendment. That may well be too complex for students just beginning their study of the Constitution to comprehend.

Rather, my only claim about the Eleventh Amendment is to identify a single meaning it did *not* have. Contrary to what the Supreme Court now maintains, the Eleventh Amendment was not a repudiation of the individualist conception of popular sovereignty articulated by Justice Wilson and Chief Justice Jay. The narrow and technical language of the Eleventh Amendment could not reasonably have been understood either as a repudiation of the grand and magisterial idea that "We the People" are sovereign or as establishing the power of the English monarchy as the model of state government authority. Given all this, I submit that beginning the study of constitutional law with the deep issues in *Chisholm*, as well as with the importance of constitutional amendments, is preferable to beginning with Chief Justice Marshall's defense of judicial review in *Marbury* as has become the custom.

Second, I am not claiming that Congress was affirming the broader reasoning of the case when it reversed only the narrow holding of *Chisholm*. John Manning seems to suggest otherwise,[79] and he may well be right. But, for the present, I am merely denying that the broader principle of state sovereignty to which Chief Justice Rehnquist referred was a "presupposition" of the text of the Eleventh Amendment. So far as constitutional implicature is concerned, the Eleventh Amendment leaves the reasoning of *Chisholm* as it was. As such, it must be judged on its merits. If it was wrongly decided, the Eleventh Amendment adds little, if any, support for that conclusion.

Nor am I claiming in this Essay that the Court in *Chisholm* was correct in its conception of popular sovereignty as belonging to the people as individuals and not to the state or state governments, either as a matter of constitutional theory or of history. Of course, my sympathies on this subject should be obvious. That *Chisholm*

[79] See Manning, supra note 52, at 1749 ("[O]ne cannot disregard the selective inclusion and exclusion implicit in such careful specification . . . [and] should perhaps attach significance not only to what the drafters placed in the Amendment, but also to what they deemed necessary or even prudent to exclude.").

was decided so close to the enactment of the Constitution—in sharp contrast to the Court's decision in *Hans* one hundred years later—and that the individualist concept of popular sovereignty was affirmed by the eminences of James Wilson and John Jay is powerful evidence that "the People" to which the Constitution refers was indeed an individualist concept. At a minimum, it is plainly not anachronistic to attribute so individualist a sense of sovereignty to the era.

The proposition that "joint sovereignty" resides in the individuals who comprise the people is also textually supported by the wording of the Tenth Amendment, which confirms that all powers not delegated to the general government by the Constitution are reserved to the states respectively, *or to the people*. If at least some of the "other" rights retained by the people to which the Ninth Amendment refers belong to individuals, as I believe the evidence shows,[80] it would be exceedingly odd if "the People" to which the Tenth Amendment refers are not also individuals. And "the People" is explicitly distinguished from "the states." I confess that I am beginning to suspect that the purely collective reading of "the People" by Professor Akhil Amar and others may well be anachronistic, but to establish this proposition would require more investigation into the historical sources than I have yet to attempt.

My only claim with respect to the Eleventh Amendment is that it did not displace the individualist concept of the people affirmed by the Court, whether rightly or wrongly, in *Chisholm*. And, unlike the Ninth Amendment, which makes no sense whatsoever without presupposing the existence of the very unenumerated rights to which it refers, the Eleventh Amendment makes perfect sense whether or not you assume the existence of state sovereignty. It can fairly be read as carving out of federal jurisdiction suits brought by two types of parties, an alteration in the jurisdiction afforded by Article III that required a *change* in the original Constitution to accomplish. At a minimum, the conclusion that *Chisholm*'s individualist concept of sovereignty was not repudiated by the Eleventh Amendment justifies including this concept among

[80] See Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 Tex. L. Rev. 1 (2006).

the contenders for how popular sovereignty was conceived at the time of the founding.

But putting aside the Eleventh Amendment, the really interesting challenge posed by *Chisholm* is its individualist theory of popular sovereignty: what *does* it mean to say that the people are "joint sovereigns"? This brings me to a final reason why *Chisholm* is not among the canon of constitutional law cases of which all learned lawyers must be aware. *Chisholm* may be ignored for the very same reason that the Ninth Amendment is ignored: it is simply too radical. Indeed, the individualist popular sovereignty affirmed in *Chisholm* is the opposite side of the very same coin as the "other" individual rights retained by the people, as affirmed by the Ninth Amendment.[81] It may well be that the concept of sovereignty affirmed in *Chisholm*, the original meaning of the Ninth Amendment, and the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment are all ignored by the Court because the implications of taking them seriously are so momentous. And law professors tend to internalize the Supreme Court's boundaries on respectable legal argument (and vice versa).

If nothing else, *Chisholm* teaches that the concept of sovereignty as residing in the body of the people, as individuals, was alive at the time of the founding and well enough to be adopted by two Justices of the Supreme Court, who were also influential Founders. Likewise, *Chisholm* shows that the bold assertion that states inherited the power of kings (subject only to express constitutional constraints) was rejected by four of five Justices when the issue first arose. By omitting *Chisholm v. Georgia*, the first great constitutional case, from the canon of constitutional law, we have turned our gaze away from perhaps the most fundamental question of constitutional theory and the radical way it was once answered by the Supreme Court. We law professors have hidden all this from our students; and by hiding it from our students, we have hidden it from ourselves.

[81] See id. (affirming the individual natural rights model of the Ninth Amendment).

2012

Does the Constitution Protect Economic Liberty?

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Georgetown Public Law and Legal Theory Research Paper No. 12-033
Georgetown Business, Economics and Regulatory Law Research Paper No. 12-011

35 Harv. J.L. & Pub. Pol'y 5-12 (2012)

DOES THE CONSTITUTION PROTECT ECONOMIC LIBERTY?

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It is my job to defend the proposition that the Court in *Lochner v. New York*[1] was right to protect the liberty of contract under the Fourteenth Amendment. I will not be defending its use of the Due Process Clause[2] to reach its result. As I shall explain, the Court should have been applying the Privileges or Immunities Clause.[3] Nor will I be contending that the Court was correct in its conclusion that the maximum-hours law under consideration was an unconstitutional restriction on the liberty of contract.[4] Although the statute may well have been unconstitutional, I will not take the time to evaluate that claim.

Instead, I want to focus on whether the Constitution of the United States protects economic liberty. To clarify the issue, let me begin by defining "economic liberty." I define economic liberty as the right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing. If the Constitution protects these rights, then the Constitution does protect economic liberty. The evidence that the Constitution protects rights of private property and contract is overwhelming.

Let us begin with the constitutional protection afforded economic liberty at the national level. The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[5] But what were these "other" rights "retained" by the people? The evidence shows that this was a reference to natural rights.

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1. 198 U.S. 45 (1905).
2. U.S. CONST. amend. XIV.
3. *Id.*
4. *Lochner*, 198 U.S. at 53.
5. U.S. CONST. amend. IX.

Consider an amendment drafted by Roger Sherman, who served with James Madison on the House Select Committee to draft the Bill of Rights.[6] Sherman's second amendment begins as follows: "*The people* have certain *natural rights* which are *retained* by them when they enter into Society . . . ."[7] In this passage, Sherman uses all the terminology the committee eventually employed in the Ninth Amendment—"the people," "rights," and "retained"—and the "rights" "retained" by "the people" are then explicitly characterized as "natural rights."

