Volume 2000 Number 2

UTAH LAW REVIEW

UNIVERSITY OF UTAH COLLEGE OF LAW

UTAH LAW REVIEW

VOLUME 2000 NUMBER 2

EDITORIAL OFFICE: The *Utah Law Review* is published at the University of Utah College of Law, 332 S. 1400 E. Rm. 101, Salt Lake City, Utah 84112-0730, by the Utah Law Review Society. Periodicals postage paid at Salt Lake City, Utah, and at additional mailing offices. All communications should be sent to the editorial office. Postmaster: Please send form 3579 (change of address) to *Utah Law Review*, University of Utah College of Law, Salt Lake City, Utah 84112.

SUBSCRIPTIONS: The *Utah Law Review* is published quarterly. The subscription rate is $25.00 per year (domestic) and $27.00 per year (foreign). All subscriptions will be renewed automatically unless the subscriber provides notice of cancellation. Notice should be sent to the editorial office.

BACK ISSUES & REPRINTS: Complete volumes and individual issues of the *Utah Law Review* are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209. To order by telephone, call 1-800-828-7571. In New York, call (716) 882-2600.

CITATIONS: Citations in the *Utah Law Review* conform to *The Bluebook: A Uniform System of Citation* (16th ed. 1996).

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Introduction

On behalf of the Utah Law Review, I would like to welcome you to this year's Law Review Symposium and to offer a few comments that I hope will set the stage for today's presentations. This should be a wonderfully engaging and entertaining event and we are proud to support the growth of an area of legal scholarship that we anticipate will be incredibly influential and fruitful in the coming years. These papers collectively take an historical approach to classic legal cases. As such, they confront us with the question: why undertake an historical approach to legal studies?

Historical inquiry, as Nietzche reminds us, can serve many functions.[1] It can serve as a method by which we use an interpretation of the past to legitimate the present; it can supply a perspective by which we criticize the status quo; it can prompt us to discover a new understanding of our present selves and circumstances. In the Academy in general, pursuing history continues to lead to the fruitful development of human knowledge: ranging from psychoanalysis' attempt to provide us with an understanding of our personal past that allows us to live in the present, to the discipline of History itself, which in recent years has turned its eye on the politics of creating history, in order to re-emphasize the importance of attending to the minutiae of historical context and to those topics, interests, or perspectives that have been occluded from traditional narratives of the past.[2] Such has been the staple of post-war histories emphasizing, among other things, differences in class, gender, and race.[3]

Disturbed by "the erosion of historical consciousness" in our society, the former chair of the National Endowment for the Humanities has written that "by reaching into the past, we reaffirm our humanity. And we inevitably come to the essence of it."[4] Understood as participating in this impulse, the recent revival of interest in history is no doubt a response to the acceleration of forgetting, that many feel characterizes an increasingly present-oriented American society. Consequently, a primary task for those who profess in the Academy must be to disabuse students of the notion that history is something that is over and done with—to bring them to a realization that they themselves live *in* history and that the form and pressure of history are made

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[1]*See* FREDERICH NIETZCHE, USE AND ABUSE OF HISTORY *passim* (Adrian Collins trans., Bobbs-Merrill 1975).

[2]*See, e.g.*, HAYDEN WHITE, THE CONTENT OF FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1987) (discussing ways in which certain forms of representing history have effect of occluding different social interests).

[3]*See, e.g.*, LYNN HUNT, ED., THE NEW CULTURAL HISTORY (1989) (collecting essays both theorizing and practicing this phenomenon).

[4]LYNN V. CHENEY, AMERICAN MEMORY: A REPORT ON THE HUMANITIES IN THE NATION'S PUBLIC SCHOOLS 7, 6 (1988).

manifest in their thoughts and actions, in their beliefs and desires. In short, we try to understand history in order to understand ourselves and the contours of our present.

Approaching classic legal cases with an eye to the particularities of the case's social and historical context, the pieces you will hear today pursue many of these interests, and others as well. After having had the pleasure of reading these pieces, I suggest that their method of historiography shares at least three important features. First, as they attend to the complex contexts in which these cases developed, these pieces foster our understanding of the contingent nature of the law. This type of historical inquiry testifies to an element of chance, to the contingencies that go into the development of the common law. As such, these studies foreground the often irrational forces that lie behind the seeming rational development of legal doctrine. Second, by foregrounding the contextual contingencies behind classic cases, these studies also teach us about the institutional blindspots, or what legal scholar Patricia Williams has called the ghosts of the past that haunt the law—those things which go unrecognized or ignored due to the methods and procedures that our legal institutions use to treat and catalogue human conflict in litigation.[5] As such, these studies reveal institutional problems in our justice system, a service that is not only diagnostic, but which may also provide insight into possible methods of institutional remediation. Last, but surely not least, these historical studies are incredibly entertaining. They demonstrate that understanding the contextual complexities of cases helps to make the study of law fun. These studies make classic cases come alive by revealing some of the human drama—drama often forgotten—that prompts the development of legal doctrine. In this sense, such an enterprise humanizes the study of law and reminds us that law is emphatically a human creation with human consequences. So, without further ado, let's begin the Symposium.

PARKER DOUGLAS, EDITOR-IN-CHIEF
1999-2000

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[5]*See* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: A LAW PROFESSOR'S DIARY (1991) *passim.*

A Fish Story: *Alaska Packers' Association v. Domenico*

Debora L. Threedy[*]

I. INTRODUCTION

A persistent criticism leveled against legal education is that it fails to teach cases in context.[1] The lack of context arises in two ways. First, the statement of facts in judicial opinions is extremely truncated[2] and is usually presented as if the facts of the case are not problematical or in dispute.[3] Second, appellate decisions are presented in textbooks and analyzed in classroom discussion with little or no discussion of the historical, economic, and social context in which the litigation arose and was pursued.[4]

The criticism concerning this lack of context has several facets. By simplifying the factual context and ignoring the larger societal context, legal education gives a distorted view of reality—litigation in a vacuum. Pedagogical research, moreover, suggests that adult learners (a category into which all law students fall) learn more easily and retain information more

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[*]Professor, University of Utah College of Law. I wish to thank the Faculty Development Committee of the College of Law for supporting this research. I also wish to thank Jessica Woodhouse and the staff of the Quinney Law Library for their research assistance. Finally, I wish to acknowledge the helpful comments I have received from Judith Maute, whose work inspired my efforts here; from my colleagues who participated in a colloquium on this subject; and from Alex Skibine, Kristin Clayton, and Lindsay Robertson, who directed me to similar work done by others.

[1]*See, e.g.*, LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL AND INSTITUTIONAL CHANGE 14–15 (1997)

[2]*See, e.g.*, Debora L. Threedy, *The Madness of a Seduced Woman: Gender, Law and Literature*, 6 TEX. J. WOMEN & L. 1, 9–10 (1996) (asserting that judicial versions of "facts" are highly selective and chosen for "maximum persuasiveness").

[3]This is partly a function of the appellate stage; the facts were "found" by the trial court and are rarely revisited by the appellate court. Note the assumption implicit in the use of the word "found." It implies that the facts are pre-existing and the trial court's function is to discover what they are. The reality of a trial, however, is that it often involves interpretation, for example of the most probable deductions to be made from circumstantial evidence. A trial court does not actually "find" the facts in the sense of conducting an investigation; it determines what is most likely to have occurred given the evidence that was offered and admitted into court. *See, e.g.*, Threedy, *supra* note 2, at 10; *see also* Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1733–35 (1993) (asserting that courts present facts as an "unproblematic account of what happened," when actual experiences "almost certainly" differ).

[4]"Too often we teach law courses as perspectiveless, adopting an analytical approach that consciously acknowledges no specific cultural, political or class characteristics . . . " Taunya Lovell Banks, *Teaching Laws With Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 345, 443 (1992).

solidly when the material is presented in context.[5] Finally, and perhaps not unrelated to the preceding point, students (particularly female students[6]) often express feelings of alienation arising in part from the lack of context in which they feel compelled to learn the law.[7]

At the same time, there seems to be a growing interest among legal historians and scholars in exploring the social and historical background of the litigation that has been reduced to a judicial opinion.[8] I suspect that this

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[5]*See, e.g.*, Cathaleen A. Roach, *A River Runs Through It: Tapping Into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV 667, 680–82 (1994) (discussing how to use contextual teaching to promote independent learning).

[6]My own interest in exploring the context of cases, something I consistently try to do in my teaching, particularly in first year Contracts and Civil Procedure, is animated by feminism. I view this kind of work as "feminist" in the broadest sense of that word, both because I, like many women lawyers, hunger for the human context in law and because, in my opinion, women law students in particular seem to suffer from the abstract presentation of cases in classroom discussions. "[Women law students] want to learn the stories behind the cases." GUINIER, *supra* note 1, at 14–15.

[7]*See* GUINIER, *supra* note 1 at 15; *see also* Margaret E. Montoya, *Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Unbraiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 201–09 (1994) (discussing importance of considering cultural and social factors in studying cases).

[8]Richard Danzig is considered by some to be the one who set this trend in motion with his 1975 article, Hadley v. Baxendale: *A Study in the Industrialization of the Law*, 4 J. LEG STUDIES 249 (1975). *See* A CONTRACTS ANTHOLOGY 183 (Peter Linzer, ed., 2d ed. 1995) [hereinafter A CONTRACTS ANTHOLOGY]. For other examples of this type of research, see Charles W. Adams, World-Wide Volkswagen v. Woodson–*The Rest of the Story*, 72 NEB. L. REV. 1122 (1993), *reprinted in* CIVIL PROCEDURE ANTHOLOGY 554 (David I. Levine et al. eds. 1998) [hereinafter CIVIL PROCEDURE ANTHOLOGY]; Banks, *supra* note 4; Paul Coady, *Dredging the Depths of* Hickman v. Taylor, 64 HARV. L. RECORD 2 (May 6, 1977), *reprinted in* CIVIL PROCEDURE ANTHOLOGY 573; RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES (1978) (discussing *Sullivan v. O'Connor*, *Jacob & Young v. Kent*, and *Ortelere v. Teacher's Retirement Board*, among others) [hereinafter THE CAPABILITY PROBLEM]; Lawrence M. Grosberg, *The Buffalo Creek Disaster: An Effective Supplement to a Conventional Civil Procedure Course*, 37 J. LEGAL EDUC. 378 (1987); LEWIS A. GROSSMAN & ROBERT G. VAUGHN, A DOCUMENTARY COMPANION TO A CIVIL ACTION (1999); Alfred S. Konefsky, *How to Read, Or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645 (1987), *reprinted in* A CONTRACTS ANTHOLOGY 219; Robert H. Lande, *A Law & Economics Perspective on a "Traditional" Torts Case: Insights for Classroom and Courtroom*, 57 MO. L. REV. 345, 399 (1992); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985); Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 501 (1995), *reprinted in* A CONTRACTS ANTHOLOGY 236; Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479 (1987), *reprinted in* CIVIL PROCEDURE ANTHOLOGY 541; Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415 (1988), *reprinted in* A CONTRACTS ANTHOLOGY 148; Bob Rizzi, Erie *Memoirs Rreveal Drama, Tragedy*, 63 HARV. L. RECORD 2 (Sept. 24, 1976), *reprinted in* CIVIL PROCEDURE ANTHOLOGY 569; Ann C. Shalleck, *Feminist Legal*

is part of a larger project which seeks to study law within a broader social context. During the same period, for example, we have seen the rise of interdisciplinary approaches to legal study: the "law and" movements such as law and literature, law and psychiatry, etc.[9]

This article explores the context of one of the canonical first year contract cases, *Alaska Packers' Ass'n v. Domenico.*[10] The case involves a wage dispute between a group of Alaskan Salmon fishermen and their employer, the operator of a salmon cannery. In the first section, I present a traditional, straight-forward analysis of the district and circuit court opinions. I also examine how other legal scholars, relying solely on the written opinions (in fact, apparently relying almost exclusively on the appellate court opinion), have interpreted the case, what it means and what it stands for. In other words, the "traditional" interpretation of the case is explicated.

In the following section, I present the "background story." I attempt to situate the legal decision in the context of the growth of the salmon industry and the formation of the Alaska Packers' Association ("Alaska Packers")—"the fish trust" that operated the cannery at Pyramid Harbor. I also provide details about the cannery operation at Pyramid Harbor, Alaska, which is where the "action" of the case occurs.

In the third section, I propose several alternative interpretations of the case. These alternative interpretations are informed by a close reading of the trial transcript[11] and by an examination of the conditions of the Alaskan salmon industry at the turn of the century. The alternative narratives I propose cannot help but reflect the context in which I write and thus may say more about the turn of the twentieth century than they do about the turn

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Theory and the Reading of O'Brien v. Cunard, 57 MO. L. REV. 345. 371 (1992); A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287 (1989), *reprinted in* A CONTRACTS ANTHOLOGY 200; A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW (1995) (discussing *Shelley's Case, Ryland & Horrocks v. Fletcher, Carlill v. Carbolic Smoke Ball,* among others); Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule,* 98 HARV. L. REV. 1109 (1985) (discussing *Lawrence v. Fox,* 20 N.Y. 268 (1859)), *reprinted in* A CONTRACTS ANTHOLOGY 384; Geoffrey R. Watson, *In the Tribunal of Conscience:* Mills v. Wyman *Reconsidered,* 71 TULANE L. REV. 1749 (1997).

[9]*See* Brian Leiter, *Intellectual Voyeurism in Legal Scholarship,* 4 YALE J. L. & HUMAN. 79 (1992). "Arguably, the most important general development in legal scholarship over the past two decades has been the remarkable flourishing of interdisciplinary work bringing together law and the humanities and social sciences." *Id.*

[10]117 F. 99 (9th Cir. 1902), *reversing* Domenico v. Alaska Packers' Ass'n, 112 F. 554 (N. D. Cal. 1901).

[11]*See* Record on Appeal. Copies of the Record on Appeal are available upon request from the author.

of the nineteenth. In particular, this article reflects a philosophical bent that questions traditional, authoritative narratives and is open to revisionist accounts.

The metaphor of an archaeological dig is appropriate here:

> [A] reported case does in some ways resemble those traces of past human activity—crop marks, post holes, the footings of walls, pipe stems, pottery shards, kitchen middens, and so forth, from which the archaeologist attempts, by excavation, scientific testing, comparison, and analysis to reconstruct and make sense of the past. Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law.[12]

The "excavation" of the *Alaska Packer* case is motivated by a desire to "make sense" of it. Many of the sources used in this paper have been found "outside the law library." They include, among others, the corporate records of Alaska Packers as well as contemporaneous government reports. I use information revealed by these sources "gently to free" the case from the "overburden" of questionable assumptions made by the judges in the case and scholarly commentators since then. By doing so, I hope that students and scholars of the law will view the case in a new and more informed light.

II. THE TRADITIONAL STORY

A. The District Court Opinion

The published opinion by the District Court for the Northern District of California is dated December 9, 1901.[13] It is authored by District Judge De Haven. John Jefferson De Haven was born in St. Joseph, Missouri, in

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[12]Simpson, *supra* note 8, at 12. *See also* Threedy, *supra* note 2, at 10 n.45 (discussing importance of teaching students to consider implicit questions not present in case itself). Professor Simpson suggests the wonderful term "legal archaeology" to describe this category of legal scholarship. *See* Simpson, *supra* note 8, at 12.

[13]*See Alaska Packers' Ass'n*, 112 F. at 554. Originally, the date caused me some confusion, as the two-day trial occurred on November 26 and 27, 1900. It had been my impression (apparently erroneous) that the problem of a significant time gap between judicial hearing and written decision was a relatively recent one.

1845.[14] He was brought to California in 1849, grew up in Eureka, attended public schools, was admitted to the bar in 1866 and was married in 1872.[15] He had a long political career including terms as a district attorney, county assemblyman, state senator, city attorney, congressman, state supreme court justice, and finally, in June 1897, he was appointed federal district court judge.[16]

The facts of the case, as summarized by Judge DeHaven, are these: Libelants,[17] fishermen and seamen, sued to recover $50 each on a contract alleged to have been entered into on May 22, 1900, in Pyramid Harbor, Alaska.[18] Previously, on March 26, 1900, before departing San Francisco for Alaska, the libelants had signed a contract with Alaska Packers in which they agreed to work for $50 for the season plus two cents for each red salmon caught.[19] (Some of the libelants had signed shipping articles[20] on April 5, 1900, which provided that they would be paid $60 plus two cents for each red salmon.[21]) Libelants, in addition to their duties as fishermen, also were required to sail the ship to and from Alaska and to discharge and load the ship's cargo at Pyramid Harbor.

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[14]*See* HISTORY OF THE BENCH AND BAR OF CALIFORNIA: BEING BIOGRAPHIES OF MANY REMARKABLE MEN, A STORE OF HUMOROUS AND PATHETIC RECOLLECTIONS, ACCOUNTS OF IMPORTANT LEGISLATION AND EXTRAORDINARY CASES, COMPREHENDING THE JUDICIAL HISTORY OF THE STATE 658 (Oscar Tully Shuck, ed. 1901).

[15]*See id.*

[16]*See id.*

[17]Because the case is an admiralty case, the parties in the position of a plaintiff are called libelants. *See* BLACK'S LAW DICTIONARY 916 (6th ed. 1990).

[18]*See Alaska Packers' Ass'n*, 112 F. at 554–55. Pyramid Harbor is across the Chilkat River from Haines, Alaska, and the site of Fort Seward. It is on the upper part of the Inside Passage, about 14 miles south of Skagway and 80 miles north of Juneau, Alaska. *See Alaska Internet Travel Guide* <http://www.alaskaone.com/haines/bells.htm> (last visited Nov. 7, 2000).

[19]*See Alaska Packers' Ass'n*, 112 F. at 555.

[20]"The shipping article is the contract of employment between the master and the seaman." MARTIN J. NORRIS, 1 THE LAW OF SEAMEN 176–79 (1985). The master of the vessel acts as agent for the owner. *See id.*

[21]*See Alaska Packers' Ass'n*, 112 F. at 555. The discrepancy between the $50 in the contracts and the $60 in the shipping articles is never explained.

Shortly after arriving in Pyramid Harbor[22] libelants "became dissatisfied"[23] and refused to work unless their pay was raised to $100 for the season, plus two cents for each red salmon caught.[24] The court noted that Alaska Packers had $150,000 invested in the cannery and that "no other men could be engaged to take the places of libelants during that fishing season."[25]

In these circumstances, the superintendent of the cannery agreed to the raise in wages, but at the end of the season, back in San Francisco, the company refused to pay anything beyond the amounts of the original agreements.[26] Under protest, the fishermen took the payment and executed releases.[27] The fishermen then brought suit for the difference between what they were paid and what they argued they were entitled to under the May contract.

Alaska Packers' answer raised three defenses: (1) there was no consideration for the contract sued upon and thus it was unenforceable; (2) the superintendent was without authority to bind the company; and (3) the releases signed by the fishermen when they were paid precluded suit on the disputed contract.[28]

The district court briefly disposed of two of these issues. Although Hugh Murray, the superintendent at Pyramid Harbor, argued he had no authority to enter into a new contract, the court found that Alaska Packers was estopped from denying his authority.[29] Finally, as to the releases, the court applied the admiralty rule; because "seamen are usually improvident, and often ignorant of their rights, they are frequently tempted by their

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[22]Apparently, they arrived in Pyramid Harbor on April 27, 1900. *See* Record at 52, Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902) (No. 789). The superintendent of the canning factory at Pyramid Harbor, Hugh Murray, testified that they arrived on April 7th, *see* Record at 106, but this was not possible if some men signed the shipping articles in San Francisco on April 5th, as was indicated by the trial court. *See Alaska Packers' Ass'n*, 112 F. at 555. The voyage between San Francisco and Pyramid Harbor could take anywhere from two weeks to a month, with an average of twenty-two days, depending on the winds. *See* Record at 131.

[23]*Alaska Packers' Ass'n*, 112 F. at 555.

[24]*See id.*

[25]*Id.*

[26]*See id.* at 555–56.

[27]*See id.* at 556.

[28]*See id.* at 555.

[29]*See Alaska Packers' Ass'n*, 112 F. at 559.

necessities to take less than is due them,"[30] and thus signing a release does not bar their suit for wages.[31]

The bulk of the district court's analysis focused on the enforceability of the May contract. First, the court considered the question of the nets. The fishermen argued that Alaska Packers failed to provide them with "serviceable nets in which an average catch of fish could be taken"[32] even though it had agreed to do so. They further argued that this default justified their refusal to work unless additional compensation was given to them. The court's treatment of this argument is worth quoting in full:

> The contention of libelants that the nets provided them were rotten and unserviceable is not sustained by the evidence. The defendant's interest required that libelants should be provided with every facility necessary to their success as fishermen, for on such success depended the profits defendant would be able to realize that season from its packing plant, and the large capital invested therein. In view of this self-evident fact, it is highly improbable that the defendant gave libelants rotten and unserviceable nets with which to fish. It follows from this finding that libelants were not justified in refusing performance of their original contract.[33]

Thus, the court rejected the fishermen's argument that Alaska Packers was the first party to breach the contract by failing to provide serviceable nets.

As the fishermen were not justified in refusing to perform the original contract and thus it continued in force, the court agreed with Alaska Packers that there was no new consideration for the May contract. That contract required the fishermen to do what they were already obligated to do under the previous agreements.[34]

The district court, however, drew a distinction between executory contracts and contracts where performance has been rendered; the court agreed that in the latter class of contracts any modification would require new consideration.[35] But with regard to executory contracts, where prior to the completion of performance one party refuses to perform unless additional payment is made, the court noted that there was a split of

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[30]*Id.* at 560.

[31]*See id.* "For an interesting explanation of the law's solicitude for seamen at a time when other workers were left to the mercies of 'freedom of contract,' see the opinion of Circuit Judge Jerome Frank in Hume v. Moore-McCormack Lines, 121 F.(2d) 336 (C. C. A. 2d, 1941)." Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 621 n.37 (1943).

[32]*Alaska Packers' Ass'n*, 112 F. at 556.

[33]*Id.*

[34]*See id.*

[35]*See id.*

authority. In such circumstances, some courts had found the modification to be without consideration and thus unenforceable, while other courts had found that the parties implicitly terminated the original contract and entered into a "new" agreement.[36] The court then sided with the novation cases.

In particular, the district court relied upon the case of *Goebel v. Lin*.[37] In *Goebel*, the Belle Isle Ice Co. promised to provide brewers with all the ice they needed for the season at $1.75 per ton unless there was a scarcity of ice, in which case the price was to be $2 per ton.[38] Halfway through the term of the contract, the ice company refused to deliver any more ice unless the brewers agreed to pay $3.50 per ton.[39] As the brewers had a considerable stock of beer on hand which would be ruined if not kept chilled, and because they were unable to procure ice elsewhere, the brewers agreed to the price increase.[40] As in the present case, however, the brewers subsequently refused to pay the additional price, arguing that there was no consideration for the new contract and that it had been obtained by duress.[41]

The *Goebel* court ruled in favor of the ice company.[42] It reasoned that "[i]f the ice company has the ability to perform their contract but took advantage of the circumstances to extort a higher price from the necessities of the [brewers], its conduct was reprehensible."[43] The court, however, noted that the brewers thought it was better to accede to the ice company's demand for a higher price than to bring suit for breach of the original contract.[44] The court noted that the brewers' reason for doing this was not explained.[45] The court then created a hypothetical case where there has been an unforeseeable change in circumstances: "Suppose, for example, the [brewers] had satisfied themselves that the ice company under the very extraordinary circumstances of the entire failure of the local crop of ice must be ruined if their existing contracts were to be insisted upon, and must be utterly unable to respond in damages."[46] The *Goebel* court thought that in these circumstances a reasonable person would renegotiate the contract.[47]

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[36]*Id.* at 557.
[37]11 N.W. 284 (Mich. 1882).
[38]*See id.* at 284–85.
[39]*See id.*
[40]*See id.*
[41]*See id.*
[42]*See id.* at 286–87.
[43]*Goebel*, 11 N.W. at 285.
[44]*See id.*
[45]*See id.*
[46]*Id.*
[47]*See id.* at 285–86.

Implicitly, the court presumed that the brewers had some such reason for agreeing to the new contract, and thus upheld it.[48]

Finally, the *Alaska Packers'* district court considered whether the new contract was obtained by duress, and concluded that "the facts appearing here do not show that the defendant acted under duress, in making [the new] contract."[49] The court reasoned that because defendant could have sued on the original contract, they had another option—even though the court acknowledged that the libelants were judgment proof.[50]

Alaska Packers moved for rehearing after the district court issued its opinion, and on rehearing the court elaborated on its reasons for finding no duress:

> [I]t is clear that no legal duress can be found in the circumstances under which the new contract was made. The libelants were not guilty of intimidation, and did nothing whatever to prevent the defendant from securing other men to take their places. If there had been an attempt upon their part to intimidate other men from taking the places which they voluntarily quit, a very different case would be presented, but nothing of that kind appears, and the fact that there were no other men there, who could be engaged for that service, does not alter the case.[51]

The district court ordered Alaska Packers to pay each fisherman[52] an additional $50 plus interest.[53]

B. The Appellate Court Opinion

Alaska Packers took an appeal from the adverse decision in the trial court. The Ninth Circuit rendered its decision on May 26, 1902, five months after the final order in the trial court. The panel was made up of Circuit Court Judges Gilbert and Ross and District Court Judge Hawley.[54] The opinion was authored by Judge Ross. His background was very different than that of Judge De Haven.

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[48]*See id.* at 286.

[49]*Alaska Packers' Ass'n*, 112 F. at 558.

[50]*See id.* at 558–59.

[51]Record at 161 (citation omitted).

[52]The court excepted one George Bataillou from its order. *See* Record at 165. Apparently, Bataillou had actually returned to San Francisco. He got on a ferry, which conveyed him to Juneau, and from there apparently he got passage to San Francisco. *See* Record at 110–12.

[53]*See* Record at 165.

[54]*See Alaska Packers' Ass'n*, 117 F. at 100.

Judge Erskine M. Ross was born in Culpepper County, Virginia, in 1845, "the son of a planter."[55] He attended the Virginia Military Institute and fought on the Confederate side during the Civil War.[56] He came to California in 1868 and lived with his uncle, a state senator and prominent attorney. After studying law under his uncle for two years, he was admitted to the bar and achieved "professional fame and financial prosperity at an exceptionally early age."[57] At the age of thirty-four he was chosen justice of the state supreme court where he served until 1887 when he was appointed a U.S. district court judge and then circuit judge in 1895. Married with a son, he owned one of the largest and most profitable orange orchards in the state, Rossmoyne. "His enlightened firmness in the discharge of judicial duty . . . was well evidenced during the great railroad strikes of 1894."[58] In that year, then District Judge Ross entered an injunction requiring striking railway workers "to perform all of their regular and accustomed duties"[59] thus effectively enjoining the workers from striking.

Regarding the issue of the nets, the appellate court said "the evidence was substantially conflicting, and the finding of the court was against the libelants."[60] Because the evidence was conflicting, the appellate court deferred to the district court "who heard and saw the witnesses."[61]

The appellate court then noted that the "real questions in the case . . . are questions of law."[62] The court found it necessary to consider only one such: whether there was consideration for the May contract.[63] The court's analysis of this issue is based upon its determination of the weight to be given to the opposing precedents. The court noted that the district court, in holding that there was a novation of the contract and thus

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[55]SHUCK, *supra* note 14, at 657.

[56]In 1864, when he was a member of the corps of cadets at the Institute, he took part in the battle of New Market, where 55 of the 190 cadets were killed or wounded. *See id.*

[57]*Id.*

[58]*Id.* The "great strikes" referred to are, of course, the Pullman strike, "the largest concentrated labor action in the nation's history." J.ANTHONY LUKAS, BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA 208 (1997).

[59]Southern California Ry. Co. v. Rutherford, 62 F. 796, 798 (1894).

[60]*Alaska Packers' Ass'n*, 117 F. at 101.

[61]*Id.*

[62]*Id.* at 102.

[63]*See id.* The court does not address whether the superintendent had authority to execute the contract and whether the libelants' suit was barred by the releases. However, the court, in rejecting the district court's conclusion that the defendant could waive its right to sue on the breached contract and make a new one, reasons that if the superintendent lacked the power to execute a contract he would also necessarily lack the power to waive the defendant's rights under the original contract. *See id.* Thus, the court seems to decide the issue of the superintendent's authority indirectly.

consideration, relied upon eight cases: five from Massachusetts; two from Michigan, which relied upon the Massachusetts authority; and one from Vermont, which was impliedly overruled by a later Vermont Supreme Court case.[64] Conversely, the court noted that the "weight of authority" holds that there is no consideration for the new contract when one party promises only to do what it was previously bound to do, and cited cases from fifteen jurisdictions.[65] Additionally, the appellate court briefly distinguished the *Goebel* case, upon which the district court had relied heavily, by saying that it "presented some unusual and extraordinary circumstances."[66]

The court did state that it thought the Massachusetts rule "wrong on principle"[67] but did not explicitly state what that principle might be. Clues to the court's policy decision can be found, however, both in the way the court summarized the facts of the case before it and from language quoted from other cases. Both of these sources come very close to characterizing the case as one involving duress.

For example, the court summarized the facts in the *Alaska Packers'* case as follows:

> [The fishermen agreed to serve] in remote waters where the season for [fishing] is extremely short, and in which enterprise the appellant had a large amount of money invested; . . . and at a time when it was impossible for the appellant to secure other men in their places, the libelants, *without any valid cause*, absolutely refused to continue the services they were under contract to perform . . . . The case shows that they *wilfully and arbitrarily* broke that obligation . . . . Certainly, it cannot justly be held...that there was any voluntary waiver on the part of the appellant of the breach of the original contract.[68]

Additionally, the court quoted the Minnesota Supreme Court:

> No astute reasoning can change the plain fact that the party who refuses to perform, and thereby *coerces* a promise from the other party to the contract to pay him an increased compensation for doing that which he

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[64]*See id.* at 104.

[65]*See id.* at 105.

[66]*Alaska Packers' Ass'n*, 117 F. at 105. Although ambiguous, the court's comment seems to accept as a fact the failure of the entire ice crop. The *Goebel* court's statement about the failure of the ice crop however, was part of the court's hypothetical. *See supra* note 46 and accompanying text.

[67]*Id.* at 105.

[68]*Id.* at 102 (emphasis added). The court's conclusion that the fishermen broke the first contract without cause is a consequence of the district court's factual finding that the nets were sufficient. *See id.* at 101.

> is legally bound to do, *takes an unjustifiable advantage of the necessities of the other party.*[69]

In a similar vein, the court quoted a Missouri case in which the court held that to permit a party to refuse to perform a contract unless additional money is paid "would be to offer a premium upon *bad faith*, and invite men to violate their most sacred contracts that they may profit by their own wrong."[70]

The appellate court does not technically hold that the new contract is void due to duress; its holding is that the new contract is unenforceable due to a lack of consideration. Nevertheless, the court's rhetoric is that of bad faith and coercion on the part of the fishermen.

C. Scholarly Interpretation

The Ninth Circuit's implicit characterization of the case as one involving duress has become the accepted reading of the case. Several scholars have discussed the case and each paints a similar picture of bad faith and taking advantage of another's necessities.

Richard Posner, a leading law and economics scholar and himself an appellate judge, characterizes *Alaska Packers'* as a "monopoly" case.[71] He labels it "a clear case where the motive for the modification was simply to exploit a monopoly position conferred on the [fishermen] by the circumstances of the contract."[72] In other words, he assumes that the fishermen realized that the company had no chance of replacing their services once they were in Alaska and that their threatened walkout was motivated solely by the desire to take advantage of that fact.

Posner distinguishes this monopolistic refusal to comply with a contract from cases involving changed circumstances, in which latter category he puts the *Goebel* case. In doing so, he assumes the failure of the

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[69] *Id.* at 102 (quoting King v. Duluth M.&N. Ry. Co., 63 N.W. 1105, 1106–07 (Minn. 1895)) (emphasis added).

[70] *Id.* at 103 (quoting Lingenfelder v. Mainwright Brewery Co., 15 S.W. 844, 848 (Mo. 1891)) (emphasis added).

[71] *See* Richard A. Posner, *Gratuitous Promises in Economics and Law* 46, *in* 56 THE ECONOMICS OF CONTRACT LAW (Anthony T. Kronman & Richard A. Posner, eds. 1979).

[72] *Id.* at 57. The circumstances referred to are the short season in remote waters without the possibility of replacements. *Cf.* ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW & THEORY 338 (2d ed. 1993) (quoting Posner and commenting ironically on his position).

ice crop as a fact.[73] He contrasts a threat to repudiate, which is "a response to external conditions genuinely impairing the promisor's ability to honor the contract" with a threat of nonperformance, which is "merely a strategic ploy designed to exploit a monopoly position" and concludes that there should be a "firm rule of nonenforceability" in the latter type of cases.[74]

Marvin Chirelstein, a contracts scholar from Columbia University, offers a similar reading of *Alaska Packers'*, which he discusses under the rubric of duress.[75] Chirelstein, like Posner, examines the context of a threat not to perform in order to determine whether it is legitimate bargaining behavior or extortion.[76] He does not consider the threat of nonperformance in *Alaska Packers'* to be difficult to classify, comparing it to the classic "gun-to-the-head case" of extortion:

> Plainly, the defendant's consent to the pay raise was a forced consent, the alternative being the loss of much of its investment in the cannery itself. The plaintiffs apparently timed their threat so as to maximize the defendant's vulnerability—plaintiffs had received no competing offer and no change had occurred in the market for their services or the conditions of their work that would explain or legitimate an effort to get an increase in compensation. . . . [T]here appears to have been considerable justification for applying the doctrine of duress.[77]

The traditional reading of *Alaska Packers'* is therefore, one of the wily fishermen taking calculated and unfair advantage of the vulnerable cannery, conduct coming close to if not actually constituting economic duress.[78]

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[73]"An unusually mild winter ruined the local ice `crop' and the ice company informed the defendants that it would not continue to supply them with ice at the contract price." Posner, *supra* note 71, at 55.

[74]*Id.* at 57. *See also* Mary Lou Serafine, Note, *Repudiated Compromise after Breach*, 100 YALE L.J. 2229 (1991) (advocating changed circumstances rule for determining whether to uphold repudiated compromise). In the Note, the author labels the *Alaska Packers'* case an example of the "hold-up problem." *Id.* at 2244.

[75]*See* MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 65 (3d ed. 1998). *See also* Serafine, *supra* note 74, at 2235 (concluding that *Alaska Packers'* court found evidence of "economic duress"). Chirelstein's assumption that Alaska Packer would lose "much of its investment in the cannery itself" is unfounded. *See infra* notes 202–18 and accompanying text.

[76]*See* CHIRELSTEIN, *supra* note 75, at 64.

[77]*Id.* at 65. Note that neither court relied upon duress in its analysis; in fact, the district court explicitly rejected that doctrine in the circumstances of the case.

[78]I confess that from my first reading of the case I was skeptical about the reality of the traditional reading, doubting that the Alaska Packers Association was ever at the mercy of the fishermen. Everything I have since learned about the case has only deepened my skepticism.

III. The Background Story: Alaska Canneries in the Gilded Age

> *Between 1850 and 1900, the population swelled; the cities grew enormously; the Far West was settled; the country became a major industrial power; transportation and communication vastly improved; overseas expansion began. New inventions and new techniques made life easier and healthier; at the same time, the social order became immeasurably more complex, and perhaps more difficult for the average person to grasp. New social cleavages developed . . . . When the blood of the Civil War dried, the Gilded Age began. This was the factory age, the age of money, the age of the robber barons, of capital and labor at war.*[79]

In the last twenty-two years of the nineteenth century, a new industry came into being: the Alaskan canned salmon industry. Those years saw an amazing explosion of canneries in Alaskan waters, from two in 1878 to forty-two in 1900,[80] with thirty opened in a single year, 1889.[81] The industry owed its existence to technological innovations introduced only decades before. Huge fortunes were made in the course of a season or two. Packing companies, threatened by this exponential growth, entered into combinations known as "the fish trusts." What was happening in Alaska was merely an outgrowth and reflection of what was happening across the United States. And with this growth came social unrest. Class and ethnicity, race and language, all served to fragment society, to create "us" and "them." This, too, was occurring in Alaska.

A. The Birth of the Salmon Industry

In the second half of the nineteenth century, large-scale exploitation of salmon as a food resource began.[82] The spur to large-scale exploitation was the development of a reliable method of canning. Canning allowed salmon to be transported over long distances and stored for extended periods without spoiling, and canned salmon was more palatable to consumers than salted salmon.[83]

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[79] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 338 (2d ed. 1985) (italics added).

[80] *See* Alaska Packers Association Records Microfiche No. 308, "Canneries Operated in Alaska from the inception of business in 1878" [hereinafter APA microfiche].

[81] *See* MARSHALL MACDONALD, REPORT ON THE SALMON FISHERIES OF ALASKA, H.R. MISC. DOC. No. 122, at 3 (1893).

[82] *See* IAN DORE, SALMON: THE ILLUSTRATED HANDBOOK FOR COMMERCIAL USERS 4 (1990) (briefly describing history of salmon industry).

[83] *See* COURTLAND L. SMITH, SALMON FISHERS OF THE COLUMBIA 15 (1979) (describing development of salmon canning industry on Pacific Coast).