But what was meant by the term "natural rights"? Sherman's draft provides some examples: "Such are the rights of Conscience in matters of religion; *of acquiring property* and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances."[8] The protection of property is at the heart of this list.

Sherman's rendition of natural rights was entirely commonplace. Consider some other examples. Another amendment proposed in the Senate reads: "That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are *the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety*."[9] Similar provisions were proposed by state ratification conventions. Virginia offered an identical amendment as its first proposed amendment.[10]

Many state constitutions contained similar language. Massachusetts: "All people are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; *that of acquiring, possessing, and protecting property*; in fine,

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6. *See Roger Sherman's Draft of the Bill of Rights*, *in* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 351 app. A (Randy E. Barnett ed., 1989).

7. *Id.* (emphasis added).

8. *Id.* (emphasis added).

9. 6 DEBATES IN CONGRESS 320 (Gales and Seaton 1838) (emphasis added).

10. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 657 (Jonathan Elliot ed., 1830), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html.

that of seeking and obtaining their safety and happiness."[11] New Hampshire: "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; *acquiring, possessing and protecting property;* and, in a word, of seeking and obtaining happiness."[12] Pennsylvania: "All men are born equally free and independent, and have certain natural, inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of *acquiring, possessing and protecting property*, and of pursuing and obtaining happiness and safety."[13] Vermont: "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; *acquiring, possessing*, *and protecting property*, and pursuing and obtaining happiness and safety."[14]

All these provisions share the affirmation that the natural, inherent, and inalienable rights retained by the people include the rights to acquire, possess, and protect property and the right to pursue happiness and safety. Today, we would characterize the right to acquire, use, and possess property as "economic," while characterizing the right to pursue happiness and safety as "personal." But these provisions show that the distinction between economic and personal liberty is anachronistic as applied to the Founding when these unenumerated natural rights were considered inextricably intertwined.

Of course, like the rest of the Bill of Rights, the Ninth Amendment only restricts the power of the federal government. What of the States? After the Civil War, the Republicans in Congress struggled to protect the newly freed slaves in the South from the Black Codes that Southern states adopted to reestablish white domination.[15] In 1866 Congress enacted the first Civil Rights Act.[16] This Act mandated that:

> [All citizens of the United States] of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same *right . . . to make*

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11. MASS. CONST. art. I, *amended by* MASS. CONST. art. CVI (emphasis added).

12. N.H. CONST. art. II (emphasis added).

13. PA. CONST. of 1776, art. I, § 1 (emphasis added).

14. VT. CONST. of 1777, ch. I, art. I (emphasis added).

15. *See generally* GARRETT EPPS, DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST–CIVIL WAR AMERICA (2006).

16. Civil Rights Act of 1866, 14 Stat. 27.

> *and enforce contracts,* to sue, be parties, and give evidence, *to inherit, purchase, lease, sell, hold, and convey real and personal property*, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .[17]

Congress identified the civil rights of *all* persons, whether white or black, as the rights "to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." At the very core of civil rights in 1866, therefore, were the economic rights of contract and property, although as with the Founding it is anachronistic to impose the modern distinction between economic and personal rights on that period.

So, where in the Constitution did Congress find the power to enact the Civil Rights Act protecting the economic rights of contract and property against infringements by the States? For many readers, the answer may be surprising: It is the Thirteenth Amendment, the first section of which prohibits "slavery [or] involuntary servitude, except as a punishment for crime . . . ."[18] And the second section of which gives Congress the "power to enforce this article by appropriate legislation."[19]

If the argument that the Thirteenth Amendment empowered Congress to protect the economic rights of contract and property seems strained, it is only because we today forget that slavery was, first and foremost, an economic system that was designed to deprive slaves of their economic liberty. The key to slavery was labor. The fundamental divide between the Slave Power and abolitionists concerned the ownership of this labor.[20] Could a person be owned as property and be denied the right to refrain from laboring except on terms contractually agreed upon? Or did every person own him or herself, with the inherent right to enter into contracts by which they could acquire property in return?

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17. *Id.* (emphasis added).

18. U.S. CONST. amend. XIII, § 1.

19. U.S. CONST. amend. XIII, § 2.

20. *See generally* Stanley L. Engerman & Robert A. Margo, *Free Labor and Slave Labor*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S at 291 (Douglas Irwin & Richard Sylla eds., 2010); Jonathan A. Glickstein, *Poverty is Not Slavery: American Abolitionists and the Competitive Labor Market*, *in* ANTISLAVERY RECONSIDERED: NEW PERSPECTIVES ON THE ABOLITIONISTS 195 (Lewis Perry & Michael Fellman eds., 1979).

Republican adherents of "free labor" held the second of these views.[21] Therefore by abolishing slavery, Republicans in Congress maintained that the Thirteenth Amendment ipso facto empowered them to protect the economic liberties that slavery had for so long denied, in particular, the "right . . . to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . ."[22]

This defense of the constitutionality of the Civil Rights Act under the Thirteenth Amendment can be simplified as follows: The Thirteenth Amendment prohibited slavery and *the opposite of slavery is liberty*. Any unwarranted restrictions on liberty—whether personal or economic—are simply partial "incidents" of slavery.[23] Therefore, Section 2 of the Thirteenth Amendment empowered Congress to protect any citizen from unjust restrictions on liberty.

Defending the Civil Rights Act in Congress, Michigan Senator Jacob Howard noted about a slave:

> He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or by descent or inheritance. He did not own the bread he earned and ate . . . .
>
> Now, sir, it is not denied that this relation of servitude between the former negro slave and his master was actually severed by this amendment. But the absurd construction now enforced upon it leaves him without family, without property, without the implements of husbandry, and even without the right to acquire or use any instrumentalities of carrying on the industry of which he may be capable . . . .[24]

In sum, by abolishing the economic system of slavery, the Thirteenth Amendment empowered Congress to protect the economic system of free labor and the underlying rights of property and contract that defined this system.

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21. *See* Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1269, 1285 (1998).

22. Civil Rights Act of 1866, 14 Stat. 27.

23. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968).

24. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866) (statement of Sen. Jacob Howard).

To the dismay of Congressional Republicans, President Andrew Johnson vetoed the Civil Rights Act.[25] In his lengthy veto message, Johnson, a Tennessee Democrat, conceded that the civil rights identified in the Act "are, by Federal as well as State laws, secured to all domiciled aliens and foreigners, even before the completion of the process of naturalization . . . ."[26] But he nevertheless protested that this claim of congressional power "must sap and destroy our federative system of limited powers and break down the barriers which preserve the rights of the States."[27] In response to Johnson's states' rights argument, super-majorities in both the House and Senate overrode his veto.[28] Congress then proposed the Fourteenth Amendment to constitutionalize the rights protected by the Civil Rights Act—and more.[29]

The privileges or immunities of citizens protected by the Fourteenth Amendment were not limited to the natural rights enumerated in the Civil Rights Act; they also included the personal rights of American citizens enumerated in the original Bill of Rights.[30] Further, the Fourteenth Amendment did not adopt the Civil Rights Act's anti-discrimination language.[31] Instead, the Amendment protected the privileges or immunities of *any* citizen, whether white or black, male or female, from any abridgment whatsoever, not merely from discrimination. And because Democrats in southern states, who viciously attacked the Civil Rights Act, were eventually going to resume their seats in Congress, Republicans sought

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25. President Andrew Johnson, Veto of the Civil Rights Bill (Mar. 27, 1866), *available at* http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.