In 1864, Hapgood, Hume and Co. established the first salmon cannery, on the Sacramento River in California.[84] "The cans were hand-soldered and the secret of sealing the cans was carefully maintained: Andrew Hapgood, who had worked at a lobster cannery in Maine, sealed all the cans himself behind closed doors."[85] Two years later, the company moved to the Columbia River.[86] That year the company packed and sold 4000 cases of salmon[87] for $16 per case.[88] The success of this pioneer company led to the development of other canneries; by 1873, there were seven canneries operating on the Columbia.[89] Two years later, there were fourteen.[90]

During the 1870's, salmon canning on the Columbia River was a prosperous business. During this period there were no failures among the canning companies.[91] However, in the following decade, canneries saw profits decline: "the competition for fish and markets resulted in higher prices for fishermen and lower selling prices for the finished product."[92]

Many of the pioneers who began on the Columbia River spread to other localities because of growing concerns that the Columbia was "fished out."[93] Alaska salmon canning began in 1878; the first two canneries were built at Old Sitka and Klawak.[94] In 1887, the Alaska Commercial Company established a cannery on the Karluk River, which made an "immense" pack in 1887 and 1888, "the fame of which quickly extended to San Francisco."[95]

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[84]*See* DORE, *supra* note 82, at 196.

[85]*Id.* The method of canning food originated in France. Napolean offered a prize of 12,000 francs to anyone who devised a way to store food for sailors. In 1809, Nicholas Appert claimed the prize; he cooked and sealed foods in glass jars. In 1819, Thomas Kensett introduced canning to the United States. In 1839, tin cans were substituted for glass. *See* SMITH, *supra* note 83, at 15–16.

[86]*See* SMITH, *supra* note 83, at 16.

[87]A case of canned salmon was made up of 48 one pound cans.

[88]*See* SMITH, *supra* note 83, at 17.

[89]*See id.*

[90]*See id.* at 18.

[91]*See id.*

[92]*Id.* In 1866, fishermen on the Columbia River received 15 cents per fish; by 1880, they were receiving 50 cents. During the same period, the price of a case of canned salmon dropped from $16 to $5. *See id.* Canneries on the Columbia River knew by 1883-84 that they had saturated the market. *See id.* at 21. The Columbia River Packers Association, however, was not formed until 1899. *See id.* at 54.

[93]*Id.* at 20.

[94]*See* Ellen Greenberg, *Historical Note on the Alaska Packers Association and the Company Records* 2, *in* PHYLLIS DEMUTH & MICHAEL SULLIVAN, A GUIDE TO THE ALASKA PACKERS ASSOCIATION RECORDS 1891-1970 IN THE ALASKA HISTORICAL LIBRARY (Alaska Dept. of Education 1983).

[95]MACDONALD, *supra* note 81, at 2. The author notes that this fame had two important consequences: it attracted the attention of investors who saw the promise of "extravagant returns for the capital invested" and the attention of Congress to the necessity of protecting

The next year, more than thirty new canneries were established[96] for a total of thirty-seven canneries.[97]

B. The Fish Trust

In the late 1880's, production far outstripped demand for canned salmon. In 1889, 1890, and 1891, canneries packed more salmon than they could sell. At the beginning of the 1891 season, "it was reported that 600,000 cases of canned salmon were in San Francisco warehouses and that in London about 400,000 cases . . . were still on the market."[98] This represented about two-thirds of the total average annual pack for the entire Pacific Coast.[99] This over-supply inevitably led to a drop in price. "Finding that the market was overstocked and the price of canned salmon reduced in consequence, so that in many cases business became unprofitable, the [Alaskan] canners decided to make a combination and curtail the fishing in the season of 1892."[100]

In 1892, a majority of the Alaskan canneries formed a loose association, the Alaska Packing Association; the members agreed to operate only about nine canneries and divide the profits among the members.[101] This experiment was successful and, in February 1893, twenty-two companies incorporated as the Alaska Packers Association.[102] In the first year, Alaska Packers operated thirteen canneries at nine locations.[103] From 1893 until the turn of the century, it averaged 70% of the annual Alaskan salmon pack.[104]

The first year Alaska Packers operated, it had a net profit of $420,470.[105] In 1900, never having operated at a loss, the net profit was

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the Alaskan salmon fisheries. The first led to the opening of 30 new canneries; the latter, to the passage of an act for the protection of the salmon fisheries of Alaska. *See id.* at 2–3.

[96]*See id.* at 3.

[97]*See* Greenberg, *supra* note 94, at 2.

[98]MACDONALD, *supra* note 81, at 10.

[99]*See id.*

[100]*Id.*

[101]*See* SMITH, *supra* note 83, at 54.

[102]*See* Greenberg, *supra* note 94, at 2.

[103]*See* Alaska Packers Association Records Microfilm Reel No. 4, "Total Pack 1893-1925: Alaska and Puget Sound; Total Pack 1893-1941: Bristol Bay District; Total Pack 1893-1938: Central Alaska District; and Total Pack 1893-1931: Southeastern Alaska District" [hereinafter APA Microfilm]. The nine locations were: Alitak, Chignik and Karluk (in central Alaska); Nushagak; Copper River; Cook's Inlet; Fort Wrangell and Loring (in southeastern Alaska); and Pyramid Harbor. *See id.*

[104]*See* JEFFERSON F. MOSER, ALASKA SALMON INVESTIGATION IN 1901, H.R. Doc. No. 706 at 350 (1902).

[105]*See* APA Microfiche No. 310, "Alaska Packers Association; Capital Stock; Net Profit; Percentage of Profit."

$770,536.[106] In 1900 there were forty-two canneries operating in Alaska; Alaska Packers operated eighteen of these.[107] Alaska Packers eventually became a division of Del Monte.[108]

C. Pyramid Harbor

The cannery at Pyramid Harbor was the site of the confrontation between the fishermen and the company which led to the law suit. The Pyramid Harbor cannery was one of eighteen canneries Alaska Packers was operating in 1900.[109] Pyramid Harbor is located on Chilkat Inlet, about eighty miles north of Juneau, Alaska. It is on the western side of the Inlet, a mile and a half south of Pyramid Island. The harbor "consists of a small cove in which two or three vessels may find anchorage."[110]

The cannery was on the southern shore of the cove. It was built in 1883, changed hands once, and was burned in the spring of 1889 but immediately rebuilt so that it operated during the 1889 season.[111] In 1892 it was a member of the Alaska Packing Association. In 1893 it became part of the Alaska Packers Association. Alaska Packers' records show the purchase price of the cannery to be $100,745.00, but that was most likely a transfer from the original owners to the corporation in exchange for Alaska Packers Association stock.[112]

The cannery at Pyramid Harbor was operated by Alaska Packers from 1893 until 1904; it was closed for the 1905 season but ran again from 1906 until 1908, when it closed for good.[113] It was abandoned in 1912 and

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[106]*See id.*

[107]*See* APA Microfiche No. 308, "Canneries Operated in Alaska from the inception of business in 1878." The 18 canneries were operated at 13 locations. In addition to the nine listed above, there were canneries at Naknek, Kvishak, Egegak, and Ugashik. *See* APA Microfilm Reel No. 4, "Total Pack 1893-1941: Bristol Bay District."

[108]*See* Greenberg, *supra* note 94, at 2.

[109]Prior to the formation of Alaska Packers Association, it appears that there were three canneries operating on Chilkat Inlet: Chilkat Packing Co., Chilkat Canning Co., and Pyramid Harbor Packing Co. *See* APA Microfiche No. 345, "Pyramid Harbor."

[110]JEFFERSON F. MOSER, THE SALMON AND SALMON FISHERIES OF ALASKA: REPORT OF THE OPERATION OF THE U. S. FISHERIES COMMISSION STEAMER *ALBATROSS* FOR THE YEAR ENDING JUNE, 1898, H. R. Doc. No. 308, at 125 (1899) [hereinafter MOSER 1898].

[111]*See id.* at 125–26.

[112]*See* APA Microfiche No. 345, "Pyramid Harbor." Interestingly, the name on the plat map for one of the three pre-existing operations (apparently Chilkat Canning Co. as the other two companies' names appear on the other two plats) is Hugh Murray, who was the superintendent of Pyramid Harbor in 1900. *See* APA Microfiche No. 447, "Plat of Amended U.S. Survey No. 3."

[113]*See* APA Microfilm Reel No. 4, "Total Pack 1893-1930: Pyramid Harbor District."

eventually dismantled in the early 1930's.[114] Pyramid Harbor was one of only three canneries closed in the first decade of the twentieth century.[115] The one year break in operations in 1905 is unexplained, but the closing of the cannery at the end of the 1908 season appears to have been driven by economics: Pyramid Harbor was one of the more expensive canneries to operate.[116]

At the turn of the century, a case of salmon from Pyramid Harbor often cost more to produce than a case from other Alaskan canneries.[117] At the same time, the pack from this cannery was considered "the choicest in Alaska."[118] Pyramid Harbor produced salmon mostly for export and the cannery was meticulously run.[119]

Moreover, Pyramid Harbor rather consistently spent a disproportionate amount on fishing gear. For example, in 1899 Pyramid Harbor spent $7,863.08 on fishing gear when it was outfitting to pack 50,000 cases, while Karluk, another cannery, spent $12,180.12 to outfit for 200,000 cases, and the Chignik cannery spent $3,650.15 to outfit for 50,000 cases.[120] The explanation for this seems to be that at Pyramid Harbor the fishing was done almost exclusively with gill nets, whereas other canneries used seine nets or traps.[121] It took more men to operate gill nets; thus, Pyramid Harbor's labor force tended to be disproportionately large.

Not surprisingly, the wages paid per man at Pyramid Harbor were consistently among the lowest in Alaska. In 1901, Alaska Packers began keeping records on fishermen's average earnings, and for every year after that when the cannery was in operation (except the final year) Pyramid Harbor's fishermen earned one of the lowest averages in Alaska.[122] For example, in 1901, Pyramid Harbor fishermen averaged $183.95 for the season, when the average for all of the Alaska Packers' Alaska canneries was $273.24.[123]

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[114]*See id.*

[115]*See* APA Microfiche No. 310, "Alaska Packers Association Fishermen's Average Earning 1901 to 1910, inclusive."

[116]*See* APA Microfiche No. 336, "Cannery Costs 1893-1946."

[117]*See id.*

[118]JEFFERSON F. MOSER, SALMON INVESTIGATIONS OF THE STEAMER *ALBATROSS* IN THE SUMMER OF 1900, H. R. Doc. No. 706, at 254 (1902) [hereinafter MOSER 1900].

[119]*See id.* at 254.

[120]*See* APA Microfiche No. 336, "Cannery Costs 1893-1946."

[121]*See* MOSER 1898, *supra* note 110, at 126. "Seines have been tried unsuccessfully [at Pyramid Harbor], probably because there are no good seining beaches." *Id.* at 128.

[122]*See* APA Microfiche No. 310, "Alaska Packers Association Fishermen's Average Earnings 1901 to 1910, inclusive."

[123]*See id.*

In 1900 the cannery was equipped with the following machinery: six retorts, two fillers, two toppers, two solderers, one cutter, and one can-making set.[124] Each filling machine could fill 800 cases per day;[125] setting the maximum daily capacity for Pyramid Harbor at 1,600 cases, which was rarely attained.[126] The packing was done entirely by a Chinese crew[127] who lived and ate separately from the fishermen. The Chinese crew was highly specialized at filleting the salmon in pieces sized to fit in the one pound cans. A small number of Native American women, called "klootchmen,"[128] also worked in the cannery doing less specialized work.

Pyramid Harbor packed primarily "redfish," which was the name given to sock-eye salmon.[129] The fish for the cannery were caught in the Chilkat, Chilkoot and Taku Inlets, although most of the fish came from the Chilkat and Chilkoot Inlets.[130] The average annual catch for the cannery fishermen for 1894-1898 was 300,000 redfish.[131] The run was about forty-five days in length.[132]

In addition to fish caught by the cannery's salaried fishermen,[133] the cannery also bought fish from the local Chilkat and Chilkoot tribes. From 1896 through 1900, the cannery bought an average of 147,000 fish annually from about 200 Chilkat and Chilkoot fishermen.[134] However, these tribesmen were not employees of the company. The Native Americans employed their traditional fishing methods: they would fish from canoes or

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[124]*See* MOSER 1900, *supra* note 118, at 253–54.

[125]*See* MOSER 1898, *supra* note 110, at 27.

[126]*See* MOSER 1900, *supra* note 118, at 254. Moser does not explain the reason for the cannery's infrequent operation of the machines at full capacity. Hypothetically, it could have been due to insufficient numbers of fish, to the physical limitations of the Chinese crew that was cutting up the salmon for the filling machine, or to limits on production imposed by the Association.

[127]*See* MOSER 1898, *supra* note 110, at 23.

[128]*Id.* at 24.

[129]*See* MOSER 1900, *supra* note 118, at 254. The cannery also packed small quantities of king and coho salmon. *See id.*

[130]*See id.* at 254. The Taku Inlet is located about 12 miles southeast of Juneau and thus about 92 miles from Pyramid Harbor. The Pyramid Harbor fishermen took only king salmon from Taku Inlet; the king run earlier than the sock-eye, and once the sock-eye commence to run, fishing for the king in Taku Inlet ceases. *See* MOSER 1898, *supra* note 110, at 126–27. Trial testimony indicated that only fourteen fishermen from Pyramid Harbor were sent to Taku Inlet for the king salmon. Record at 31–32.

[131]*See* MOSER 1898, *supra* note 110, at 127.

[132]*See* MOSER 1900, *supra* note 118, at 254.

[133]A small number of Native Americans were employed as boat-pullers. That is, they made up half of the two-man crew on some of the fishing boats. They then shared in the gillnet catch. *See id.* at 254. *Cf.* Record at 119.

[134]*See* MOSER 1898, *supra* note 110, at 126–27; MOSER 1900, *supra* note 118, at 254, 320.

from a platform built over the stream, using a "gaff" (a long pole ten to twelve feet long with an unbarbed hook on the end, about four inches across the bend).[135] The gaff was thrust into the water and the salmon impaled on the hook; when the fish were plentiful, the gaff could simply be dragged through the water.[136] Although the cannery purchased a large part of its supply from the Native Americans,[137] certain individuals complained that the Native Americans were unreliable.[138]

In 1900, Pyramid Harbor employed ninety-two white and ten Native American fishermen.[139] Eighty-two of the fishermen joined in the lawsuit. From the names on the libel, it appears that a majority of these were Italian. It also appears that at least the Italian fishermen were recruited by a "labor contractor" named G. Viscecova.[140] "Labor contractors" were more prevalent in other sections of the canning industry, such as among cannery workers. By and large, the fishermen avoided the system of labor contractors, but "[i]ntermittently . . . Italians recruited in San Francisco for the Alaska fisheries [had] fallen into the clutches of boss contractors of their own nationality. Whenever this occurred a general lowering of [living] standards resulted."[141] Generally, labor contractors received a fee from the fishermen they recruited.[142] It appears that Viscecova may also have run the messhouse at Pyramid Harbor.[143]

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[135]*See* MOSER 1898, *supra* note 100, at 127.

[136]*See id.*

[137]This was true throughout southeastern Alaska. *See id.* at 22.

[138]*See id.* at 25.

[139]*See* MOSER 1900, *supra* note 118, at 255. Murray testified that he "thought" Alaska Packers employed "ten crews" of Native Americans, or 20 men, that season. Record at 119.

[140]Record at 145.

[141]L.W. Casaday, Labor Unrest and the Labor Movement in the Salmon Industry of the Pacific Coast 263 (1938) (unpublished Ph.D. dissertation, University of California-Berkeley on file with the author). Even after the fishermen became generally unionized, the system of labor contracting continued, resulting in the union agreements containing express provisions prohibiting the practice. *See id.*

[142] On several occasions the Italian fishermen, in spite of the fact that they belonged to the union, have been known to hire themselves to contractors of their own nationality. For this they paid fees ranging as high as $50 to $100 per season and in addition were forced to accept inferior board and lodging at the canneries as furnished by these contractors.

Id. at 429.

Although it is probable that the fishermen were paying the labor contractor a fee, the evidence is that Alaska Packers was supplying, or at least paying for, their board. *See* MOSER 1898, *supra* note 110, at 127; MOSER 1900, *supra* note 118, at 254.

[143]Murray testified that "Mr. G. Viscasso" ran the messhouse. Record at 82. This name is very similar to "Viscecova," the name of the labor contractor who recruited the men. Record at 145. The similarity leads me to suppose that the two are one and the same, especially given that it was customary for the labor contractor also to board the men. *See*

With this understanding of how the cannery at Pyramid Harbor operated, as well as a broad brush picture of the Alaskan canned salmon industry, it is now possible to consider some alternative narratives to the "traditional story" enshrined in the two court opinions.

IV. ALTERNATIVE STORIES

In this section, alternative readings of the *Alaska Packers'* case are put forth. First, a theory suggested by a reading of the trial transcript is explored: that the nets were indeed serviceable for fishing in Pyramid Harbor, but because the nets were unique to that fishery and because a large majority of the fishermen were both new to Alaska and not fluent in English, they mistakenly believed the nets were inadequate. Conversely, the possibility that the nets were indeed substandard is considered, along with an examination of why Alaska Packers had a motive to supply inadequate equipment. The assumption that Alaska Packers was at the mercy of the fishermen is challenged in the next section. Finally, changes in the labor market are examined as a source of the fishermen's dissatisfaction.

A. The Question of the Nets

At trial the fishermen justified their refusal to work by arguing that Alaska Packers had provided them with substandard nets.[144] The trial court, however, rejected this argument. Although all three of the libelants' witnesses testified that the nets were in poor condition,[145] the court found that this contention was "not sustained by the evidence."[146]

One possible reading of the trial transcript in the *Alaska Packers'* case is that the nets provided by the Alaska Packers were indeed serviceable, but that the fishermen did not realize this, due in large part to differences in language and experience. A review of the individual libelants quickly reveals that most were Italians. Testimony at the trial indicated that most were immigrants[147] and that the majority did not speak English.[148] An

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Casaday, *supra* note 141, at 429.

[144] *See* Domenico v. Alaska Packers' Ass'n, 112 F. 554, 556 (N.D. Cal. 1901).

[145] *See* Testimony of Andrew Soffocati, Record at 19; Testimony of John Rutge, Record at 43; Testimony of Antonio Jetta, Record at 62.

[146] *Alaska Packers' Ass'n*, 112 F. at 556.

[147] The cannery fishermen are nearly all foreigners, the majority being "north countrymen," or, as they are termed, "hardheads," though there are some fishing gangs comprised of what are called "dagoes," consisting of Italians, Greeks, and the like. When these two classes form different fishing gangs for the same cannery, the north-country crew is

interpreter was present and, on at least one occasion, used at trial.[149] The transcript itself indicates some language problems.[150]

In addition, it appears that for most of the fishermen this was their first year fishing at Pyramid Harbor, although they testified they had experience in other places.[151] The trial testimony strongly suggests that the type of nets used at Pyramid Harbor was different than the type used at other places, such as on the Columbia River.

The Pyramid Harbor fishermen used gill nets exclusively,[152] which were supplied by the company. The nets from top to bottom are sixteen to eighteen feet deep (also described as thirty-two meshes deep).[153] At Pyramid Harbor, each year the top sixteen meshes of the net were new; however, the bottom meshes were not. The bottom meshes were recycled from the top of the preceding year's net.[154]

Apparently, reusing the nets in this way was unique to Pyramid Harbor. There was testimony at trial that on the Columbia River in Oregon and at Orca in Alaska the nets were new each year.[155] The fishermen's complaints about the nets at trial appear to have focused on the old, reused portion of

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referred to as the "white crew."

MOSER 1898, *supra* note 110, at 23. *See also* Casaday, *supra* note 141, at 105 (noting that "[f]rom the earliest days of the industry the salmon fishermen of the Pacific Coast have been largely of foreign birth").

[148]*See* Testimony of Andrew Soffocati, Record at 23 (stating that "[n]one of us can read and very few of us can speak English").

[149]*See* Testimony of Lucito Arsmus, Record at 135. This one instance of the interpreter's comments appearing on the record is actually from the transcript of the *Bataillou* case, which was incorporated into the record of the *Alaska Packers'* case. *See id.* at 105.

[150]*See, e.g.*, Record at 19, 39, 49, 65, 66 (illustrating language difficulties).

[151]*See, e.g.*, Testimony of Andrew Soffocati, Record at 33 (stating that this was his first year at Pyramid Harbor, although he had thirteen or fourteen years fishing experience); Testimony of John Rutge, Record at 45, 60 (testifying that although fishing his first year at Pyramid Harbor, Rutge had eight or nine years experience fishing Columbia River and in British Columbia); Testimony of Antonio Jetta, Record at 64 (describing two years fishing experience on Orca River, further north in Alaska). *But see* Testimony of Hugh Murray, Record at 98, 113, 144 (testifying as superintendent of cannery that while there were men who had fished two or three years and knew type of nets used, on whole they were a "green" lot).

[152]*See* MOSER 1900, *supra* note 118, at 254. "[W]here the water is discolored gill nets are used . . . where the water is clear, drag seines give the best results." MOSER 1898, *supra* note 110, at 22.

[153]*See* Testimony of Hugh Murray, Record at 107.

[154]*See id.* Murray testified that they had been reusing the nets like this for seven years, ever since Alaska Packers took over the cannery. *See id.* at 82.

[155]*See* Testimony of John Rutge, Record at 51 (stating that meshes in Columbia River were new). Testimony of Antonio Jetta, Record at 64 (stating that it was custom in Alaska to provide new net each year).

the nets. They testified that the nets were hanging in the cannery and that they could tear the meshes by pulling on them with two fingers.[156] One testified that the fish broke right through the bottom of the nets where the mesh was old.[157]

Murray, the superintendent of the cannery, testified that the reason for reusing the nets in this way was because fish are only caught in the upper portion of the net, the top seven or eight meshes.[158] The lower part of the net is there merely to keep the net hanging properly.[159] The reason that fish are only caught in the upper portion of the net at Pyramid Harbor had to do with the conditions of the water where they were fishing. At the point in the channel where they were fishing, the fresh river water floats on top of the denser salt water to a depth of six or seven feet.[160] Because the salmon were found only in the muddy, nutrient-rich, fresh water, there was new netting for the top six or seven feet of the net, where the fish would be. The fish did not strike in the clear salt water that lay below the fresh river water.[161]

Murray testified that when the men first complained to him about the nets, on May 19th, "I explained the way we fished, and the way we got our fish."[162] He also was of the opinion that the few fishermen who had been at Pyramid Harbor before understood about the nets and "could fully explain the kinds of nets we used," although he did not know whether they had.[163] Given the fishermen's language difficulties, and assuming that Murray did not speak Italian,[164] the possibility exists that the men's understanding of what Murray was saying was incomplete.

Assuming for the moment that the fishermen did not understand that the nets were perfectly adequate for fishing at Pyramid Harbor, the case takes on a different complexion. Their misunderstanding might not have affected the ultimate outcome of the case because, after all, there still would not have been justification in fact for their strike. However, any suggestion of duress would have disappeared, as the fishermen would have had a good faith, albeit mistaken, reason for refusing to work.

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[156]*See* Testimony of John Rutge, Record at 43; *see also*, Testimony of Andrew Soffocati, Record at 19 (describing ease with which nets would tear).

[157]*See* Testimony of John Rutge, Record at 49–50.

[158]*See* Testimony of Hugh Murray, Record at 87, 107.

[159]*See id.* at 87.

[160]*See id.* at 88.

[161]*See id.* at 82.

[162]*Id.* at 108.

[163]*Id.* at 98.

[164]This is an assumption on my part. There is nothing in the transcript to indicate one way or the other whether Murray spoke Italian. *Cf. Id.* at 115 (testifying that he did not speak French).

B. Divergent Interests: An Assumption Called Into Question

Another distinct possibility is that the nets were indeed substandard. The court disbelieved the fishermen because the court assumed that Alaska Packers' self-interest would lead it to furnish the fishermen with good nets. The court took it as a "self-evident fact" that Alaska Packers would provide adequate gear "for on [the fishermen's] success depended the profits defendant would be able to realize that season from its packing plant, and the large capital invested therein."[165] The court thus assumed that the fishermen and Alaska Packers both wished to maximize the number of fish caught. This line of reasoning, however, over-simplifies the economics of the salmon canning industry at the turn of the century. While the fishermen certainly wanted to maximize the number of fish they caught, it should not be assumed that the cannery wanted to as well.

Certainly, the fishermen's self-interest would lead them to want to catch as many fish as possible. At the turn of the century, Alaskan fishermen's wages were made up of two components: "run money" and the price paid per fish.

> From the earliest days of the industry fishermen sent to Alaska from the United States proper customarily have manned the company vessels on the voyage to and from the salmon fields. For this service they are paid what is known as "run money"—a flat sum for the season negotiated in advance. . . .[166]

The run money included payment for anything that was not fishing.[167] As the testimony at trial showed, the fishermen were expected not only to sail the vessel from San Francisco to Pyramid Harbor, but also to unload supplies for the cannery, clean and mend the fishing nets and other equipment, close up the cannery at the end of the season, and load the packed cases of canned salmon onto the ship.[168]

The greatest part of the fishermen's earnings, however, came from the price paid per fish.[169] The original contract gave the men $50 in "run

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[165]*Alaska Packers' Ass'n*, 112 F. at 556.

[166]Casaday, *supra* note 141, at 267; *see also id.* at 24 (defining "run money").

[167]*See id.* at 24 (stating that run money "is supposed to be in payment for services performed while aboard ship, both ways, and for work other than fishing while at the canneries").

[168]*See* Testimony of Hugh Murray, Record at 90, 128.

[169]*See* Casaday, *supra* note 141, at 270.

money" and four cents per red salmon per boat.[170] As two men manned each boat, this worked out to two cents per man per fish.

Conversely, the canneries needed the fishermen to catch sufficient fish, but not too many. There were no facilities in 1900 for preserving the fish until they could be canned. Moreover, canning the fish was a very labor intensive operation.[171] If the salmon harvest was too bountiful, the cannery workers would not be able to keep up and fish would rot before they could be canned.

Exactly this situation occurred in British Columbia in 1897: "[s]almon ran in vast numbers that year . . . . The vast numbers of fish delivered each day exceeded the cannery capacity. Until strict limits per boat were imposed on the fishermen, large amounts of salmon lay rotting in trenches dug to receive the overflow."[172] One scholar has noted that "[f]ailure to make use of caught salmon used to be very common."[173] In 1900, the government inspector for the Alaskan canneries commented that the waste in the Bristol Bay district was "strikingly large."[174]

As it turned out, the salmon run during the 1900 season was exceptionally large.[175] "From all parts of Alaska come reports of a large and steady run of salmon: The number of cases packed this year in Alaskan waters will be the greatest on record."[176] At least for Alaska Packers, this prediction proved true: in 1900 for the first time the total pack exceeded one million cases.[177] Of course, in May when the fishermen made their demands, no one

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[170]*See* Testimony of Antonio Jetta, Record at 63 (testifying that they were paid four cents per boat for each salmon, whether red or king, but that other canneries paid more for king salmon). ***But see*** Testimony of John Rutge, Record at 44 (testifying in response to leading question on cross-examination that they received ten cents per boat per king salmon). I suspect that this discrepancy is another example of language problems.

[171]The reliance of the canning industry on manual labor existed until 1905, when a machine that prepared salmon for canning was first introduced. The machine, in a striking example of the racism of the period, was called the "Iron Chink." It could do the work of 30 to 40 Chinese laborers and was a significant improvement in the efficiency of the canning process. *See* SMITH, *supra* note 83, at 24–25.

[172]JOSEPH E. FORESTER & ANNE D. FORESTER, FISHING: BRITISH COLUMBIA'S COMMERCIAL FISHING HISTORY 21 (1975).

[173]Casaday, *supra* note 141, at 331 n.74.

[174]MOSER 1900, *supra* note 118, at 187.

[175]Coast Seamens Journal, Aug. 1, 1900, Microform v. 12–13. Taku Inlet, about 92 miles south of Pyramid Harbor, where Pyramid Harbor men had fished for king earlier in the season, reported an "unprecedented" run of salmon as of July 10, 1900, so much so that "[t]he boats fishing for the local cannery have been limited to 1,500 pounds per day." *Id.* I suspect the cannery referred to was not Pyramid Harbor but Taku Packing Company, a small cannery that opened in the spring of 1900. *See* MOSER 1900, *supra* note 118, at 259.

[176]Coast Seamens Journal, Aug. 1, 1900, Microform v.12–13.

[177]APA Microfilm Reel No. 4, "Total Pack 1893-1925: Alaska and Puget Sound."

could know what the run would be like for that season, but they knew the possibility existed that the run could be very large.

There is very little in the trial testimony that sheds any light on the relation between the catch and the Pyramid Harbor cannery's ability to can that catch. Murray, the superintendent, testified that the pack in 1900 was 1,500 to 2,000 cases better than in 1899.[178] He indicated that 2,000 cases represented about 20,000 fish.[179] Murray also testified that the run in 1900 was about the same as the run in 1899.[180] However, Mr. Banning, the attorney for the fishermen, failed to pin Murray down on the comparison between 1900's catch and that from 1899.[181]

If the catches in the two years were comparable while the pack for 1900 increased by 2,000 cases, that would suggest that in 1899 the cannery was unable to process at least 20,000 salmon.[182] It also would suggest that

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[178]*See* Testimony of Hugh Murray, Record at 86 (testifying that pack was 1,500 cases better). Also testifying in the *Bataillou* case which was incorporated by reference into the record of this case, he said that the number was 2,000 cases. Record at 113. Alaska Packers' records indicate that the total pack for Pyramid Harbor in 1899 was 53,237 cases and in 1900 it was 55,601, an increase of 2,364 cases. APA Microfilm Reel No. 4, "Total Pack 1893-1930: Pyramid Harbor District."

[179]*See* Testimony of Hugh Murray, Record at 113 (suggesting that it takes approximately ten salmon to fill case of forty-eight one pound cans). Government documents from the period indicate that at Pyramid Harbor it took between ten and eleven salmon to fill a case. *See* MOSER 1898, *supra* note 110, at 126 (stating that 10.3 salmon per case were used in 1898 and 1897); MOSER 1900, *supra* note 118, at 255 (11 salmon per case).

[180]*See* Record at 86–87.

[181]A successful canning year depended upon the relationship between three distinct concepts: the salmon run, the catch, and the pack. The run depends upon the health of the fishery; it refers to the number of salmon in the water. The catch depends in part upon the run; if the run is small, the catch is liable to be as well. But the catch also depends upon the numbers and skill of the fishermen. The pack, although affected indirectly by the run and more directly by the catch, is also dependent upon the number of cannery workers and the efficiency of the canning operation.

In the *Bataillou* transcript, this exchange took place (between Mr. Woodworth, Bataillou's attorney, and Murray):

Q. You just testified that the season was just as good as the previous season.

A. I testified that the run of fish was good.

Q. And that the catch was just as good this year as last year?

A. An average catch.

Testimony of Hugh Murray, Record at 144.

[182]The increased pack cannot be explained by any increase in the size of the Chinese canner crew as it was exactly the same size in both 1899 and 1900. *See* MOSER 1900, *supra* note118, at 320–21.

A possible explanation for the increased pack is the fact that in 1900 the cannery bought 47,178 more fish from the local tribes than it had in 1899: 217,074 in 1900 versus 169,896 in 1899. *See id.* at 254. Given that 2,000 cases require about 20,000 fish, this would still leave the canner unable to process some 20,000 salmon.

the company had a motive for making sure the fishermen's catch did not exceed the cannery's capacity.[183]

This motive is reinforced by Alaska Packers' documents indicating the number of cases for which Pyramid Harbor was outfitted. Due to the distance between Alaska and the mainland, cannery superintendents had to plan for the season months before it began and without knowing what the run would be like. In 1900, Pyramid Harbor was outfitted (with materials such as tin, solder, labels, cases, etc.) to can 55,000 cases.[184] In fact, that year it canned 55,601.[185] This suggests that in 1900, Pyramid Harbor was operating pretty much at capacity for the season.[186]

Moreover, in both 1898 and 1899 the pack at Pyramid Harbor had either met or exceeded the number of cases for which the cannery had been outfitted.[187] This suggests that the cannery would not have had many extra supplies on hand from previous seasons. None of these facts, however, came out in the trial.[188]

There is another possible reason for why the cannery might have provided substandard nets. As was pointed out above, Pyramid Harbor's cost per case of salmon was higher than most of the other Alaska Packers' canneries, and it spent more on fishing gear than other canneries of a comparable size.[189] The reason for the disproportionate gear expenditure may have been the need to fish with gillnets, which are an inefficient means

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[183]The physical capacity of the cannery was 1,600 cases per day, which was rarely attained. *See* MOSER 1900, *supra* note 118, at 254. The operating capacity of the cannery, however, may have been less than its physical capacity. Even with sufficient salmon on hand to can 1,600 cases (approximately 16,000 to 17,000 fish), the cannery crew may not have been able to process that many fish in a day.

[184]*See* APA Microfiche No. 336, "Cannery Costs 1893-1946." There is also the possibility that Alaska Packers artificially limited the number of cases a cannery was supposed to pack. In other words, the number of cases for which a cannery was outfitted may not have represented management's prediction as to how good a season the cannery would have, but rather the market share that was allocated to that cannery. Recall that the original purpose for the formation of Alaska Packers was to control the amount of canned salmon reaching the market.

[185]*See id.*

[186]*See id.* In surveying the APA records for the other canneries, I found that only rarely did a cannery's pack exceed the number of cases for which it had been outfitted. In most cases where the pack did exceed the number of cases for which the cannery had been outfitted, the excess was three thousand cases or less. The largest discrepancy occurred in 1895 at Chignik where the cannery had been outfitted for 60,000 cases and packed 69,963.

[187]*See id.*

[188]Of course, at this time discovery was practically nonexistent. Nevertheless, it is somewhat disconcerting to realize that I have access to information about Pyramid Harbor's 1900 season which was not available to the fishermen's attorney.

[189]*See supra* notes 116–20 and accompanying text.

of fishing for salmon. Thus, if Murray, the superintendent, felt the need to reduce the cost per case, he may have chosen to economize on the nets by recycling portions of last year's nets.

Murray may have been willing to economize on the nets, even though this reduced, to some extent, the fishermen's catch, because he knew he could purchase fish from the local tribes. Each year, the cannery obtained a significant percentage of its fish from the Chilkat and Chilkoot fishermen. The records show that Pyramid Harbor regularly obtained 25% to 40% of its fish from the tribes.[190] In 1900, it purchased over 200,000 fish from them.

Perhaps what Alaska Packers really needed the fishermen for was not fishing, but for sailing the vessel to and from San Francisco, unloading supplies upon arrival in Alaska, and loading the pack at the end of the season.[191] In fact, Murray testified that it was "just as necessary" to have the men discharge the ship as it was to have them fish.[192] The possibility that Alaska Packers was not concerned with maximizing the fishermen's catch due to the availability of fish from the local tribes was not raised at trial.

I suspect that Banning's failure to establish any credible motive for the cannery to provide its fishermen with substandard equipment is an example

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[190]The following table shows the number of fish purchased from the Chilkat and Chilkoot Indians. The data is compiled from MOSER 1898, *supra* note 110, at 126–27, and MOSER 1900, *supra* note 118, at 254, 320. Keep in mind that during this period the cannery fishermen were averaging 300,000 redfish per season.

Year	No. of Indians selling fish to the cannery	No. of fish the cannery purchased
1896*	~200	159,000
1897**	~300	78,872
1898	192	110,816
1899	196	169,896
1900	224	217,074

*In 1896 the run of fish in the Chilkoot River was so large that the cannery limited its purchases to 100 fish per man per day. MOSER 1898, *supra* note 110, at 127.

**The small number in 1897 is "due to the Klondike excitement." MOSER 1898, *supra* note 110, at 128. Most of the Indians (and about half of the fishermen) left halfway through the season to haul freight over the passes to the gold fields. *See id.*

[191]*See generally* Casaday, *supra* note 141, at 281 (pointing out that having fishermen sail vessels to and from Alaska saved canneries from expense of maintaining sailing crew in idleness during run and that skilled sailors were in demand).

[192]Record at 131.

of what has been called "litigation incapacity."[193] Our adversarial system posits two opposing sides with relatively equal resources. In reality, of course, the two sides frequently are mismatched. In several places, the transcript suggests that Alaska Packers' attorney was very familiar with the salmon canning industry, while Banning was not.[194] This is hardly surprising, given that Alaska Packers was a large, well-funded conglomerate, certainly with more financial resources than the largely illiterate wage laborers on the other side of the case. Indeed, what is surprising is that the fishermen were able to obtain counsel at all.[195]

Banning's trial strategy focused on comparing what the fishermen caught elsewhere and what they caught at Pyramid Harbor in the 1900 season. For example, Banning attempted to present evidence showing that one of the fishermen had caught twenty-nine thousand fish at Copper River, Alaska.[196] At Pyramid Harbor, this same fisherman caught five thousand six hundred fish.[197] From this, he wanted to draw the implication that substandard equipment at Pyramid Harbor led to the reduced catch. This strategy, however, triggered objections from Alaska Packers' counsel[198] and rebuttal testimony that called into question the abilities of the fishermen.[199] Ultimately, Banning's strategy did not persuade the trial judge.

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[193]Judith L. Maute, *Peeryhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 N.W. U. L. REV. 1341, 1448 (1995); *Cf.* Danzig, THE CAPABILITY PROBLEM, *supra* note 8 (referring to the same phenomenon as the "capability problem").

[194]For example, Alaska Packers' attorney, Gregory at one point says "I have myself seen men at Karluk catch sixty thousand fish at one haul." Record at 62. Also, the firm of Chickering, Thomas & Gregory was listed as the new corporation's attorneys when Alaska Packers first incorporated in 1893. APA Microfilm Reel No. 1, "Alaska Packers Association History 1891-1904."