26. *Id.*

27. *Id.*

28. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 233 (1988).

29. *See id.* at 70–71. But *cf.* EPPS, *supra* note 15, at 164–83 (explaining how the legislative origin and movement of a constitutional amendment paralleled rather than succeeded the origin and movement for the Civil Rights Act). According to this chronology, each initiative employed a different means to accomplish the same end of protecting the fundamental rights of freedman and Republicans in the South. Still, Epps does not deny that the passage of the Fourteenth Amendment was motivated, at least in part, by the need to respond to Johnson's veto.

30. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3058–88 (2010) (Thomas, J., concurring in the judgment). *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1987).

31. *Compare* U.S. CONST. amend. XIV, *with* The Civil Rights Act of 1866, 14 Stat. 27.

to place these guarantees beyond the power of any future Congress to repeal.[32]

But what the Republicans in Congress giveth, the Supreme Court taketh away. Just five years after the Fourteenth Amendment's enactment, the Court in *The Slaughter-House Cases*[33]—by a vote of five-to-four—effectively gutted the Privileges or Immunities Clause by limiting its scope to purely national rights, such as the right of a citizen to be protected while traveling on the high seas; it also adopted Andrew Johnson's narrow reading of the Thirteenth Amendment.[34] Ever since, the economic liberties protected by the Constitution have been questioned by those who would put the economic powers of the slaveholder into the hands of Congress and state legislatures.

Of course, these constitutionally protected economic liberties can still be reasonably regulated. After all, even the First Amendment's rights of freedom of speech and assembly are subject to reasonable "time, place, and manner" regulations.[35] As Justice Bradley explained in his dissenting opinion in *Slaughter-House*, "[t]he right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe *the manner of their exercise*, but it cannot subvert the rights themselves."[36]

By eliminating the Privileges or Immunities Clause, while distorting the meaning of the Due Process and Equal Protection Clauses—along with ignoring the original meaning of the Ninth Amendment—the Supreme Court has deprived Americans of these express protections of *all* their natural rights, including their rights "to make and enforce contracts" and "to inherit, purchase, lease, sell, hold, and convey real and personal property."[37] But thanks to the foresight of men like Virginia's James Madison, who conceived the Ninth

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32. *See* EPPS, *supra* note 15, at 164–83.
33. 83 U.S. 36 (1872).
34. *Id.* at 69–70, 79.
35. *See* Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941).
36. *Slaughter-House*, 83 U.S. at 114 (Bradley, J., dissenting) (emphasis added).
37. Civil Rights Act of 1866, 14 Stat. 27.

Amendment,[38] and Ohio's John Bingham, who drafted the Privileges or Immunities, Due Process and Equal Protection Clauses of the Fourteenth Amendment,[39] these protections of our natural rights—both personal *and* economic—remain a part of the written Constitution of the United States. They can be denied, they can be disparaged, and they can be abridged, but they have not been repealed.

38. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 235–42 (2005).

39. *See* EPPS, *supra* note 15, at 164–83.

CONSENTING TO FORM CONTRACTS

Randy E. Barnett[*]

There is a remarkable dissonance between contract theory and practice on the subject of form contracts. In practice, form contracts are ubiquitous. From video rentals to the sale of automobiles, form contracts are everywhere. Yet contract theorists are nothing if not suspicious of such contracts, having long ago dubbed them pejoratively "contracts of adhesion." Indeed, I would wager that a plurality of contracts teachers would favor a judicial refusal to enforce form contracts altogether—or could not explain exactly why they would reject such a suggestion.

In this essay, I will identify one theoretical source of the common antipathy towards form contracts and why it is misguided. I contend that the hostility towards form contracts stems in important part from an implicit adoption of a promise-based conception of contractual obligation. I shall maintain that, when one adopts (a) a consent theory of contract based not on promise but on the manifested intention to be legally bound and (b) a properly objective interpretation of this consent, form contracts can be seen as entirely legitimate—though some form terms may properly be subject to judicial scrutiny that would be inappropriate with nonform agreements. In this regard, I shall endorse the much-maligned approach of the United States Supreme Court in its decision in *Carnival Cruise Lines v. Shute*.[1] With this account of form contracts in mind we can better appreciate the wisdom of that other maligned contracts case: *Hill v. Gateway 2000, Inc.*[2]

I. THE CASE AGAINST FORM CONTRACTS

Ever since Friedrich Kessler dubbed them "contracts of adhesion,"[3] form contacts have been under a scholarly cloud. The reason is

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1. 499 U.S. 585 (1991).

2. 105 F.3d 1147 (7th Cir. 1997). Since I will be evaluating and partially defending the court's decision in *Gateway*, I should disclose that in 1999 I was retained and compensated by Gateway to express an opinion to the American Law Institute and the National Conference of Commissioners on Uniform State Laws on the merits of proposed revisions of Article 2 of the Uniform Commercial Code that would have effectively reversed the holding of that case. I have had no further relationship with Gateway since then.

3. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of*

straightforward: If contract is based on promise, then how can someone have promised to do something in a writing he or she has not and was not expected to have read? As I shall explain, whether this presents an intractable difficulty for form contracts depends not only on whether one views a contract as based on promise, but also on whether one adopts a subjective or objective theory of assent and which objective theory one adopts.

A. *Form Contracts, Promising, and the Objective Theory*

Professor Joseph Perillo, the honoree of this symposium, has recently shown in these pages that there are not two, but at least three, approaches one can take towards the assent needed for contract formation.[4] First is what he calls the "medieval" objective approach, which looks exclusively to the public meaning of the language used by the parties. He provides a late example of this from Zephaniah Smith writing in 1795:

> The intent of the parties, is to be gathered from the external signs and actions. For no man may put a construction upon his words contrary to the common understanding. Therefore he who has an obligation in his favour, has a right to compel him, from whom it is due, to perform it in that sense, which corresponds to the ordinary interpretation of the signs made use of.[5]

If you take contract to be based on the making of a promise but adopt this extreme objective approach towards discerning the existence of a promise, then form contracts are unproblematic. Just look at the signs employed in the form and give them their normal public meaning. Not only would this approach treat form and nonform agreements alike, it would treat form terms exactly the same as separately negotiated terms within an agreement.[6] All would be judged by the objective meaning of the words employed.

Second, if a subjective view of contractual assent is taken, then form contracts pose a very serious problem. If a person must consciously have had the particular terms in mind when signifying agreement to them, then most terms in most form contracts lack assent. Most people fail to read most terms most of the time and no person can credibly claim to read all of the terms in form contracts all of the time. Every contracts professor and law student knows this from personal

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Contract, 43 Colum. L. Rev. 629 (1943).

4. The next few paragraphs have been deeply informed by Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 Fordham L. Rev. 427 (2000).

5. 1 Zephaniah Swift, A Digest of the Law of Evidence in Civil and Criminal Cases and a Treatise on Bills of Exchange 377 (1810), as it appears in Perillo, *supra* note 4, at 451.

6. Which, perhaps I should emphasize, is not the approach I shall advocate below.

experience. Everyone reading these words, including yours truly, has at one time clicked the "I agree" box of a software license agreement without reading the terms in the scroll-down box. Hence the problem: How can someone be said to have "actually"—meaning subjectively—consented to terms of which one was completely unaware? To impute subjective assent to the person indicating consent to a form is obviously to engage in a fiction. Under a subjective theory of contractual assent, very few, if any, of the terms in a form contract would be assented to.

Though Professor Perillo demonstrates that the subjective theory of contractual assent was never a dominant approach, he also explains how the modern objective approach is more subjective than the medieval approach insofar as it seeks to discern the "objective intention as reasonably understood by one or both contracting parties."[7] As an early example, he offers the opinion in the 1871 case of *Smith v. Hughes*:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[8]

While this may look upon first glance to be the same as the medieval objective approach, a subtle and significant subjective shift has occurred. Instead of adhering strictly to the public meaning of the signs used, one asks what one party would reasonably have thought the other party meant by his words and deeds.[9]

With this as one's objective approach to the existence of a promise, form contracts run into a serious problem. If contracts are enforceable promises to do or refrain from doing something, then one must have *actually* promised to do or refrain from doing something. True, such promises are to be judged objectively, but if the promisee knows or has reason to know that a particular promise went unread then it is unreasonable for the promisee to conclude that the promisor even objectively manifested assent by signing a form contract or clicking "I agree." In this manner, combining a conception of contract based on promise with either a subjective or a modern objective

7. Perillo, *supra* note 4, at 451.

8. Smith v. Hughes, 6 L.R.-Q.B. 597, 607 (1871).

9. In addition, one party must have subjectively understood the other party's meaning to be that of a reasonable person. *See, e.g.*, Embry v. Hargadine, McKittrick Dry Goods Co., 105 S.W. 777, 779 (Mo. Ct. App. 1907) ("[I]f what McKittrick said would have been taken by a reasonable man to be an employment, *and Embry so understood it*, it constituted a valid contract of employment for the ensuing year." (emphasis added)).

approach leads one to question the legitimacy of form contracts.[10]

B. *The Benefits of Form Contracts: Todd Rakoff's Analysis*

Because most terms in a form contract are rarely read, it is considered a fiction to think one has promised—either subjectively or objectively under the modern view—to perform according to a term of which the other party knows good and well one is unaware. Despite this, most contracts professors and practitioners also know that form contracts make the world go round. Psychologists tell us that the human mind will strive mightily to resolve the dissonance between two incompatible ideas. In this case, some resolve the conflict between theory and practice by rejecting form contracts because consent is lacking, while others are led to reject consent as the basis of contract and then, because consent is unnecessary, also reject form contracts in favor of government-supplied terms.[11] By either route, then, form contracts are disdained.

Nowhere was this dissonance between the theory and practice more tellingly displayed than in Todd Rakoff's classic treatment of form contracts in *Contracts of Adhesion: An Essay in Reconstruction*.[12] It is almost as though Rakoff's piece is comprised of two separate articles. The first explains at length all the reasons why form contracts, so disparaged by his peers, are beneficial, if not essential, to the market economy. "Firms create standard form contracts," he wrote, "in part to stabilize their external market relationships, and in part to serve the needs of a hierarchical and internally segmented structure."[13]

> Form documents promote efficiency within a complex organizational structure. First, the standardization of terms, and of the very forms on which they are recorded, facilitates coordination among departments. The costs of communicating special understandings rise rapidly when one department makes the sale, another delivers the goods, a third handles collections, and a fourth fields complaints. Standard terms make it possible to process transactions as a matter of routine; standard forms, with standard blank spaces, make it possible to locate rapidly whatever deal has been struck on the few customized items. Second, standardization makes possible the efficient use of expensive managerial and legal

10. Though I contend that a consent theory leads to a different stance on form contracts than does a promise-based theory, it remains the case that a completely objective approach to promise would also vindicate form contracts. The difference is that a highly objective theory of promising would vindicate the entire form without qualification, while a consent theory coupled with the modern objective approach vindicates the terms of a form contract within some limits, which I explain below.

11. For an example of a contracts scholar who vehemently rejects consent, see Jean Braucher, *Contract Versus Contractarianism: The Regulatory Rule of Contract Law*, 47 Wash. & Lee L. Rev. 697 (1990).

12. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174 (1983).

13. *Id.* at 1220.

> talent. Standard forms facilitate the diffusion to underlings of management's decisions regarding the risks the organization is prepared to bear, or make it unnecessary to explain these matters to subordinates at all. Third, the use of form contracts serves as an automatic check on the consequences of the acts of wayward sales personnel. The pressure to produce may tempt salesmen to make bargains into which the organization is unwilling to enter; the use of standard form contracts to state the terms of the deal obviates much of the need for, and expense of, internal control and discipline in this regard.[14]

Economists around this time came to call this last situation the "agency problem."[15] In a firm in which agents are unavoidably entering into transactions with third parties that will bind their firm, how does the firm constrain the ability of agents to serve their *own* interests, for example, by offering extravagant terms of which their principals will unavoidably be unaware? Simple: we bind both agents and third parties to the (unwaivable) terms in a form contract. Business on a scale that benefits everyone would simply be impossible if firms were unable to control the terms their agents could offer to third parties by using form contracts.

But what of the third parties themselves? Here, Rakoff anticipated what came to be the much-discussed economic concept of rational ignorance. With respect to a large proportion of terms in almost any contract, the low probability of the term ever being invoked in some future lawsuit, combined with the relatively low stakes of many such contracts, makes it irrational for form-receiving parties to spend time reading, much less understanding, the terms in the forms they sign.

> [F]or most consumer transactions, the close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous. Moreover, many of the terms concern risks that in any individual transaction are unlikely to eventuate. It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies. And the standard forms—because they are drafted to cover many such contingencies—are likely to be long and complex, even if each term is plainly stated. Once form documents are seen in the context of shopping (rather than bargaining) behavior, it is clear that the near-universal failure of adherents to read and understand the documents they sign cannot be dismissed as mere laziness. In the circumstances, the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest.[16]

This leads to a two-fold problem for a theory of contract based on

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14. *Id.* at 1222-23.

15. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ. 288 (1980).

16. Rakoff, *supra* note 12, at 1226.

assent: first, clearly the person signing such a contract did not subjectively, consciously assent to terms that went unread. Second, no one offering such terms can reasonably have thought that the other party subjectively assented and therefore, according to the modern objective theory, there was no *objective* assent either. That is, no one who hands a form contract to another to sign, knowing full well that it will largely go unread, can conclude that the other party has consciously assented to each of the terms therein.

Another of Rakoff's advances on previous scholarship—one that has been inadequately appreciated, I think—is to reject the association of form contracts with the pejorative concept of unconscionability.[17] Unconscionability is associated with the problems of unequal bargaining power, unfair surprise, and substantively unreasonable terms. For Rakoff, in contrast with other contracts scholars before or since, none of these concerns is at the core of the problem with form contracts.[18]

Instead, he contended that the issue with form contracts was not whether terms were bargained for but whether they could be "shopped" elsewhere; not on whether some terms constituted an "unfair surprise" but on whether it was rational for the form receiving party to read any of them; not whether the terms were substantively objectionable but whether there is a lack of assent caused by rational ignorance.[19] After all, most forms are signed by agents of large companies doing business with agents of other large companies, neither of whom can complain about the problems typically handled by unconscionability doctrine.