[195]Counsel for the fishermen was identified as the firm of Woodworth & Banning. E. J. Banning was the trial counsel. *See* Record at 14. In *The History of the Bench and Bar of California*, an attorney by the name of Edward J. Banning is discussed. *See* SHUCK, *supra* note 14, at 995. Assuming this is the same Banning, he was born in 1873 in San Francisco, graduated from St. Ignatius College in 1892 and from Hastings College of Law in 1895. He became assistant U.S. Attorney in December 1898, and according to *The History* was still occupying that position when the book went to press. *See id.* Woodworth, who had been the trial counsel in the earlier *Bataillou* case, was a classmate of Banning's at Hastings; he graduated in 1894. Woodworth also became an assistant U.S. Attorney in December 1898. He became U. S. Attorney in March 1901. *See id.* at 1088. It seems that either being a U.S. Attorney was not a full time position or else Banning had left that office shortly before the trial.

[196]*See* Record at 61.

[197]*See* Testimony of Antonio Jetta, Record at 63.

[198]Mr. Gregory pointed out that the two places were two thousand miles apart. *See* Record at 61.

[199]*See e.g.*, Testimony of Hugh Murray, Record at 83–84 (describing John Rutge as a "very poor fisherman").

Hindsight, of course, has perfect vision, but if Banning had focused on the cannery's capacity and had been able to establish that the 1900 catch met or exceeded the cannery's capacity, then he would have established a motive for the cannery to limit the fishermen's catch. Similarly, if he had been able to bring out the disparities between Pyramid Harbor and other canneries in cost per case and expenditures for fishing gear, along with the extent to which Pyramid Harbor relied on the local tribes, he could have suggested a motive to cut corners on the nets. Either strategy would have bolstered the credibility of the fishermen who testified that the nets were substandard. Moreover, if Banning had been able to bring out the extent to which local tribal fishermen contributed to the cannery's operation, he would have been able to argue that the cannery could have operated even if the fishermen had refused to work during the season. This leads into the "duress" issue.

C. The Question of Duress

As discussed above, both the appellate court and scholars examining the court's opinion have come close to categorizing this case as one involving duress.[200] They point to the short fishing season, the impossibility of obtaining other fishermen, and the significant amount of money Alaska Packers invested in the cannery at Pyramid Harbor. As a result, they concluded that the company had no feasible alternative to agreeing to the fishermen's demands. As Chirelstein phrased it, the company's only other alternative was "the loss of much of its investment in the cannery itself."[201] The company's vulnerability, however, never rose to such a level.

There are at least three reasons why Alaska Packers was not completely without options. First, Pyramid Harbor would still have been able to pack a substantial number of salmon even without the fishermen's catch. Moreover, even if Pyramid Harbor had operated at a loss for the 1900 season that would not have caused Alaska Packers to post a loss. Finally, the fishermen were just as isolated as the cannery and their isolation could have been exploited by the company.

At trial, there was actually not much testimony about the availability of substitutes for the fishermen. Murray was asked if he needed the men's "services as fishermen" and he answered yes.[202] He was also asked if he

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[200] *See supra* notes 67–78 and accompanying text.

[201] CHIRELSTEIN, *supra* note 75, at 65.

[202] *See* Testimony of Hugh Murray, Record at 108. This testimony was actually from the *Bataillou* case and was incorporated by reference in this case. *See id.* at 105.

could have obtained other fishermen and he answered no.[203] On cross, he was asked whether "there were Indians there that you could have got?"[204] Murray responded that there were "[o]nly a limited number" who come every year.[205]

He was being somewhat disingenuous at this point. While there were only a few Native Americans who were actual employees of Pyramid Harbor,[206] in the five years between 1896 and 1900, the cannery purchased fish from approximately two hundred Native Americans every year.[207] As discussed in the preceding section, these non-employee Native Americans supplied the cannery with significant numbers of fish. Thus, it was highly unlikely that the season would have been a complete failure even if the fishermen had refused to fish.[208] Certainly the assumption that the company's only other option to acceding to the fishermen's demand for increased wages was to lose its entire investment in the cannery is not supported by these circumstances.

As suggested in the preceding section, perhaps the company really needed the men's services as sailors.[209] It is unlikely that the Native Americans would have had the skill, not to mention the desire, to man the sailing vessel back to San Francisco with that season's pack. If the primary concern was with shipping the pack to San Francisco, however, there would have been no time pressure, as there was with the short fishing season. In other words, the company could have brought up replacement sailors and it would not have mattered that they arrived after the run of salmon.

Furthermore, what is overlooked in this picture of the company at the mercy of the recalcitrant fishermen is that Alaska Packers was a trust, a combination of a number of independent canneries. In 1900, Alaska Packers operated eighteen canneries in Alaska and two more on Puget Sound.[210] Part of the purpose of Alaska Packers was to protect individual canneries from catastrophic losses, such as the loss of the ship bearing the entire season's

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[203]*See id.* at 109.

[204]*Id.* at 121.

[205]*Id.* at 121–22.

[206]*See id.* at 119 (stating that in 1900 there were ten or twenty Native American employees); *see also* MOSER 1900, *supra* note 118, at 255.

[207]*See supra* note 190 (table showing number of fish purchased from Chilkat and Chilkoot Indians).

[208]It is also not clear if all the Pyramid Harbor fishermen were involved in the work stoppage. Moser indicates that there were 92 white and 10 Native American fishermen, but only 82 are listed as libelants. *See* MOSER 1900, *supra* note 118, at 255.

[209]*See supra* notes 191–92 and accompanying text.

[210]*See* APA Microfilm Reel No. 1, "Alaska Packers Association History: 1891-1904."

pack, which were part and parcel of the salmon industry.[211] Even if the cannery at Pyramid Harbor had not canned a single tin of salmon and its entire season had been a loss, it would not have had a profound effect on Alaska Packers' bottom line.[212]

The cannery at Pyramid Harbor did not represent a major part of Alaska Packers' operations. In 1900, Pyramid Harbor packed 55,601 cases of canned salmon, which as it turned out was the cannery's best year.[213] Alaska Packers' total pack for Alaska and Puget Sound that year was 1,004,318.[214] Thus, in 1900, Pyramid Harbor represented 5.5% of Alaska Packers' total output.

Alaska Packers' net profit for 1900 was $770,536.[215] The market value of Pyramid Harbor's 55,601 cases was approximately $230,000.[216] It cost Alaska Packers $170,190 to pack the 55,601 cases.[217] This indicates that Alaska Packers' profit from the Pyramid Harbor pack was about $58,885. Subtracting that from Alaska Packers' overall net profit still leaves a net profit of more than $700,000.

In other words, from this perspective, Alaska Packers could have called the fishermen's bluff. Given the disparity in their economic resources, the fishermen would have suffered far more from the loss of a season's income than Alaska Packers would have.[218]

It has been suggested, however, that evaluating the coerciveness of the fishermen's threat not to work from the point of view of Alaska Packers is

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[211]Another purpose was to avoid flooding the market with canned salmon, thereby driving down prices.

[212]The relative insignificance of the Pyramid Harbor events is reflected by a comment made by, Mr. Gregory, the attorney for Alaska Packers. At the end of the trial, he referred to the case as "a very small one." Record at 145.

[213]*See* APA Microfilm Reel 4, "Total Pack 1893 to 1925: Alaska and Puget Sound."

[214]*See id.*

[215]*See* APA Microfiche, No. 310, "Alaska Packers Association: Capital Stock; Net Profit; Percentage of Profit."

[216]*See id.* No. 309, "Alaska Packers Association: Net Prices for Canned Salmon per case of 48-1lb. cans." In 1900, the net price, based upon San Francisco delivery, was $4.12 per case of red salmon. The net price for other types of salmon was lower. *See id.* Although not all of Pyramid Harbor's pack was made up of red salmon, most of it was, so I have used that price to compute the market value of the 1900 pack.

[217]*See* APA Microfiche, No. 336, "Cannery Costs 1893-1946."

[218]There was testimony at trial that most of the fishermen had families to support. Testimony of Andrew Soffocati, Record at 29. Moreover, the trial court ruled that signing releases did not bar the fishermen's suit, relying on an admiralty rule that recognized fishermen's straightened circumstances often led to their compromising their rights. *See Alaska Packers' Ass'n*, 112 F. at 560.

inappropriate.[219] Certainly, perception of coercion depends upon the frame of reference. From the point of view of Hugh Murray, the superintendent of Pyramid Harbor, the situation may have seemed coercive; his compensation and perhaps even his job may have depended upon the success of the cannery's season. But this only establishes that his self-interest may have conflicted with the company's.

There is an additional reason why the distribution of bargaining power between the fishermen and Alaska Packers was not all on the fishermen's side. The messhouse operator, once he found out that the men were not working, refused to serve them meals and only Murray's intervention persuaded him to continue to do so.[220] This suggests that the company could have leveraged the fact that the men had no other source of victuals in the same way the men were leveraging the company's lack of substitute fishermen. During labor unrest in the mid-1930's, packing companies "threw [striking fishermen] on the beach," "that is, they deprived the men of board and lodging and forced them to shift for themselves."[221] This may not have been an option for Murray; he testified that the fishermen threatened to break into the messhouse and help themselves, and that he ordered the messhouse operator to feed them because he did not want any trouble.[222]

Even putting aside the company's ability or desire to withhold food, the historical record suggests that Alaska Packers was not faced with a Hobson's choice when the fishermen threatened a work stoppage. The company had access to a substantial number of salmon as a result of the efforts of the local Native American fishermen. Moreover, Alaska Packers had more financial resources than the immigrant fishermen and could have absorbed the loss of Pyramid Harbor's season.

D. Changes in the Labor Market

There was a cartoon hanging in the lobby of the "Scandinavian Rooms" in Juneau, Alaska, in the early part of this century.[223] The cartoon, entitled "A Fish Story," shows a thin, bedraggled fisherman in his boat, holding up the tail of a salmon.[224] The fisherman is saying: "Is this my share[?]."[225] On the dock stands a large-bellied, grinning man, dressed nattily in a suit with

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[219]This suggestion was made by a member of the audience at the Symposium at which an earlier version of this paper was given.

[220]*See* Testimony of Hugh Murray, Record at 89–90.

[221]Casaday, *supra* note 141, at 460–61.

[222]*See* Testimony of Hugh Murray, Record at 89–90.

[223]*See* Casaday, *supra* note 141, at 261.

[224]*See id.* (depicting cartoon).

[225]*See id.*

top hat and spats; on his suit coat appears the legend "Fish Trust."[226] He answers the fisherman: "It's the same as you always get — what ya kicking about?"[227] In the waters of the bay, a mermaid pleads with Neptune, the god of the sea: "Father Neptune can't you help that poor fisherman?"[228] And Neptune, pipe in hand, muses: "You can't help anyone who won't help themselves."[229] Neptune is, of course, referring to the failure of the fishermen to organize.

In Alaska Packers' view of the case, the fishermen had gone on strike solely to get more money. At the end of the trial, Mr. Gregory, the attorney for Alaska Packers, called a Mr. G. Viscecova to the stand. He was the labor contractor who recruited the fishermen for Pyramid Harbor.[230] Gregory sought to have this witness testify as to a letter he had received, apparently from some of the libelants, but the court excluded the letter as hearsay. In the letter, according to Gregory, the writer or writers admitted that they had "gone on strike" for better wages.[231] Moreover, Murray testified that there was some talk at the time of the work stoppage that the fishermen should have had $100 for run money from the beginning.[232]

One explanation for why the Pyramid Harbor fishermen demanded an increase in wages could be that, when they agreed to the original terms, they were proceeding with imperfect information regarding Alaskan wages. Then, when they arrived in Pyramid Harbor, they discovered that other fishermen in the immediate vicinity of Pyramid Harbor were earning more than they were.

In the spring of 1900, two new small canneries had opened in the vicinity of Pyramid Harbor. Neither were members of the Alaska Packers' Association. One was the Chilkoot Packing Company, which was located at the head of Chilkoot Inlet, and the other was Taku Packing Company, which was located in Taku Inlet where Pyramid Harbor fishermen fished for king salmon early in the season.

The company that opened the Chilkoot cannery was from Aberdeen, Washington.[233] It employed 24 white and 8 native fishermen and purchased fish from another 16 natives.[234] The fishermen were recruited from the Puget

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[226]*See id.*

[227]*See id.*

[228]*See id.*

[229]*See id.*

[230]*See* Record at 145. Viscecova also apparently ran the messhall. *See supra* note 143 and accompanying text.

[231]*See* Record at 145.

[232]*See* Testimony of Hugh Murray, Record at 129.

[233]*See* MOSER 1900, *supra* note 118, at 255.

[234]*See id.* at 256.

Sound area and they were paid $25 per month from the time of departure from Puget Sound to the date of return, plus 5 cents for each redfish per two man boat.[235] Even accounting for the fact that it probably did not take as long to sail from Puget Sound as it did from San Francisco, the Chilkoot Packing Company fishermen were making more than the Pyramid Harbor fishermen, probably at least $75 in run money plus the extra half cent per man per fish.

The Taku Packing Company was organized in Astoria, Oregon, and thus probably recruited fishermen from that port.[236] It employed 30 white and 14 native fishermen. The Taku fishermen received $80 for the season and 5 cents per redfish per two man boat.[237] Again, these men were earning more than the Pyramid Harbor fishermen.

It is highly probable that, after arriving at Pyramid Harbor, the fishermen discovered that they were being paid less than the fishermen at the two closest canneries. Moreover, these other fishermen were getting more run money even though they were traveling less distance. Perhaps the men also became aware for the first time that, as little as two years previously, the cannery at Pyramid Harbor was paying $100 in run money, though only 3 cents per fish per boat.[238]

The following demonstrates a likely scenario: In San Francisco, the men were not organized. They were of different nationalities, although predominantly Italian.[239] They probably did not belong to a union. They scarcely knew their fellow fishermen. They were new to Alaska. After they arrived in Alaska, for the first time they had the opportunity to talk with the few fishermen who fished at Pyramid Harbor in the past and they discovered that the average catches were not what they thought they would be. The nets were different, not like they were used to using. Accordingly, their concerns about their ability to earn a living wage increased. In addition, they discovered that other nearby canneries were paying their fishermen more

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[235]*See id.* at 255.

[236]*See id.* at 259.

[237]*See id.*

[238]*See* MOSER 1898, *supra* note 110, at 127.

[239]Interestingly, a fair number of all the Alaskan fishermen of Italian nationality seem to have been at Pyramid Harbor in 1900. The annual report of U.S. Shipping Commissioners indicated that in 1900, 16,212 were shipped at the San Francisco office. Of these, "4,910 were native Americans [meaning U.S. citizens], 2,959 Scandinavians, 3,433 British, 1,259 Germans, 144 Italians, 216 French, and 3,291 of various other nationalities, including Chinese and Japanese." Coast Seamen's Journal, December 19, 1900, Microform v.14–15. Perhaps this is a consequence of the labor contracting system. *See supra* notes 140–42 and accompanying text.

than Pyramid Harbor. Together in a foreign place, isolated from outside influences, they coalesced into a group and went on strike.

Interestingly, there appears to have been a repeat of the Pyramid Harbor strike two years later at Bristol Bay, in western Alaska. On June 24, 1902, seven hundred fishermen went on strike demanding an increase in pay per fish, from two to three cents per red salmon. The strike lasted four days, at which time the cannery gave in to the men's demands.[240] Apparently, however, just as with this case, the company at the end of the season refused to pay the increased amount and the courts upheld the company.[241] According to the *Coast Seaman's Journal*, there was a lesson to be learned here: "[t]heir present experience should teach the Alaskan fishermen that the proper place to raise wages is in San Francisco, and the proper time when they are signing articles. To wait until they are on the grounds and the fish begin to run is to take bigger risks than fish, to say the least."[242]

IV. CONCLUSION

Although history is interesting for its own sake, the point of developing as fully as possible the history of the *Alaska Packers'* case is to contribute to our understanding of the law. This article attempts to do that by looking beyond the authoritative narrative enshrined in the judicial opinions to a more complete, and more complex, story.

An important lesson that emerges from this work is the insidious way in which assumptions about how the world works influence litigation outcomes. Because District Judge De Haven assumed the "self-evident fact" that Alaska Packers would want the men to catch as many fish as possible, he did not find the men's testimony regarding the inadequate nets to be credible. Because of his assumption, he could see no motive for the company to provide substandard nets. The possibility that there could be too many fish, or that the cannery was trying to cut corners on its equipment, did not occur to him.

Other assumptions have led to this case being thought of as a case of duress. Assumptions about language, experience, and perhaps class led to the conclusion that the men were motivated solely by a desire for more wages and obscured the possibility of honest misunderstanding. Crucial to seeing this case as one of coercion is the assumption that, if the men had refused to work, Alaska Packers had no other means of obtaining salmon and would have lost its investment in the cannery. The substantial contribu-

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[240]*See* Coast Seamen's Journal, August 6, 1902, Microform v.14–15.

[241]*See* Casaday, *supra* note 141, at 411.

[242]Coast Seamen's Journal, September 17, 1902, Microform v.14–15.

tions of the Native American fishermen to the cannery's operation, as well as the resources of the fish trust, are not seen.

By developing the social and economic history of the case, I have tried to call these assumptions into question. My goal is not to "prove" the outcome of the case wrong. Rather, it is to "shake things up," to destabilize the received wisdom about the case and to suggest other ways of looking at the litigation. I hope that this fuller historical narrative will enrich classroom discussion and provoke debate, both about the merits of the case and about our adversarial system of justice.

Response: The Values of Legal Archaeology*

*Judith L. Maute***

Justice, justice, shall you seek[1]

I. INTRODUCTION: HISTORICAL RECONSTRUCTION AS AN ARCHAEOLOGICAL DIG

At its best, the study and practice of law is a passionate and untiring pursuit of justice. In the hustle of daily demands for our time and attention, we often lose sight of that goal, and lawyers' essential role in achieving just results. By pausing long enough to reflect on one case—intricately weaving together the facts, law, and historical context—one's passion and commitment to the ends of justice can be revitalized. To the extent that law is taught and received as a set of abstract legal rules, one can safely remain at a distance from the significance of a legal ruling to the parties, the greater community, and the legal system as a whole.

Professor Debora Threedy has suggested that historical reconstruction of noteworthy cases be viewed using the metaphor of an archeological dig.

> "[A] reported case does in some ways resemble those traces of past human activity . . . . Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law."[2]

This metaphor captures what is involved in doing historical reconstruction, the value to those who get their hands dirty laboring in the field, and the resulting contributions to a deeper understanding of the law.

Historical reconstruction is invaluable to understanding legal processes: how cases are presented, take shape through the adversary process, and are finally decided by a court of last resort. The term "legal archaeology" is both

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[1]Bible, 1994 New Oxford Annotated; *see also* Michael D. Goldhaber, *Case Reveals the Meaning of Life* NAT'L L. J., at A20 (Sept. 6, 1999).

[2]Debora L. Threedy, *A Fish Story: The Context of* Alaska Packers' Association v. Domenico, 2000 UTAH L. REV. 2, at 188 n.12 (quoting A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships* Peerless, 11 CARDOZO L. REV. 287 (1989), *reprinted in* A CONTRACTS ANTHOLOGY 200).

elegant and accurate. The process it describes is labor-intensive and thus can only be done by those who are willing to get their hands dirty, who are passionately motivated by a detective-like curiosity to understand, and who are willing to sift patiently through piles of sand until they find a coherent story take shape by piecing together broken shards.

Another possible metaphor is that of pathology done in the coroner's office. I suspect that everyone recalls a sense of outrage in response to studying a case at some time during their law school experience. The facts seemed compelling, providing a strong moral and legal basis for the claim. According to the law student's sense of justice, the case was wrongly decided.

During the process of legal education, many students and lawyers learn to shrug off outrage, and transfer their attention to a higher level of abstraction. They focus upon identifying the legal principle articulated by the court, and how that principle fit within the legal framework of this substantive area of law. As is so often true, if one does not accurately understand what transpired factually, a correct resolution to the problem is practically quite difficult. Law students and practicing lawyers must be vigilant toward the facts as stated, and constantly ask whether the court's decision was based upon assumptions about the facts which could not withstand careful scrutiny.

II. VALUES OF DOING LEGAL ARCHAEOLOGY

A. Passion for Justice and the Skills to Help it Happen[3]

Zeal on a client's behalf is not necessarily translated into competent representation within legal bounds. At its best, legal education equips students with the technical skills needed for competence, a firm grounding in lawyers' ethical obligations, and a passion to have their professional lives make a positive difference in the legal system.

A primary value of legal archaeology is to harness an individual's passion for justice—to develop the legal skills to understand a case in its industrial, economic, and theoretical context. This process enables a rich comprehension about law, and how cases are decided in an adversary system. Besides making possible a deeper understanding of precedent and its possible flaws, this process also helps develop lawyering skills that are necessary to represent clients competently, with an adequate inquiry into facts, and

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[3]*See Micah* 6:8 (New Oxford Annotated Bible, 1994) ("[W]hat does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God.").

provide effective presentation of the case starting with the initial interview, the pleadings, discovery, and on through final decision.[4]

Competence "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[5] A student of the law can better appreciate what this rule means by examining the details of a case, what evidence might have been available, the evidence's impact on possible theory and policy issues, and the strategic choices made by the lawyers and their clients. Whether in law school, or in practice, we can all benefit from occasional pause for in-depth reflection on legal archaeology (or pathology); such reflections help put our professional lives in perspective, in terms of what we do, how we do it and why we do it. I find tremendous practical value from studying a case in depth. Such study may trigger creative ideas for factual inquiry and theoretical possibilities. As one participant in this symposium so eloquently put it: trying a case is like navigating a river; one must be able to read the river at this point in time, in light of what has gone before and possibilities for change. Understanding context enables the lawyer to position a case to flow in the deepest path of the law, avoiding obstacles that impede the flow.[6]

B. Benefits to Researcher and Students

I find it difficult to make clean distinctions between benefits flowing to the legal historian and those flowing to students of the law. The intrinsic benefits of doing the work have external impact upon its consumers, whether they are students of the researcher or more distant readers of the final product.

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[4]*See* SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, AM. BAR ASS'N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT (1992) [hereinafter MacRate Report]; *see also* John J. Flynn, Why, Why? (undated unpublished manuscript on file with author) (explaining case method of legal education, with close connection of facts, policies, rules, and consequences); Introductory Memo from Judith Maute to Contracts Students of the University of Oklahoma Law School (1992) (on file with author) (explaining objectives and methods of legal education).

[5]ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.1 (1999).

[6]*See generally* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) (comparing training of steamboat pilot in Mark Twain's life on the Mississippi with lawyers' training).

1. Fun and Travel in the Name of Research

Let's be upfront about it. Law professors have great jobs. Academic freedom allows us significant latitude in determining our scholarly pursuits. If we are blessed with the curiosity about what really happened in a case and can identify possible sources of information, we can justify (at least to ourselves) the worthiness of exploration. When I first began to inquire about the *Peevyhouse*[7] case, I was a newcomer to the state of Oklahoma. Feeling much the *stranger in a strange land*,[8] my curiosity about the case provided a good conversation topic as I began to meet people in the diverse Oklahoma legal community. Lawyers love to tell stories, and the contemporary history of the Oklahoma Supreme Court bribe scandal was a rich topic for interesting tales. Over time, the stories fit together. Operating on Woodward and Bernstein's principle of investigative reporting, I would not publish any alleged "fact" of scandalous history unless I could find documentary support, or two sources who were willing to be cited as a reference for that point.[9] In the process of fact-gathering, I made many new friends and acquaintances, developed a rich understanding of my adoptive state's history, and established a foundation for appreciating its local legal culture. Interviews with lawyers or other persons typically required that I leave the hallowed halls of the academy, and venture out to other towns, cities, and the outlying countryside. My travels exposed me to parts of the state I would not otherwise have visited, and helped me to appreciate the aesthetic beauty of a geography which was foreign to me.

As I reflected upon Professor Threedy's symposium piece, I was thrilled with the potential her project holds for exploration in San Francisco and the Inside Passage of Alaska. Both are awesome in their beauty, and steeped in exciting history around the turn of the century. Spring break, summer travels . . . need I say more?[10]

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[7]*See* Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1960).

[8]*See* ROBERT HEINLEIN, STRANGER IN A STRANGE LAND (1961).

[9]At the time I began this project, Woodward and Bernstein were still honored for the work they had done in uncovering the Watergate Scandal. *See* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENTS MEN *passim* (1974). Times have changed, and their "waggish" take on Washington affairs is less revered. *See, e.g.*, Jamie Malanowski, *A New Nixon Who's Warm and Fatherly*, N.Y. TIMES, Aug. 15, 1999, at § 2, 9 (reviewing hilarious movie, DICK (Columbia Pictures 1999), which portrays Woodward as "shrill and stuffy," and Bernstein as "vain and nebbishy").

[10]I dare not give tax advice, for that specialty field is not my own. If, however, the "primary purpose" of travel is business, the potential tax deductions may be attractive as self-justification for spending extended time in a desired location with rich historical resources. *See* I.R.C. § 162 (1999).

2. Contextualizing Improves Law School Instruction

Particularly for professors in state or regional law schools, there is much to be said for getting a lay of the land.[11] Students do not enter law school with their minds tabula rasa. How they read cases and their subjective and moral reactions to legal and intellectual issues are deeply influenced by their backgrounds. By developing some familiarity with the sociological, economic, and political backgrounds from which many of my students have come, I have become better equipped to hear and respond to the concerns that they express in class.

The pedagogical benefit of contextualizing is not confined to cases from one's "home state" or geological region. Before they become physically exhausted or cynical about the law, most students yearn for justice in individual cases. Intuitively, they sense that facts are important to outcome. Some would say that a subtext to legal education—particularly first year—is to wipe out fuzzy thinking guided by sentimental notions of right and wrong.[12] As the work load increases and the fog begins to roll in, anxiety impulses often move students to grasp desperately for abstract legal principles that they can memorize and dutifully regurgitate on an exam.[13] They do not yet grasp the critical connection between facts and law. By taking the time in class to examine the factual details in or around some cases, a professor helps the sun begin to burn through the clouds.

As a personal reminder to make explicit this realist perspective, for years I kept a taped note on the cover page of my contracts casebook: "If you don't get it factually, you can't get it right legally." The evolutionary nature of legal doctrine is better grasped when students are trained to read carefully for subtle factual variations, and to think about the date of decision as a cue to consider the decision against the backdrop of its economic, industrial and political context.

Contextualizing helps the justice-hungry student who is outraged with an "unjust result" to grasp the fact that the law is not static, that it has potential for change, and that the quality of lawyering may have a significant impact on the outcome of litigation. Students who are trained to think about the relationship between fact-gathering, theory development, and practical lawyering skills are empowered, so that their skill, knowledge and dedication

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[11]Excuse the puns. Having lived so intensively with the aesthetic and geological aspects of stripmining and land reclamation, double entendres pertaining to land have become second nature.

[12]*See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 1–13 (1993).

[13]*See* William L. Prosser, *Lighthouse No Good,* 1 J. LEGAL EDUC. 257, 262 (1948).

to a client's cause can make a meaningful difference in the quality of justice. If this point is made early on, and throughout their legal education, students may emerge better equipped to represent clients.[14]

Contextualizing also helps students see the big picture. Pressures to cover and adequately survey an area of law necessarily dictate treatment of many issues in snippets; following the excerpt of a principal case, the typical casebook treats multiple related issues in small, cryptic paragraphs. With practice, the seasoned learner can conceptually place these issues according to their relative importance. In the last twenty years, legal education has become more attentive to teaching pedagogy, and has drawn upon research showing that individuals have different optimal learning styles. By varying one's approach to presenting materials, the teacher better satisfies students' diverse learning needs, while also expanding their capacity to master material presented in different formats. Many students are what I would call "whole to part" learners; until they can see the big picture, they cannot understand the discrete parts. I find well spent the initial time investment in developing an overview of a course. Detailed case reconstructions are superb teaching materials for this purpose. Civil procedure teachers have long used Marc Franklin's *Biography of a Case*,[15] and Gerald Stern's *The Buffalo Creek Disaster*.[16] Indeed, one reason I embarked on the *Peevyhouse* project was to create such materials for first year contracts students. To see in the rich detail of one case, the development of a contract, from negotiation through formation, performance, breach, excuse, and remedies, the beginning student is introduced to the doctrinal universe covering in the course. Professor Threedy's work on *Alaska Packers'*[17] could serve the same purpose. Background on the salmon fishing industry at the turn of the century, introduction to the dominant views on industrial development, labor, and laissez-faire economics provide a rich backdrop for the doctrinal issues of consideration, pre-existing duty rule, modification, and duress.

While I understand the time pressures imposed by curricular revisions to the first year courses, I would suggest that students' overall comprehension could be helped significantly by the occasional study of reconstructed cases. There are many possibilities. Students could be assigned to read a

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[14]*See generally*, MacCrate Report, *supra* note 4, at 38–46 (discussing importance of factual investigation for sound legal reasoning).

[15]Marc Franklin, *Biography of a Legal Dispute*, 46 SYRACUSE L. REV. 1243, 1251 (1996).

[16]GERALD M. STERN, THE BUFFALO CREEK DISASTER (1976). Another fine example of legal archaeology, although the message may be too depressing for incoming first year law students, is JONATHAN HARR, A CIVIL ACTION (1995), or the movie counterpart by the same name, A CIVIL ACTION (Touchstone Pictures 1998).

[17]Domenico v. Alaska Packer's Ass'n, 112 F. 554 (N.D. Cal. 1901).

completed work (like my own) before their first class as an overview for the course, and then occasionally revisit the material while studying specific doctrines. Or, the material could be used for writing assignments and practical skills development.[18] The professor could assign the reading out of class and perhaps have law firm teams concentrate on different lawyering skills components.

A couple years after completing the *Peevyhouse* project, I was asked to discuss what influence legal archaeology had on my teaching for a faculty workshop on teaching pedagogy. I found myself dreaming (literally) about my years of classroom teaching, and the underlying philosophy that continues to shape my classroom behavior. The assignment took on a metaphysical tone, akin to the existential query: "What is the meaning of life?" I summarize my conclusions below:

> 1. View any legal doctrine as the product of context, theory, policy, procedure, and the adversary system.
> 2. Aid students who need to see the big picture before studying minutiae.
> 3. "If you don't get the facts right, you can't get the law right."
> 4. Explicit development of higher levels of learning, starting with knowledge, analysis, and application, and moving to the higher levels of synthesis and evaluation.
> 5. Importance of "curiosity-based learning."
> 6. Practical skills: Teach students how competent lawyers go about identifying relevant facts, gathering information to use in theory development, and ways to present that information effectively during settlement efforts and any ensuing litigation.[19]

3. Fundamental Lawyering Skills: Factual Investigation, Communication, and Theory Formulation

When reading a case, it is common to take the facts as given, without pausing to consider precisely what evidence was used to establish those facts, how it was gathered, and what other information might have been available to support an alternative legal principle and outcome.[20] This tendency towards abstraction is useful, perhaps essential, to mastering the study of

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[18]For example, Dean Nancy Rapoport used the *Peevyhouse* materials as the basis for her integrated contracts and legal research and writing course while at Ohio State.

[19]Judith Maute, Handout for New York Law School Teaching Pedagogy Workshop (Mar. 5, 1997) (unpublished, on file with author).

[20]*See generally* JEROME FRANK, COURTS ON TRIAL: MYTH & REALITY IN AMERICAN JUSTICE 17–21 (1949) (detailing various factors affecting the accuracy of testimonial evidence).

law. One must be able to identify common fact patterns and corresponding legal principles, organize them by category, and articulate coherent explanations for varying applications. For twenty years the practicing bar, while acknowledging law schools' relative success at teaching doctrine and theory, has encouraged greater attention to fundamental lawyering skills.[21] Law schools must respond to the reality that many graduates will not receive extensive practical skills training after graduation. Many will become sole practitioners. Fewer law firms make the longterm investment in training new associates; new lawyers increasingly are expected to generate sufficient billings to cover their salary, overhead, and profit for partners. As part of the professional training, law schools must do more to equip students for the practice of law.[22]

Reconstructed case histories can provide excellent opportunities for developing a wide range of lawyering skills. The court transcript vividly demonstrates the importance of careful fact-gathering, theory development, clarity of communication, and effective use of exhibits. Older cases, like *Alaska Packers'* and *Peevyhouse*, involve short trials with little or no discovery. By studying the brief record and other available factual information, students can retry the case, formulating a line of questioning that more effectively develops and presents their theory. Hands-on involvement with the record and exhibits also helps students understand the importance of evidentiary rules as practical guidance for case investigation and trial presentation. Historical cases enable students to contrast the rough quality of justice then available with what might be possible today with advanced technology, science, and research capabilities. Perhaps most importantly, students can obtain the first-hand experience of developing a theory, finding supportive evidence, and figuring out how to present it persuasively in a formal trial process.

Existing studies of reconstructed cases, as occasional treats, may serve as templates for students' own investigative efforts. In newer cases, students may try to locate and interview any surviving witnesses or lawyers. I listened with interest to descriptions of case studies produced by (then-professor) Dean Patricia White's torts students here at the University of Utah. While I suspect that this approach caused some students extreme performance

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[21] *See* SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY, THE ROLE OF THE LAW SCHOOLS 3–4 (1979).

[22] I understand this challenge presents difficult resource questions. This is not the time or place to engage in the debate. Instead, I offer the comparison to medical education, which requires a clinical component as part of the degree program. Medical students have practiced on live patients under close supervision before they are turned loose and authorized to accept private patients. Is the law really so different?

anxiety, and uncertainty about whether they were "getting what they needed" (i.e., substantive information needed to pass the bar exam), I have no doubt that these students' grasp of the legal system was deeply enriched by conducting their own case investigations.

III. "THE *Peevyhouse* PROJECT" (OR, "YOU'RE THE REASON I'M IN OKLAHOMA": THE MEANING OF LIFE IN THE LAW?)[23]

Peevyhouse v. Garland Coal and Mining Co.[24] provoked outrage when I was a law student. Mr. and Mrs. Peevyhouse owned a small parcel of land in rural Oklahoma.[25] They reluctantly agreed to allow coal operators to stripmine on part of their land, provided that, when it was done, the coal operators would do certain remedial tasks to smooth off the spoil banks and allow for safe passage to the untouched land beyond the pit. Their concern that the land be restored was unusual at that time; no state or federal law required any kind of post-mining reclamation. The specially negotiated contract terms reflected their moral, aesthetic, and economic values—that it have continuing utility after the mining was complete. Garland did not perform the remedial tasks, and the Peevyhouses sued. Garland stipulated to breach, thus limiting the dispute to remedial issues. Peevyhouses appealed as inadequate the $5000 jury verdict. Garland cross-appealed. As presented to the Oklahoma Supreme Court, the choice was between the cost to complete the breached remedial provisions ($25,000) and $300 diminution in value to the land caused by the breach. The court held that in a breach of contract action, where the breached provision is "merely incidental to the main purpose in view," which was assumed to be the mutually profitable extraction of mineral resources, and "the economic benefit . . . to the lessor [landowner] from full performance . . . is grossly disproportionate to the cost of performance, the damages . . . are limited to the diminution in value . . . because of the non-performance."[26]

In 1982, I began teaching at the University of Oklahoma College of Law. To my dismay, the *Peevyhouse* case appeared in the first week's material in the contracts casebook. I asked George Fraser, an esteemed colleague well versed in Oklahoma history, how I might approach the case

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[23] I often thought the song by DAVID FRIZZELL and SHELLY WEST, *You're the Reason God Made Oklahoma* on GREATEST HITS: ALONG & TOGETHER (K-Tel 1981), was meant for me. The Peevyhouses are the reason I'm in Oklahoma.

[24] 382 P.2d 109 (Okla. 1962)

[25] Unless otherwise stated, the facts in this section are taken from *Peevyhouse*, 382 P.2d at 111–14.

[26] *Id.* at 114.

in class. He replied, "Have you heard about the bribe scandal?" Shortly after the court's 1962 decision, it was publicly revealed that several members of the Oklahoma Supreme Court had accepted payments for their support in certain cases.[27] At that, I began a long and careful dig to understand the lease transaction, what happened in the litigation, and the local legal culture at that time of Oklahoma history. Special care at historical accuracy was crucial: allegations of corruption always raise sensitive questions of fairness and proof, and the reputations of persons both living and dead could be tarnished.[28] Self-interested concerns (i.e. denial of tenure, and the risk of defamation liability) encouraged me to take my time with the historical inquiry, establish trusted connections within the local legal community, and become immersed in the technical aspects of the mining industry.[29]

I summarize here a few key findings.[30] As consideration given to obtain Garland Coal's promises to perform the remedial work, the Peevyhouses relinquished the customary right to advance payment of surface damages based on fair market value of the land. That is, they effectively paid three thousand dollars, reflecting the higher value they placed upon having done work which would insure the land's future condition. This fact, which is critical to correct resolution of the case under contract doctrine, was not presented at any stage of the litigation. The legal record is deficient because, I believe, the Peevyhouses' lawyer did not adequately investigate and understand the transaction and its significance under contract doctrine. He was a sole practitioner who practiced primarily in the torts field, in which his fee was based upon a percentage of the total amount recovered. He conceded to me that contracts was not his strong suit, a point confirmed by his contracts professor.

The entire litigation, from beginning to end, was a match between unequals. Garland Coal was ably represented by an accomplished litigator with proven contracts expertise, whose trial and appellate work reflected

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[27]The payments began as campaign contributions to support judges' re-election campaigns. Troublesome questions have long existed regarding financial support for judicial elections. *See* Judith L. Maute, *Selecting State Court Judges: The Ballot Box or the Back Room*?, U. SO. TEX. L. REV. (forthcoming).

[28]This prompted close attention to defamation law, and the need to identify factual premises for my scholarly conclusions.

[29]This patience also paid off with personal rewards, acclimating me to a new community, terrain, and culture. Often while writing, especially when not in Oklahoma, I would listen to the album, FOLKWAYS: A TRIBUTE TO WOODY GUTHRIE AND LEADBELLY (CBS Records 1988).