Terms that are in the parties' interest to focus on and "shop," Rakoff called "visible terms." Terms for which it was not in the interest of rational cost minimizing persons to shop elsewhere (or even read) he called "invisible terms." "Considered by themselves, then, the visible terms of a contract of adhesion are most often those that would constitute the entire explicit contents of a very simple ordinary contract, with the price term (dickered or not) being the paradigmatic example. The invisible terms are, quite simply, all the rest."[20]

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17. *See id.* at 1190-94. However, the distinction between the particular problems raised by form contracts and those addressed by the doctrine of unconscionability underlies his entire treatment.

18. However, Rakoff was concerned with one-sided terms in form contracts—a problem also thought to underlie the doctrine of unconscionability. *See id.* at 1227. ("[O]ver time more and more risks are shifted to the adhering party.").

19. This is not to say that Rakoff rejects a doctrine of unconscionability based on lack of bargaining, unfair surprise, or substantively unfair terms. Rather he rejects equating the problem of form or "adhesion" contracts with these problems addressed by unconscionability. Such forms could *also* be unconscionable, but are objectionable, he contends, even if they are not.

20. *See* Rakoff, *supra* note 12, at 1251.

While I think Rakoff's distinction between terms that one has a sufficient interest in reading and those terms about which it is rational to remain ignorant was a critical advance on previous theory, I think his decision to call the former terms "visible" and the latter "invisible" was unfortunate. After all, the terms one may rationally fail to read are not *literally* invisible; rather, they were unread and unshopped. Unread terms *could* be read if a party so chose; literally invisible terms cannot.

This rhetoric choice could well account for how Rakoff resolves the dissonance between the important value of form contracts, which he took pains to explain, and the unread nature of what he calls "invisible terms." In what seems almost like a second and different article, he argues that only visible terms should be enforced as written. Invisible terms should presumptively be supplanted by terms supplied by statute or by the courts.

> In most cases, the terms that a drafting party stipulates to fill in the transaction type will be invisible and hence, under the proposed analysis, presumptively unenforceable. If nothing further appears, the case should be decided by application of background law. But even if the drafting party tries to show that an invisible term should be upheld, the court cannot evaluate that showing without determining how the case would come out absent the form clause; for the showing must be particularized, and the degree of deviance from the background rule as well as the reasons supporting both the background and form terms would appear always to be relevant. Therefore, before the invisible terms can be judged, the background law and its application to the particular case must be known.[21]

There are a great many things one can say about this recommendation. For one, it assumes that courts, legislatures, or the American Law Institute are capable of writing gap-filling terms that better serve the interests of both contracting parties than is the author of the form.[22] Imposing terms more favorable to the party disfavored in the form will raise the cost of the transaction to the other party—and not just the monetary cost. By so doing, this may ultimately disserve the party who is supposed to be the beneficiary of government intervention. It might work to the ultimate advantage of the "adherent" to consent to a "one-sided" term and rely on the other

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21. *Id.* at 1258.

22. Rakoff does make an effort to support this claim:

> Compared . . . to the drafters of forms, judges, legislators, and administrative officials are impartial. They fill roles that encourage them to take a broader view of the common good. Legislators, at least, are subject to popular political control—and the decisions of administrators and judges, ultimately, to legislators. If government is at all legitimate, it is legitimate for the purpose of framing generally applicable legal rules. That cannot be said of the form draftsman.

Id. at 1238.

party to deliver voluntarily what may not be required of it under the terms of the form.[23] It is very hard for third parties writing terms of contracts to know whether they are really improving the situation for the adherent. However, if we lack confidence that any particular intervention is actually beneficial to the adherent, the principal justification of intervention is greatly weakened to say the least.

Furthermore, the terms that will actually be imposed on the parties are even more removed from the transaction than is a form. If anything, the problem of rational ignorance will be greatly exacerbated. Parties would no longer be weighing the probability of a suit against the cost of reading the form in front of them; they now would have to weigh this probability against the cost of hiring a lawyer to tell them what is in case law or a statute and predict, if prediction is possible, how a background rule will be applied by a future court. Surely this proposal moves an agreement much farther from the consent of the parties and towards a regime in which the legal system supplies terms that others think best.

Nevertheless, Todd Rakoff provided important and previously overlooked reasons why form contracts are useful and why they do not automatically implicate the same problems addressed by the doctrine of unconscionability. His unfortunate choice of terminology notwithstanding, the substance of his distinction between visible and invisible terms in forms is a highly useful one, as we shall see in the next part.

II. FORM CONTRACTS AND CONSENT TO BE LEGALLY BOUND

A. *The Consensual Basis for Enforcing Form Contracts*

Suppose that the enforcement of private agreements is not about promising, but about manifesting consent to be legally bound. Suppose the reason why we enforce certain commitments, whether or not in the form of a promise, is because one party has manifested its consent to be legally bound to perform that commitment.[24] According

23. For an example of this phenomenon in the feed and grain trade, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996). There, she provides a "theory of legally unenforceable agreements" explaining why it may be in one party's interest to agree to a "one-sided" legal commitment while relying on the good faith of the other party to do more than it was obligated to do under the contract. *See id.* at 1787-95. Bernstein's analysis responds directly to Rakoff's claim that courts and legislatures can provide default rules that are superior to those provided by one party and consented to by the other.

24. By referring to consent as "*the* reason," I do not mean to suggest that there are not several important reasons why consent to be legally bound ought to be the central principle of contractual enforceability. *See* Randy E. Barnett, Contracts Cases and Doctrine 614-36 (2d ed. 1999) (discussing how six core principles of enforceability—will, reliance, restitution, substantive fairness, efficiency and

to this theory, the assent that is critical *to the issue of formation or enforceability* is not the assent to perform or refrain from performing a certain act—the promise—but the manifested assent to be legally bound to do so.[25]

Consider the Uniform Written Obligations Act, which has been in effect in Pennsylvania since 1927:

> A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.[26]

Here the promise (or release) is enforceable if accompanied by a separate statement indicating that the signatory intends to be legally bound. It is this statement that substitutes for consideration and provides the element of enforceability.

Now think of click license agreements on web sites. When one clicks "I agree" to the terms on the box, does one usually know what one is doing? Absolutely. There is no doubt whatsoever that one is objectively manifesting one's assent to the terms in the box, whether or not one has read them. The same observation applies to signatures on form contracts. Clicking the button that says "I agree," no less than signing one's name on the dotted line, indicates unambiguously: I agree to be legally bound by the terms in this agreement.

If consent to be legally bound is the basis of contractual enforcement, rather than the making of a promise, then consent to be legally bound seems to exist objectively. Even under the modern objective theory, there is no reason for the other party to believe that such subjective consent is lacking. Even if one does not want to be bound, one knows that the other party will take this conduct as indicating consent to be bound thereby.

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bargain—can be mediated by the criterion of consent).

25. I have defended this approach elsewhere. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269 (1986); Randy E. Barnett, . . . *and Contractual Consent*, 3 S. Cal. Interdisc. L.J. 421 (1993); Randy E. Barnett, *Some Problems with Contract as Promise*, 77 Cornell L. Rev. 1022 (1992); Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 Soc. Phil. & Pol'y 62 (1992); Randy E. Barnett, *The Internal and External Analysis of Concepts*, 11 Cardozo L. Rev. 525 (1990); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 866 (1992) [hereinafter Barnett, *Sound of Silence*]. Some doctrinal implications of this approach to contractual obligation are developed in Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 Soc. Phil. & Pol'y 179 (1986); Randy E. Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 Harv. J.L. & Pub. Pol'y 783 (1992); Randy E. Barnett, *Squaring Undisclosed Agency Law with Contract Theory*, 75 Cal. L. Rev. 1969 (1987). *See also* Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 U. Va. L. Rev. 1175 (1992) (discussing Macneil's inconsistent use of the concept of consent).

26. Uniform Written Obligations Act, Pa. Stat. Ann. tit. 33, § 6 (West 1997).

If this sounds counterintuitive, as it will to many contracts professors, consider the following hypothetical. Suppose I say to my dearest friend, "Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you." Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later? To take another example, is there some reason why a soldier cannot commit himself to obey the commands of a superior (within limits perhaps) the nature of which he will only learn about some time in the future? Hardly. Are these promises *real*? I would say so and cannot think of any reason to conclude otherwise. What is true of the promises in these examples is true also of contractual consent in the case of form contracts.

If contractual enforcement is not about the promise to do or refrain from doing something, but is about legally committing oneself to perform the act described in the envelope, there is no reason, in principle, why this consent cannot be considered real. Therefore there is no reason, in principle, why such consent cannot be objectively manifested to another person. This reveals the nested nature of consent. The particular duty consented to—the promise or commitment—is nested within an overall consent to be legally bound. The consent that legitimates enforcement is the latter consent to be legally bound.

Suppose now that instead of the promise being in an unopened envelope, it is contained in an unread scroll box on a computer screen. Does this make the act of clicking "I agree" below the box any less a manifestation of consent to be bound by the unread terms therein than did the promise to perform the unknown act described in the envelope? I cannot see why. Whether or not it is a fiction to say someone is making the promise in the scroll box, it is no fiction to say that by clicking "I agree" a person is consensually committing to these (unread) promises.

True, when consenting in this manner one is running the risk of binding oneself to a promise one may regret when later learning its content. But the law does not, and should not, bar all assumptions of risk. Hard as this may be to believe, I know of people who attach waxed boards to their feet and propel themselves down slippery snow and tree covered mountains, an activity that kills or injures many people every year. Others for fun freely jump out of airplanes expecting their fall to be slowed by a large piece of fabric that they carry in a sack. (I am not making this up). Or they ride bicycles on busy streets with automobiles whizzing past them. It seems to me that if people may legally chose to engage in such unnecessarily risky activities—and these choices are not fictions—they may legally choose to run what to me is the much lesser, and more necessary, risk of accepting a term in an unread agreement they may later come to

regret.

B. *The Limits on Enforcing Form Contracts*

Does the justification for enforcing form contracts based on the existence of a manifested intention to be legally bound entail that any and every term in a form contract is enforceable? I do not think so. To begin with, as with negotiated terms, there are limits to what the obligation can be. It cannot be a commitment to violate the rights of others or (in my view) to transfer or waive an inalienable right.[27] But the enforcement of some form terms may be subject to additional constraints that would not apply to expressly negotiated terms.

While it does manifest consent to unread terms as well as read terms, I believe there is a qualification implicit in every such manifestation of consent to be legally bound. Call it the "your-favorite-pet" qualification. If a term of the sort that Rakoff calls "invisible" (insofar as it is rational to remain ignorant of its content) specifies that in consequence of breach one must transfer custody of one's beloved dog or cat,[28] it could surely be contended by the promisor that "while I did agree to be bound by terms I did not read, I did not agree to *that*." As Andrew Kull has explained in the context of the defenses of mistake, impossibility, and frustration:

> Common sense sets limits to a promise, even where contractual language does not. Though a promise is expressed in unqualified terms, a person does not normally mean to bind himself to do the impossible, or to persevere when performance proves to be materially different from what both parties anticipated at the time of formation. Faced with the adverse consequences of such a disparity, even a person who has previously regarded his promise as unconditional is likely to protest that he never promised to do *that*. . . . The force of the implicit claim is hard to deny: I did not mean my promise to extend to this circumstance; nor did you so understand it; to give it that effect would therefore be to enforce a contract different from the one we actually made.[29]

If, therefore, a realistic interpretation of what clicking "I agree" means is "I agree to be legally bound to (unread) terms that are not radically unexpected," then that—*and nothing more*—is what has been consented to objectively. To appreciate this better, consider the following three possible interpretations of clicking "I agree."

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27. *See* Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law 77-82 (1998) [hereinafter Barnett, The Structure of Liberty]; Barnett, *Contract Remedies and Inalienable Rights*, *supra* note 25.

28. I prefer this example to the "first-born-son" provision since there may be well-founded objections to enforcing such a transfer even were it consented to. Dogs and cats can ordinarily be sold, given away, and presumably even used as collateral for an obligation. Nevertheless, such a term in a contract would be highly unexpected.

29. Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 Hastings L.J. 1, 38-39 (1991).

1. By clicking "I agree" I am expressing my intent to be bound only by the visible price and quantity terms and none of the terms in the box above. (In the case of free software, I am agreeing to nothing whatsoever when I click "I agree" though I know that the other party does not wish me to use the software without agreeing to these terms).[30]

2. By clicking "I agree" I am expressing my intent to be bound by any term that is in the box above no matter how unexpected such a term may be.

3. By clicking "I agree" I am expressing my intent to be bound by the terms I am likely to have read (whether or not I have done so) and also by those unread terms in the agreement above that I am not likely to have read but that do not exceed some bound of reasonableness.

Options 1 and 2 have the advantage of certainty but sacrifice the consent of the parties. Option 1 is agreement not only to visible terms but to terms supplied by statute or some future judge which are much farther removed from the consent of the parties than the terms in the scroll box. Option 2 is easy to administer but unlikely to reflect the subjective and, for this reason, the objective meaning of "I agree."

If option 3 is the most likely meaning of clicking "I agree," as I think it is, then two things follow. First, in Rakoff's terminology, "invisible" terms that are unlikely to be read, as well as "visible" terms, can and should be enforced. Second, "invisible" terms that are beyond the pale should not be enforced unless they are brought to the attention of the other party who manifests a separate agreement to them. While option 3 does, therefore, require judicial scrutiny, it requires much less judicial scrutiny than option 1 (the option preferred by Rakoff, and probably most contracts scholars, over option 2) which permits courts to provide all the terms of the agreement beyond the few that are visible.

Discerning whether or not an "invisible" term is radically unexpected would require an inquiry much like what law and economics analysis provides. Namely, is this the sort of term that a reasonable person *would have* agreed to had the matter been expressed? Or perhaps the better formulation is that, *if most reasonable persons would not have agreed to such a term, then the other party cannot assume consent to be bound to such a term unless it is made visible.* In this way, hypothetical consent is perhaps the best way we have to determine actual consent to unread terms.