[30]For complete development of the reconstructed case, its doctrinal and theoretical implications, see, Judith L. Maute, *Peevyhouse v. Garland Coal and Mining Co. Revisited: The Ballad of Willie and Lucille,* 89 NW. U. L. REV. 1341 (1995) [hereinafter Maute, *Peevyhouse Revisited*].

substantial investment of time and other resources. Peevyhouse counsel, by contrast, clearly was operating on a shoestring. Plaintiffs' case was woefully deficient in both fact and law. Vague defense testimony suggested that Garland would have done the remedial work, except the "coal ran a bit thin" on Peevyhouse land. Some contracts scholars suggest that this was a nascent factual basis for an impossibility defense, which would excuse Garland from its duty to perform or be liable for breach damages. My painstaking analysis of the coal operations map indicated that the coal depth on their land was not appreciably different from that on others' land which was mined more extensively. Instead, the coal operator's decision to relocate the mining activity may have been attributable to financial self-interest by one or more of the decisionmakers, who secretly owned the land next mined. Had the case been fully and competently presented, I submit that the court would have found that the remedial provisions were a material part of the contract for which valuable consideration was paid. Garland's failure to perform was a willful and deliberate breach and not legally excuseable. Accordingly, the cost measure of damages was appropriate protection of plaintiffs' expectation interest, and fully supported both by contract policy and principles of economic efficiency.

Was *Peevyhouse* tainted by scandal? I think not. It was a 5-4 decision; two justices voting with the majority had been implicated by the scandal. One, Justice Welch, had close connections to the defense firm. Upon examination of seventeen "closely decided" cases involving this firm, I found that Justice Welch consistently voted for the firm's client. I concluded, to a .01 level of statistical significance, that this voting pattern did not occur by chance, but rather was the product of improper judicial bias. Indeed, I found clear proof that Justice Welch changed his vote to support Garland at a time when it was determinative. Nevertheless, I do not believe that the decision was the result of bribery; the stakes were small and the case history otherwise did not bear the indicia of other fishy votes. Rather, I believe that Justice Welch did a favor in throwing his weight behind a client of the defense firm.

What went wrong? Richard Danzig's pathbreaking work on the "capability problem" provides the basis for critical observations, that there are systemic defects in the adversary system of justice.[31] The adversary system is premised on underlying assumptions, that parties to a litigated dispute can participate effectively because they are represented by equally skilled and dedicated advocates and have equal resources to commit to

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[31]*See* RICHARD DANZIG, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 1–2 (1978).

resolution of the dispute.[32] We know,from real life experience that there are serious flaws with those basic assumptions. The problem in *Peevyhouse*, similar to that in *Alaska Packers*,' is that the parties' lawyers were not equally skilled, with mastery over the facts and law, and comparable resources to spend on the litigation. In both cases, lawyers for the industrial defendants had long-term relationships with their clients, and understood the industrial context. In both cases, there was little (or no) discovery. At the time of the *Alaska Packers'* case, a "trial by surprise" reigned supreme; no formal discovery mechanisms existed. While procedural rules in effect when *Peevyhouse* was tried allowed discovery, none took place. I suspect that the prevailing litigation practice was to shoot from the hip, particularly for contingent fee plaintiffs where there were not obvious avenues and methods of paying for pre-trial discovery. Professor Threedy's work, like my own, suggests that the defendants in both cases benefitted from superior preparation, trial presentation, and commitment of resources to achieving the optimal legal result for their clients. While her work does not indicate the basis by which libellants' counsel was paid, I doubt it was on an hourly basis. In both cases, it would appear that defense counsel were compensated more handsomely than plaintiffs' counsel.

IV. *Domenico v. Alaska Packers' Association:* COMMON THEMES WITH *Peevyhouse v. Garland Coal and Mining Co.*

I see three common themes in the *Peevyhouse* and *Alaska Packers'* case studies: first, the critical importance of viewing any given case in the context of when it was decided, at a particular time in history, and as a reflection of prevailing economic, political, and legal thought; second, the unique role served by judges, and the extent to which their decisions mirror their views and backgrounds; third, issues pertaining to the quality of justice, including disparities in available resources and lawyering skills, and systemic questions about built-in inequities which distort outcomes. The disparities may create an incomplete trial record, leaving room for judges to make assumptions about critical fact questions, which then provide the foundation, or factual underpinnings of legal doctrine.

These themes were extensively developed in the *Peevyhouse* project. In its truest sense, legal archaeology involves both a microscopic examination of the shards uncovered by painstaking digging, and a macroscopic assessment of how the component parts fit together to describe and explain

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[32] *See* Murray L. Schwartz, *The Zeal of the Civil Advocate,* 1983 AM. B. FOUND. RES. J. 543, 546–48.

the culture left behind.The following section briefly sketches some of the major points which may be of interest for future development by Professor Threedy in expanding her work on the *Alaska Packers'* case.

A. Importance of Historical Context

Legal novices (including many first year students) often clamor to learn "the rule," or general legal principle which can be applied reliably to determine the outcome of common fact patterns. Support for this view could be found with early Anglo-American legal education, consisting of readings from Blackstone's *Commentaries on the Law*.[33] Studying law as a science, dissecting opinions in order to decipher their meaning, had its advent near the turn of the century with Christopher Columbus Langdell, of Harvard Law School.[34] Legal realism focused attention on larger issues of political, social and economic contexts. While consideration of historical context is now commonplace, standard legal textbooks give relatively little attention to placing doctrinal developments in the context of how legal thought at the time was a reflection of social, economic and political concerns.[35]

The *Alaska Packers'* facts occurred in 1900. The United States was at the cusp of major transformation. Eminent legal historian, Lawrence Friedman, describes:

> When the blood of the Civil War dried, the Gilded Age began. This was the factory age, the age of money, the age of the robber barons, of capital and labor at war. And the frontier died . . . . By 1900, if one can speak about so slippery a thing as dominant public opinion, that opinion saw a narrowing sky, a dead frontier, life as a struggle for position, competition as a zero-sum game, the economy as a pie to be divided, not a ladder stretching out beyond the horizon. . . . The United States became a "nation of joiners." . . . Many Strong Interest Groups Developed—labor unions, industrial combines, farmers' organizations, occupational associations. These interest groups jockeyed for position and power in society. They molded, dominated, shaped American law.[36]

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[33]*See* WILLIAM LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 38 (1994) [hereinafter LAPIANA]; FRIEDMAN, *infra* note 36, at 340.

[34]*See* LAPIANA, *supra* note 33, at 48.

[35]Notable exceptions in contracts texts include RANDY BARNETT, CONTRACTS CASES AND DOCTRINE (2d ed. 1999); STEWART MACAULAY ET AL., CONTRACTS LAW IN ACTION (1995) and KASTELY ET AL., CONTRACTING LAW (1996).

[36]LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 338–39 (2d ed. 1985) [hereinafter FRIEDMAN].

It was a time of social strife. Captains of industry amassed great wealth and expanded corporate power on the backs of laborers who were poorly paid, suffered under adverse working conditions, and often lived in company towns.[37] The prevailing legal regime reinforced laissez-faire economics, which favored the dominant interests of employers. Meanwhile, workers increasingly viewed collective action as necessary leverage, especially in "[t]he struggle against industrial combines—the dreaded trusts—for a 'fair share of the economy."[38] During the first half of the nineteenth century, American courts condemned concerted activities of workers' associations as "criminal conspiracies."[39] In 1886—"called the period of 'the great upheaval'"—nationwide strikes and sympathy strikes arose on slight provocation; labor action meetings were disrupted by violence.[40] There was acute class consciousness, especially among unskilled workers.[41] Large corporate employers squashed important steelworker and railway strikes in 1892 and 1894.[42] Pinkerton guards protected companies' property rights against threats of striking workers. With ready access to the courts, management successfully waged legal battles against collective actions by workers. The common law richly supplied doctrines to support the legal outcomes, often "presented as hallow deductions from empty general propositions."[43]

Justice Frankfurter eloquently addressed the role of law in re-enforcing corporate prerogatives:

> The coming of the machine age tended to despoil human personality. It turned men and women into "hands." The industrial history of the early Nineteen-Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an

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[37]*See generally* E.L. DOCTOROW, RAGTIME (1974) (historical novel and social commentary).

[38]FRIEDMAN, *supra* note 36, at 340.

[39]RUSSELL A. SMITH ET AL., LABOR RELATIONS LAW CASES AND MATERIALS 3–6 (1979) (describing *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 38 Am. Dec. 346 (1842) as "the first break in the doctrine of criminal conspiracy . . ., enabling labor to shift its emphasis from political action towards 'business unionism' (which seeks improvement through collective bargaining)" [hereinafter SMITH ET AL LABOR RELATIONS].

[40]*Id.* at 9 & n.4.

[41]*See id.*

[42]*See id.* at 10. Pinkerton guards employed by Carnegie Steel Company shot and killed several workers in Homestead, Pennsylvania. *See id.* at 10–11 n.8.

[43]*Id.* at 20–22 (quoting Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 & 7 (1894)).

> expression of life and not merely the means of earning subsistence. But unionization encountered the shibboleths of a pre-machine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of "liberty" were equated with theories of laissez faire. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists and resulting disregard of . . . the Constitution led to Mr. Justice Holmes' famous protest in the *Lochner* case against measuring the Fourteenth Amendment by Mr. Herbert Spencer's Social Statics.[44]

The West was undergoing massive population growth, fueled by the pioneer spirit of rugged individualists in pursuit of wealth. The gold rush, and the lure of new opportunities, brought tens of thousands of new settlers to the region. In terms of social organization, what traveled west and became the dominant theme of American law during the last half of the nineteen century was "a notion quite the antithesis of primitive democracy. The notion was: "organize or die . . . in every area and arena of life."[45]

I have long sensed that *Alaska Packers'* involved a collective work stoppage as leverage to obtain fair wages. Professor Threedy's findings reinforce that perception. The facts raise doubt about whether the fishermen at Pyramid Harbor were earning a decent living wage, in light of their seasonal employment, costs of living at the camps, and family support obligations. Their collective action in demanding higher wages is an understandable human response, when they realized (or perceived) that the poor condition of the nets resulted in a smaller catch, and consequently, smaller gross earnings than anticipated. Deductions for the hiring fee paid to the labor contractor, and lodging costs to the messhouse may have left them with a net pay far below their original expectations. Their possible feelings of exploitation may have combined with a sense of empowerment when they realized the potential for collective action to improve their financial lot.[46]

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[44]American Federation of Labor v. American Sash & Door, 335 U.S. 538, 542–43 (1949).

[45]FRIEDMAN, *supra* note 36, at 370.

[46]While the above refers primarily to the use of common law and the history of American labor law, I am also curious about how *Alaska Packers'* fits in the context of admiralty law. The case is, after all, brought in federal court pursuant to its admiralty jurisdiction, and the dispute involves seamen's wages. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY (2d ed. 1975). As noted by Professor Threedy, the district court judge applied

After closer consideration of the historical and legal context and the particular backgrounds of the Ninth Circuit judges deciding the case, I now see other issues that make the case more complex. The balance of this piece begins to develop those other issues.

B. Who Were the Judges?

Judges are creatures of their own time, upbringing and life experience. Their conduct in office reflects their views on the rule of law, legal traditions, and adjudication.[47] Where some judges were persuaded that organized labor dangerously threatened the balance of power, others were "almost equally afraid of the sinister un-American trusts."[48] Thus, to understand a case (and origin of legal doctrine) in context, it is helpful to know about a judge's personal and legal background.[49]

1. Federal District Judge John Jefferson De Haven

Professor Threedy provides some biographical information about Judge De Haven, who presided over the trial in federal court.

> John Jefferson De Haven was born in St. Joseph, Missouri, in 1845. He was brought to California in 1849, grew up in Eureka, attended public schools, was admitted to the bar in 1866 and was married in 1872. He had a long political career including terms as a district attorney, county

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an admiralty rule, solicitous of seamen, to find the signed releases did not bar their suit for wages. Threedy, *supra* note 2, at 190–91 (stating that because "'seamen are usually improvident, and often ignorant of their rights, they are frequently tempted by their necessities to take less than is due them'").

I am intrigued by the challenge of finding out more about the human actors involved in a case. I am curious to know more about the superintendent, the labor contractor and owner of the lodging quarters, and the principal owners of the ship and canneries. County historical societies and genealogical research may provide fruitful avenues of inquiry. Current availability of information through websites could also make such research feasible.

[47]*See* FRIEDMAN, *supra* note 36, at 36. Judges, members of the same society as their litigants, "shared the general outlook that American life was a zero-sum game." *Id.* "However much judges liked to clothe doctrine in history and in the costume of timeless values, doctrine was still at bottom flesh and blood, the flesh and blood of [current] struggles over goods and positions. . . ." *Id.* at 342.

[48]*Id.* at 362.

[49]This basic point is exemplified in current struggles over judicial appointments and confirmation. An individual's predilections on the role of law, and general approaches towards certain issues often can be anticipated by close examination of their personal and professional biographies. While judicial independence enables growth and courage in office, dramatic reversals in political and philosophical orientation are rare.

> assemblyman, state senator, city attorney, congressman, state supreme court justice, and finally, in June 1897, he was appointed federal district court judge.[50]

His parents, it appears, were '49ers—part of the cataclysmic inflow of population to the West brought by the gold rush.[51] The sparse biography perhaps sheds some light on his assessment of the evidence presented at trial. Eureka, a Victorian seaport located in northern California near the Oregon border, had its roots in the timber and commercial fishing industries.[52] His parentage, place of upbringing, and career in California politics suggest that he was well in tune with the populism which dominated that era of the state's history. His *Alaska Packers'* opinion reflects a nuanced understanding of the commercial fishing industry and its relationship to admiralty law, and an empathy for the parties' conduct. For example, he upheld the use of admiralty jurisdiction because the contract was "maritime in nature" even though the men slept, and performed some of their work, on shore.[53] In evaluating the competing lines of authority on the pre-existing duty rule, he opted to find rescission and a new agreement, finding that defendant probably chose not to sue the fishermen for breaching the original contract because of their "inability . . . to respond in damages."[54] Judge DeHaven found that Murray, the Alaska Packers Associations' ("Alaska Packers") general superintendent, was authorized to employ labor while at Pyramid Harbor, including the new contracts for higher wages.[55] While Judge DeHaven invoked the equitable protections admiralty law extended to ignorant and improvident seamen, he deftly avoided application of an admiralty statute which would have denied recovery to the libelants had they been merchant seamen.[56] A crucial finding of fact rejected libelants' claim that the nets were "rotten and unserviceable" because he assumed the association's financial self-interest in a successful season was aligned with the fishermen's interest in maximizing the catch.[57] This finding ultimately doomed libelant's argument that the association's breach of the original contract provided consideration for the new agreements, which was the only hope for sustaining the judgment on appeal. I surmise that Judge DeHaven

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[50]Threedy, *supra* note 2, at 188–89.

[51]*See* FRIEDMAN, *supra* note 36, at 363.

[52]*See* City of Eureka, California, A Victorian Seaport (visited Mar. 1, 2000) <http://www.eurekawebs/cityhall/main.cfm>.

[53]*See Alaska Packers'*, 112 F. at 556.

[54]*Id.* at 559.

[55]*See id.*

[56]*See id.* at 559–60.

[57]*Id.* at 556.

determined this key fact based on his understanding of the commercial fishing industry in northern California, which he assumed to hold true for salmon fishing in Pyramid Harbor. As Professor Threedy has suggested in her dig about the nets, perhaps this was a mistaken assumption.[58] Courts' mistaken assumptions of facts are made possible by defects in the litigation process, a point developed in subsection C below.[59]

2. Ninth Circuit Panel: Judges Ross, Gilbert and Hawley

Professor Threedy provides some biographical information on Judge Erskine Ross, author of the Ninth Circuit appellate opinion. My brief independent dig discovered a treasure-trove of information about his life and judicial philosophy, and more generally, the early history of the Ninth Circuit. I commend David Frederick's book *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891-1941.*[60] Should Professor Threedy pursue a more comprehensive archaeological dig into the *Alaska Packers'* case, this text may be an invaluable resource in understanding the philosophy and jurisprudence reflected in the decision.

> Judge Erskine M. Ross was born in Culpepper County, Virginia, in 1845, "the son of a planter." He attended the Virginia Military Institute and fought on the Confederate side during the Civil War. He came to California in 1868 and lived with his uncle, a state senator and prominent attorney. After studying law under his uncle for two years, he was admitted to the bar and achieved "professional fame and financial prosperity at an exceptionally early age." At the age of thirty-four he was chosen justice of the state supreme court where he served until 1887 when he was appointed a US district judge; and then circuit judge in 1895. Married with a son, he owned one of the largest and most profitable orange orchards in the state, Rossmoyne. "His enlightened firmness in the discharge of judicial duty . . . was well evidenced during the great railroad strikes of 1894."[61]

Other available data on him, and Judge William B. Gilbert, provide rich insights on their backgrounds and judicial philosophy. Their thirty year relationship as judicial colleagues was strained by jurisprudential conflicts, to the extent that they often served on the same appellate panel to prevent

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[58] *See* Threedy, *supra* note 2, at 189–90.

[59] *See infra* Part IV.C; *see also* Maute, *Peevyhouse Revisited*, *supra* note 30, at 1446–55.

[60] *See* DAVID C. FREDERICK, RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891-1941, at *passim* (1994) [hereinafter FREDERICK].