Option 3 was the approach taken by the Supreme Court in *Carnival Cruise Lines v. Shute*,[31] a case involving a forum selection clause in a

30. This suggests that the contract lacks the objective consent of the software distributor.

31. 499 U.S. 585 (1991).

form contract on the back of a cruise ticket. While rejecting the proposition that a non-negotiated forum-selection clause is never enforceable simply because it is nonnegotiated,[32] the Court emphasized that such "clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."[33] In essence, the Court rejected options 1 and 2 in favor of option 3. "Fundamental fairness" can be viewed as a surrogate for highly unexpected terms. Nobody expects the Spanish Inquisition.[34]

Does an inquiry into the fundamental fairness of terms reflect a rejection of freedom of contract? Hardly. We must never forget that it is a form contract the Court is expounding. The issue is what the parties have (objectively) agreed to. If I am right, parties who sign forms or click "I agree" are manifesting their consent to be bound by the unread terms in the forms. They would rather run the risk of agreeing to unread terms than either (a) decline to agree or (b) read the terms. Refusing to enforce *all* of these terms would violate their freedom *to* contract. But parties who click "I agree" are not realistically manifesting their assent to radically unexpected terms. Enforcing such an unread term would violate the parties' freedom *from* contract.[35]

Refusing to enforce a term a court finds to be radically unexpected does not prevent both parties from contracting on that basis. All a party who seeks to have such an unexpected term enforced need do is make it visible to the other party. The term would then be expected

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32. *Id.* at 585.

33. *Id.* at 595.

34. See Monty Python, The Spanish Inquisition Sketch, *available at* http://www.montypython.net/scripts/spanish.php:

> Chapman: (slightly irritatedly and with exaggeratedly clear accent) One of the cross beams has gone out askew on the treddle.
>
> Cleveland: Well what on earth does that mean?
>
> Chapman: *I* don't know—Mr. Wentworth just told me to come in here and say that there was trouble at the mill, that's all—I didn't expect a kind of Spanish Inquisition.
>
> (JARRING CHORD) (The door flies open and Cardinal Ximinez of Spain (Palin) enters, flanked by two junior cardinals. Cardinal Biggles (Jones) has goggles pushed over his forehead. Cardinal Fang (Gilliam) is just Cardinal Fang)
>
> Ximinez: NOBODY expects the Spanish Inquisition! Our chief weapon is surprise . . . surprise and fear . . . fear and surprise. . . . Our two weapons are fear and *surprise . . . and ruthless efficiency. . . . Our three* weapons are fear, surprise, and ruthless efficiency . . . and an almost fanatical devotion to the Pope. . . . Our *four* . . . no . . . *Amongst* our weapons. . . . Amongst our weaponry . . . are such elements as fear, surprise. . . . I'll come in again.

35. *See* Barnett, The Structure of Liberty, *supra* note 27 at 64-65 (explaining how "freedom of contract" has two dimensions: "freedom to" and "freedom from" contract). I first saw this felicitous terminology in Richard Speidel, *The New Spirit of Contract*, 2 J.L. & Comm. 193, 194 (1982) ("[T]he spirit of a people at any given time may be measured by the opportunity and incentive to exercise 'freedom to' and the felt necessity to assert 'freedom from.'").

and, barring the application of some other limiting doctrine, should be enforced. This is analogous to the rule of *Hadley v. Baxendale*,[36] which requires that special notice be given of any consequences of breach that are unusual and therefore not normally foreseeable or expected. Like the rule in *Hadley*, the "fundamental fairness" test should be viewed as a way to distinguish what was actually consented to from what was radically unexpected and therefore not objectively agreed to, rather than a vehicle for overriding the consent of the parties.

What is true of terms unread because of rational ignorance is also true of terms unread because they are supplied later, an issue that was raised in the cases of *ProCD, Inc. v. Zeidenberg*[37] and *Hill v. Gateway 2000, Inc.*[38] *ProCD* involved what is called a shrink-wrap or box-top agreement in which the terms are contained inside a box that one cannot read until one gets home from the store and opens the box. In *ProCD*, the court held that the terms of the software license were agreed to. In *Gateway*, the parties agreed to the sale of a computer over the phone. The written terms of the sale were later delivered to the buyer in the box along with the computer, both of which he was free to accept or reject. In *Gateway,* the court upheld the enforceability of the agreement that followed the telephone transaction. In both of these transactions, then, there was an initial "agreement"—the store purchase and the phone order—and terms to follow later.

At first blush, there is one seemingly big difference between clicking agreement to (unread) terms in a scroll box and agreeing to (unread) terms in a form one has yet even to receive. With the scroll box a party *could* read the terms if he or she so chose and reject them by refusing to click "I agree." With terms arriving later in a box, one cannot read them until one receives them. In such a case, it seems appropriate that one be given the opportunity to decline such terms by returning the goods. The court in both *ProCD* and *Gateway* emphasized the existence of this option.

Requiring an opportunity to decline the terms received later seems, however, to reveal a defect in the argument I have offered here. Why insist on the opportunity to decline the terms? If the enforceability of a commitment is not based on the appearance that one has subjectively made a promise, but on the consent to be legally bound, and if, as I have argued, one can consent to be legally bound to terms one has not read—and that the other party knows one has not read—then why does one need a right to decline these terms? Have they not already been consented to? For that matter, why even send the terms

36. 156 Eng. Rep. 145 (Ex. D. 1854).
37. 86 F.3d 1447 (7th Cir. 1996).
38. 105 F.3d 1147 (7th Cir. 1997).

along with the item, since one has already consented to them initially when buying the software or ordering the computer over the phone?

Such a line of questioning would misconstrue my claim. I argued above that, in principle, one *can* consent to terms one does not read. By the same token, *in principle* I think one can consent to terms one is not even shown in advance. The main point of this essay is that there is nothing incoherent or illogical about claiming that consent to be legally bound in these situations is real—not fictitious. I was not claiming, however, that anyone actually *does* consent to such terms. That is a factual or empirical question that needs to be answered not in principle but in practice.

In practice it is difficult to establish definitively the true implicit meaning of actions when parties do not make their intentions explicit. One way we typically do this is to ask counterfactual questions. For example, do we think a person buying a computer over the phone would say they agree to *any* unseen term no matter how unexpected it may be, or to any term they have never even had an opportunity to read? The result of such counterfactual (or hypothetical) exercises is to establish the likely meaning of silence and establish a default rule that then puts the onus on a dissenting party seeking to get an express agreement to the contrary.[39]

This suggests that, while it is *possible* for a computer buyer to consent to numerous terms she not only did not read but could not read because she never received them, such an interpretation may be an entirely unrealistic assessment of actual transactions. I think the act of purchasing software or ordering a computer over the phone is more realistically portrayed as the first step of a process of consent that is not finalized until there is an opportunity to inspect the terms, even if such opportunity is never exercised. By insisting on this, the court in *ProCD* and *Gateway* can be seen as viewing the manifestation of consent as a combination of the initial purchase or phone order and the act of retaining the software or computer.

That a manifestation of consent has two parts at two different times is far from novel. In the famous case of *Hobbes v. Massasoit Whip Co.*,[40] the seller sent conforming eel skins used to make whips to the buyer who kept them. The Supreme Judicial Court of Massachusetts found that this constituted acceptance of the eel skins because of the prior relationship or understanding of the parties. "The plaintiff was not a stranger to the defendant," wrote Justice Holmes,

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39. A counterfactual inquiry by a court or jury is a sensible method to discover the probable meaning of silence by consumers because judges and jurors are consumers too. What they think most people would mean by their silence is a good indicator of what most people do mean. Of course if parties are not typical consumers but members of a trade, their silence may have a different meaning and evidence of this should be examined.

40. 33 N.E. 495 (Mass. 1893).

> even if there was no contract between them. He had sent eel skins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it was fair to assume that if it had admitted the eel skins to be over 22 inches in length, and fit for its business, as the plaintiff testified and the jury found that they were, it would have accepted them; that this was understood by the plaintiff; and, indeed, that there was a standing offer to him for such skins.
>
> In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance.[41]

In *Gateway*, the parties were not strangers to each other. In the absence of the phone order, Gateway could not simply send the buyer a computer and take his failure to return it as consent to the purchase. The phone order imposed a duty on the buyer to accept or return the computer and accompanying terms. As in *Hobbes*, the transaction must be viewed in its entirety to assess the reasonable meaning of the buyer's silence.[42]

From this perspective, the only genuinely controversial issue of *Gateway* is whether the court should have upheld the enforceability of the form in the absence of some express notice to phone buyers that a form would be sent to them later.[43] There are some compelling reasons for requiring that notice be given. If most consumers would be surprised by the existence of additional form terms in the box, a default rule requiring notice that a form will follow in the box is more likely to lead to manifestations of assent that reflect the subjective assent of the parties than a contrary rule requiring no disclosure.

As I have explained elsewhere,[44] we can expect that repeat-player-sellers will have low cost access to a default rule requiring them to notify buyers that a form agreement will follow later in the box and can inexpensively comply with the rule. In contrast one-time-player-buyers are unlikely to know of a background rule permitting forms to follow without notice, and for this reason are unlikely even to ask whether such will occur. According to this analysis, a default rule

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41. *Id.*

42. For an insightful elaboration of the meaning of silence in on-line and other modern transactions, see James J. White, *Autistic Contracts*, 45 Wayne L. Rev. 1693 (2000).

43. The comparable issue in *ProCD* is whether there should be some explicit notice on the box that a form agreement is on the software inside.

44. *See* Barnett, *Sound of Silence*, *supra* note 25, at 885-94.

requiring disclosure by sellers is more likely to reduce any gap between objective consent and subjective assent and is to be preferred for that reason.

All Gateway or other sellers need do to obtain enforcement of their form is to tell consumers on the phone that the form will follow in the box. They no more need to read aloud all the terms to follow than the software company needs to read aloud all the terms in the scroll box above the button labeled "I agree." Both formalities perform the same function: putting the other party on notice that it is agreeing to other terms that it may or may not read.

Moreover, withholding consent until the form is delivered is prudent because it locks the other party into some terms rather than agreeing to a blank slate. It also provides an incentive for the other party to offer more reasonable terms that marginal parties who do read their forms will not reject. For this reason too, we may infer from their silence that most parties are withholding their consent until they have actually received the terms and had an opportunity to reject them even if they never plan to read the terms themselves.

In sum, just as persons can manifest their intent to be bound by terms they have not read in a scroll box, they can manifest their intent to be bound by terms they will receive later in the box containing the goods they are buying. The empirical question is whether or not they *have* so consented. The presence of notice that more terms are to follow resolves any uncertainty as to the existence of consent and greatly reduces the risk of any misunderstanding. And if repeat-player-sellers know that one-shot-player-buyers would be surprised to learn additional terms are forthcoming, they cannot take the failure to return the computer as an objectively manifested consent to the terms in the box.

Apart from what it suggests about whether notice of terms to follow and opportunity to accept or decline them should be required, the last discussion establishes that any such requirement is entirely consistent with the main thesis of this article: One can consent to be legally bound even to terms in form contracts of which one is rationally ignorant, whether the unread terms are in a box on a computer screen, in a box purchased in the store and opened later, or in a box sent later by UPS. Nothing in principle prevents a competent individual from assuming the risk that they later will dislike one of the unread terms in the box, though there are limits on what one can consent to in this manner. Barring a showing that these terms were radically unexpected, or that some other defense applies, the enforcement of even the "invisible" terms of form contracts can be justified on the basis of consent—real consent properly understood—not a fiction.

CONCLUSION

Section 2-204 of the Uniform Commercial Code famously says that

"[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[45] I am always surprised when lifelong self-professed "realist" critics of what they like to call "formalism" criticize *ProCD* or *Gateway* because they fail to conform to some highly rigid conception of offer and acceptance. Yet, as is widely acknowledged, formal offer and acceptance is only one way of manifesting assent. There is no reason in principle why contracts cannot be formed in stages, provided the circumstances or prior practice makes this clear or adequate notice is provided. This insight is neither revolutionary nor reactionary.

In assessing the enforceability of form contracts, we must never forget that contract law is itself one big form contract that goes unread by most parties most of the time. Yet, as I have argued elsewhere, under certain conditions, there can realistically be said to be consent even to the enforcement of the default rules of contract law.[46] In which case, the enforcement of judicially supplied default rules can be said to be based on consent and is not inconsistent with contractual freedom. But the inference of consent to be governed by judicially supplied default rules is rebutted when there has been consent to be bound by the rules in a party-supplied form contract. In other words, the consensual justification for the enforcement of the default rules of contract law does not apply to the extent these default rules are supplanted by the terms contained in a form contract supplied by one of the parties, to which the other party has manifested consent.

Of course, one can question either the justice or utility of enforcing any or all consensual agreements. Elsewhere, I have attempted to

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45. U.C.C. § 2-204 (1998).

46. *See* Barnett, *Sound of Silence*, *supra* note 25. The relationship between the arguments made there and here is a bit complex. There, I sought to show how consent to *particular* default rules, like the consent to particular terms of an agreement, could be said realistically to exist. Where the conditions for such consent were absent, as they are for terms in form contracts of which the form recipients are rationally ignorant, however, a general consent to be legally bound can still imply a consent to default rules *but only within substantive limits* governed by the expectations of the rationally ignorant party.

> The manifestation of intention to be legally bound is a necessary condition of contractual obligation and, *when parties are rationally informed*, a sufficient justification to enforce the *particular* default rules in effect when the contract was formed. When, however, either or both parties who have manifested their intention to be legally bound are rationally ignorant, only conventionalist default rules can provide a sufficient consensual justification for enforcement.

Id. at 897-98 (emphases added). This limit on the consensual justification of default rules corresponds to the limits on the substance of form terms contended for here. *See also id.* at 905 (discussing the conditions needed to justify as consensual the enforcement of *immutable* rules of contract law around which parties cannot contract).

justify such enforcement. There I contend that freedom of contract—which in this context includes both the freedom *to* consent to form contracts and the freedom *from* having other terms imposed on both parties by judges or legislatures—is needed to solve the pervasive social problems of knowledge, interest, and power. What the analysis presented here is intended to do, and nothing more, is refute the commonplace notion that form contracts, including click agreements, are illegitimate by their very nature because they lack actual contractual consent.