[61] Threedy, *supra* note 2, at 194 (citing HISTORY OF THE BENCH AND BAR OF CALIFORNIA 657).

either from having too much influence in the development of Ninth Circuit law.[62] They disagreed on so many issues that the outcome of cases frequently was determined by the third panel member.[63] On cases relating to natural resources, however, they both consistently protected the corporate and industrial interests against claims of private landowners and environmental regulation.[64]

One may speculate upon the influence of their contrasting backgrounds. Ross, the youngest of four sons of a plantation owner and his wife, was just fifteen years old and a cadet at the Virginia Military Institute when the Civil War broke out. His military service was cut short so he could complete his education at the prestigious military academy. At times considered California's leading Democrat, Ross was first elected to a three year term, and then to a full twelve year term on the Supreme Court. Generally, he was held in high esteem as a judge, respected for his "razor-sharp" intellect, and sometimes was mentioned for possible appointment to the United States Supreme Court.[65]

President Grover Cleveland appointed Ross to the federal district court, where he served from 1886 to 1895.[66] While on the trial bench, in 1893 he acquired a national reputation for his strict enforcement of the Geary Act, which excluded Chinese laborers from immigrant status, and for his tough handling of the Pullman rail strike in 1894.[67] Judge Ross' anti-Chinese judicial enforcement won popular approval from Los Angeles and the labor community, both which jealously protected limited job opportunities for unskilled workers from immigrant competition.[68]

Early in 1895 Judge Ross was named as the third judge to the Ninth Circuit.[69] Within weeks of his appointment, he was designated to serve as trial judge in a suit brought by the United States' against the estate of Leland Stanford, a principal shareholder of the Central Pacific Railroad, to recover fifteen million dollars in government loans which financed railroad construction.[70] The continued existence of Stanford University, which was created and funded by a bequest from the estate, depended on the outcome.[71] Recall, this was the gilded era of robber barons who became fabulously

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[62]*See* FREDERICK, *supra* note 60, at 118, 121.
[63]*See id.* at 29.
[64]*See id.* at 114–19.
[65]*See id.* at 21–26, 38.
[66]*See id.* at 22–23, 65.
[67]*See id.* at 22, 64–67.
[68]*See id.* at 66.
[69]FREDERICK, *supra* note 60, at 23.
[70]*See id.* at 23, 35–36.
[71]*See id.* at 36.

wealthy in railroads, industrial trusts, and industrial expansion. From the federal perspective, with widespread popular support, the shareholders' assets should be available to repay the federal loans. For present purposes, the technical legal issues are not important. Judge Ross ruled in favor of the Stanford estate, based on his unique interpretation of state and federal law.[72]

In his appellate capacity, Judge Ross rigorously scrutinized for error the lower court proceedings, giving little deference to the rulings of the trial judge.[73] His judicial philosophy tended towards formalism.[74] He was a strict constructionist in the interpretation of both statutes and written documents. For example, in an opinion denying specific performance of a contract for lack of specificity, Judge Ross wrote that the parties' intent could neither add to, nor detract from the written document: "To read by construction into the written contract of the parties such a requirement [making explicit certain obligations] is therefore to read into it a most important provision not there found."[75] As owner of substantial acreage in southern California, he was especially sensitive to issues of property rights. Throughout his judicial career, his rulings reflected his views on the sanctity of property rights.[76]

By comparison, much less is known of his colleague Judge William B. Gilbert. Judge Gilbert was appointed as second judge of the Ninth Circuit in 1892, where he served until his death in 1931. Like Ross, he was also born into a prominent Virginia family. The similarities end there. His Unionist family did not share in the Confederate views of their neighbors; they moved to Ohio before onset of the Civil War. He did not serve in the military, but rather pursued his education at Williams College, and later, his law degree at Michigan. He practiced in Portland for twenty years before his appointment to the appellate bench.[77] Judge Gilbert was "[t]ireless, industrious [in his work], and possessed of great charm . . . , [a man who] zealously guarded his privacy . . . [with a] 'passion for inconspicuousness.'"[78] In sharp contrast to Ross, Judge Gilbert was deferential to the trial court's fact-findings and application of legal standards; he was not inclined to find an abuse of discretion.[79] On matters of both statutory and contract interpretation, Judge

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[72]*See id.* at 37–43. A respected legal commentator, Seymour Thompson, strongly criticized the opinion. Ultimately, the decision was upheld by both the Ninth Circuit and the United States Supreme Court, literally saving Stanford University from certain demise. *See id.* at 39–51.

[73]*See id.* at 28.

[74]*See id.* at 102.

[75]*Id.* at 101.

[76]*See id.* at 99–100.

[77]*Id.* at 19–20.

[78]*Id.* at 20.

[79]*See id.* at 101.

Gilbert was willing to look beyond technical deficiencies, and to fill gaps by implication of what the drafters must have intended.[80] In the specific performance case mentioned above, Judge Gilbert dissented, stating: "Where a contract is susceptible of a construction in accordance with justice and fair dealing, the court should adopt it."[81] Judge Gilbert authored the Ninth Circuit opinion in the Stanford case, affirming Judge Ross's decision that the shareholders were not liable to repay the government loan. While Ross's rationale was based on state corporation law, and reflected suspicion of national power, Gilbert based the appellate decision on federal law, where the statutory omission of shareholder liability was interpreted as governmental indifference, thus waiving its right to collect from the company.[82]

Federal district court Judge Thomas Hawley of Nevada sat by designation to serve as the third member of the Ninth Circuit panel. He had served on at least three other important panels: the Stanford shareholder case; a Chinese immigration case;[83] and a federal environmental enforcement action. In the last one, *Mountain Copper Company v. United States,*[84] Judge Hawley dissented to a majority opinion authored by Ross and joined by Gilbert. The United States filed a nuisance action in its capacity as owner of public lands, seeking a permanent injunction against smelting operations which irreparably damaged timber. Despite their jurisprudential differences in other areas of law, Ross and Gilbert shared a common objective in supporting economic development of natural resources in the West, consistently ruling in favor of business interests that exploited natural resources to the detriment of the environment."[85] This 1906 decision typified their commitment to such industrial development, rejecting the government's claim as an ordinary landowner to relief that could not be justified by a cost-benefit analysis. Judge Hawley's eloquent dissent "admonished Ross's ledger-balancing approach and maintained that a profitable corporation 'has no right . . . to destroy the property of the individual landowners in the vicinity or seriously to impair and injure the health of those living upon their own lands in the vicinity of its works.'"[86]

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[80]*Id.* at 100–01.

[81]*Id.* at 101.

[82]*See id.* at 45–46. Seymour Thompson, a legal commentator, also strongly disapproved of Judge Gilbert's opinion. *See id.* at 46.

[83]*See id.* at 69. A unanimous court preserved the right to appeal from the district court immigration order. This was a notable vestige of 1880's federal judicial protection of Chinese immigrants against hostile federal laws. *See id.*

[84]142 F.625 (1906).

[85]*Id.* at 115–16.

[86]*Id.* at 116 (quoting Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (C.C.D. Cal. 1884)).

What light is cast on the *Alaska Packers'* case by virtue of looking at the biography and legal perspectives of the panel judges? The decision was unanimous; Ross wrote for the court in reversing the decision below. Consistent with Frederick's observations of his judicial method, Ross independently examined the trial court record, showing little deference to Judge DeHaven. Two findings of fact were upheld: that Alaska Packers could not obtain replacement workers and that the fishing nets were not defective.[87] The latter finding is, as we well know, key to the legal conclusion that the promise for additional pay was not supported by consideration. Judge Ross then rejected the trial court's suggestion of waiver, finding uncontradicted the superintendent's testimony disclaiming authority to change the contract.[88] It could not justly be held that there was any voluntary waiver by Alaska Packers to the terms of the original contract. Having recast the determinative facts, the Ninth Circuit decision is premised on traditional contract doctrine: absent consideration or voluntary waiver, the promise to pay more was not enforceable. To the doctrinally-oriented first year contracts student, the case is a straightforward example of the ancient common law pre-existing duty rule.

The archaeological dig enables one to go beneath this superficial learning. In keeping with the judicial philosophies of Judges Ross and Gilbert, *Alaska Packers'* supports industrial development of natural resources—the catch and canning of salmon in the wilds of Alaska. It does not trigger long-term environmental concerns of importance to Judge Hawley. Perhaps the foregoing biographical inquiry disproves my initial take that it is a nascent collective bargaining case. The issues were far more complex. If collective organizing efforts were to be legally sanctioned, the contract bargaining had to take place in an orderly fashion, and not perpetuate fears of anarchy or criminal conspiracy. That many of the libelant fishermen were immigrants further works against enforcement of the promised extra pay. Labor's support of anti-Chinese immigration laws may suggest an overriding concern, to keep available jobs and benefits for those who join in lawful collective action. A major challenge for the early labor movement was to persuade diverse workers that they had common interests in uniting. To the extent that a subgroup of workers could, subsequent to the original contract, obtain additional pay through their own collective action, it could dilute the reason many would have for joining forces with the union. Organized collective bargaining of a labor contract through designated representatives in San Francisco is tame in comparison to an unruly gang of

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[87] *See Alaska Packers'*, 117 F. at 101.

[88] *See id.* at 102.

fisherman far from an established legal system. The Ninth Circuit had significant prior experience with chaos and violence arising from lawless efforts to grab the rich natural resources of Alaska.[89] Amply supported by the majority of precedent and these substantial policy considerations, the court's decision to deny enforcement makes perfectly good sense. In view of the historical context, the outcome seems quite right. One might consider the social consequences had the decision gone the other way.

C. The Capability Problem: Strains on the Quality of Justice

Richard Danzig's germinal work on the capability problem inspired renewed study by contracts scholars of the litigation process, and the process inherent structural constraints that may distort accurate outcomes.[90] Effective partisan participation is an underlying postulate to the adversary system. This postulate assumes that parties are ably represented by counsel who are roughly equal in skill, dedication and resources.[91]

Professor Threedy's impressive work develops important industrial and economic data which enables the student to better understand the case. The fishermen, like the Peevyhouses, were represented by a sole practitioner. The Alaska Packers Association, like Garland Coal, were represented by law firm attorneys who had an established, on-going relationship, which enabled a more comprehensive mastery over both the industrial facts, and the subtleties which could be used to litigation advantage.[92]

In one possible theory, Professor Threedy suggests that Alaska Packers deliberately structured the nets to catch only that quantity of salmon which

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[89]*See* FREDERICK, *supra* note 60, at 78–97 (describing "Intrigue at Anvil Creek," which culminated in a 1901 opinion authored by Judge Ross, involving "high-handed and grossly illegal proceedings initiated almost as soon as [newly appointed territorial] Judge Noyes and McKenzie had set foot on Alaskan territory at Nome . . . [which] may be safely and fortunately said to have no parallel in the jurisprudence of this country"). Judges Ross, Gilbert, and Morrow served on the panel of the case involving insubordination by district court officials at the behest of a corrupt claim jumper. Afficionados of popular culture may know the story line, depicted in Rex Beach's novel, THE SPOILERS (1905) and three movies by the same name (1930, with Gary Cooper); (1942, with John Wayne, Gary Cooper, Marlene Dietrich, and Randolph Scott); (1955, with Anne Baxter). *Id.* at 94, 274 n.41.

[90]DANZIG, *supra* note 31, at 1–2; *see also* Maute, *Peevyhouse Revisited*, *supra* note 38, at 1446–47. Twentieth-century realists began this task in earnest, with Arthur Corbin and Karl Llewellyn making enormously important contributions in the field of contracts.

[91]*See generally* Murray L. Schwartz, *The Zeal of the Civil Advocate,* 1983 AM. B. FOUND. RES. J. 543, 546–48.

[92]*See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change,* 9 L. & SOC'Y REV. 95, 95–151 (1974) (repeat players in litigation obtained outcomes superior to occasional litigants).

it could can before spoiling.[93] In modern economic jargon, the association could operate at its optimal marginal utility. It would only have to pay the fishermen for the salmon which could be processed for sale. Had the nets yielded a higher catch, Alaska Packers would have to pay the fishermen more for their labor, but could not profitably can the additional fish. For each fish caught beyond the optimal marginal utility, Alaska Packers would lose money. If this were so, but not fairly contemplated by the terms of the original bargain, it would lend credence to the fishermen's contention that the association breached the contract by not providing serviceable nets.

Certainly we would not expect Alaska Packers to voluntarily present evidence that was disadvantageous to its case. The hallmark of partisan presentation is that each side competitively marshals and presents the evidence most strongly supporting its view of the case. Because the case arose long before emergence of civil discovery, libelants had no way of obtaining the information or understanding its significance. Besides this built-in constraint on the late nineteenth century adversary process, the vast geographical distances between San Francisco (location of trial) and the Alaskan worksite virtually assured that libelants counsel could not casually (or cheaply) obtain useful information about defendant's industry and practices. Because libelants lacked access to potentially valuable information, they could not create a solid trial record to establish the nets were defective, and hence a breach of the employers' duty to provide adequate equipment.

As a doctrinal matter, compromise of a bona fide dispute about the employers' breach could have provided sufficient consideration to enforce the promised additional pay. Libelants' inability to persuade a sympathetic trial judge on this key point left room for Judge DeHaven to make his own factual assumption, based on his localized understanding of the northern California fishing industry. Even had they successfully persuaded the trial judge, Judge Ross' habit of carefully scrutinizing the trial record would leave such a finding vulnerable to reversal on appeal. I suspect their lack of proof on this issue presented an insurmountable barrier to recovery.

In traditional civil litigation when a few individuals assert relatively small claims against an industrial defendant with long-term concerns for precedential value, mismatches in resources, adversary skill and dedication are predictable. Modern discovery rules and the class action device go far (some would say too far) in balancing the litigation forces.

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[93] *See* Threedy, *supra* note 2, at 211–13.

V. CONCLUSION

Professor Threedy's ambitious undertaking has provided rich food for thought about this old fish tale. I commend her efforts and urge that she pursue the project further. Besides incorporating the contextual, historical, and biographical materials, I suggest she then step back for a perspective on contracts doctrine, theory, and policy. For the researcher, doing legal archaeology is arduous. When the product is complete, it yields great benefits to understanding the development of the law. I thank her for her labors.

"A Mere Feigned Case": Rethinking the *Fletcher v. Peck* Conspiracy and Early Republican Legal Culture*

*Lindsay G. Robertson***

Frederic Maitland, the great English legal historian, once wrote that "[t]he only direct utility of legal history . . . lies in the lesson that each generation has an enormous power of shaping its own law."[1] As I read this, Maitland makes two points. The first is that the value of history to law lies in its capacity to empower by illuminating the human element in the process by which law is made. The second is that each generation does in fact shape its own law; i.e., that the law of a given time is the product of contemporaneous human agents. The law produced by a given generation—Maitland himself was interested in the Middle Ages—can best be interpreted by reference to the circumstances driving its creation. Modern scholars, lawyers and jurists interested in understanding the meaning of an old opinion can best do so by understanding the history of its rendering. One might call this "history illuminating law." I would suggest that it is the dominant rationale underlying most legal history being written by lawyers. There is another rationale at large in the academy, and, not surprisingly, it posits the reverse. Legal history tells us much about culture. Law is, after all, at its base simply the means by which we regulate interaction between people. By looking to the history of individual instances of dispute resolution, we can learn much about the values of a given age or set of individuals. This vision drives many non-legally trained historians who make use of legal materials. One might call this approach "law illuminating history."

As a professional hybrid, I find myself not simply alternating between the two, but through some perverse synergy adding additional layers. The following is an example, drawn from a larger study of one of the Supreme Court's foundational Indian law cases, *Johnson v. M'Intosh*,[2] decided in 1823. My hope here is to draw your attention to what I believe to be one of the great Supreme Court case studies, C. Peter Magrath's *Yazoo*,[3] a "history illuminating law" book on *Fletcher v. Peck*,[4] and to suggest that there is

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[1] *See* NORMAN F. CANTOR, INVENTING THE MIDDLE AGES 51 (1991) (quoting Frederic Maitland (1896)).

[2] 21 U.S. (8 Wheat.) 240 (1823).

[3] C. PETER MAGRATH, YAZOO: LAW & POLITICS IN THE NEW REPUBLIC (1966).

[4] 10 U.S. (6 Cranch) 48 (1810).

perhaps something more to the history of that case that moving back in the reverse analytical direction reveals. This is a stab at law illuminating history illuminating law.

First, I will set out a brief history of late colonial and early republican land speculation in general and the Yazoo speculation, which inspired *Fletcher v. Peck*, in particular. Next, I will relate the standard modern history (as best expressed by Professor Magrath) of the pleading and decision of *Flectcher v. Peck*, focusing on charges of attorney misconduct. Lastly, I will explore the role of feigned cases in early federal litigation and argue that not only were Peck's attorneys not guilty of misconduct, they had exploited the only worthwhile pleading means available to them. This reconsideration of the laws governing early republican pleading will, I hope, better illuminate the history of apparent collusion that the standard history suggests illuminates the meaning of the opinion itself.

The years between the Treaty of Paris of 1763, ending the Seven Years War, and the cession of the last of the eastern states' western land claims in 1802 were arguably the glory days of land speculation in America. Speculation flourishes in an atmosphere of uncertainty, when risks and potential returns are greater. The acquisition in 1763 by the British crown of France's claim to the lands west of the Appalachians inspired legions of eastern colonials to venture west in search of good deals on Indian lands. Such purchases were of course prohibited by Crown proclamation, but by increasing the risk the prohibition only increased the potential return. After the Revolution, and prior to the cession of their western land claims, the new states of Georgia and North Carolina invited speculators to coax them into yielding empire-sized tracts before turning the whole of these lands into federal public domain.

The most extreme example of the assault by speculators on eastern states in process of negotiating post-revolutionary cessions to the federal government was the famous Yazoo speculation. In 1795, the Georgia Mississippi Company and three other land speculation concerns purchased from the State of Georgia thirty-five million acres of land in the region centered on the Yazoo River in what became the Mississippi Territory.[5] The act authorizing the sale was the product of widespread corruption.[6] When a preliminary sale bill passed in December 1794, for example, only one of the legislators voting for it had not been bribed.[7] In 1796, the Georgia Mississippi Company sold its eleven million acre stake in the Yazoo lands to the New

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[5]*See* MAGRATH, *supra* note 3, at 7.
[6]*See id.* at 6–7.
[7]*See id.* at 7.

England Mississippi Land Company for $1,138,000.[8] On the very day this deal closed, all of the Yazoo grants were repudiated by the succeeding Georgia Legislature.[9] So complete was this repudiation that all records of the grants were ordered excised from Georgia's public records and the original act of sale was burned in the public square at Louisville, where the legislature had convened.[10] The act of immolation was accomplished by magnifying glass, in order to bring the destroying flame down from God.[11]

The Yazoo speculators were not ones to quit, and the battle over title carried over to Congress when the United States acquired Georgia's western land claims in 1802. Opposition to the claims of the Yazoo transferees was focused on the circumstances of the passage of the original act of sale. On the floor of Congress, Yazooists and their opponents debated incessantly the legitimacy of the original grants and the validity of the subsequent repeal. The New England Mississippi Land Company employed numerous high-ranking agents—including soon-to-be Associate Justice Joseph Story—as Capitol Hill lobbyists. Despite their efforts, the New England Mississippi Land Company speculators had no luck at forcing a compromise. Part of the problem traced to timing. Most of the leading members of the New England Mississippi Land Company were members of the Federalist Party, and some of those who were not, including Story, were suspected of being closet Federalists. The Federalist Party had governed the new nation during the first two Presidential administrations, but in 1800, in what was then termed a "revolution," Thomas Jefferson's Republicans swept the Federalists from both the House of Representatives and the Executive Mansion. Two years later, Jefferson's party took control of the Senate, and the governance of the nation effectively passed into new hands unlikely to find attractive the thought of enriching the shareholders of the New England Mississippi Land Company. The Federalists never again dominated the Congress of the United States, and after the election in 1800, it was absolutely clear to the Yazoo speculators that any hope of success in prosecuting their claim would have to rest elsewhere.

In the waning days of the last Federalist administration, President John Adams and the Federalist Congress took steps to assure that they would not entirely relinquish the country to Jefferson and his party. In February 1801, shortly before the new administration took office, Adams signed a new Judiciary Act creating sixteen new judgeships, which Adams promptly filled

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[8]*See id.* at 15.
[9]*See id.* at 13–15.
[10]*See id.* at 12–13.
[11]*See id.* at 13 (citation omitted).

with Federalists.[12] Chief Justice Oliver Ellsworth of the Supreme Court had resigned for reasons of ill health, and on January 20, 1801, Adams nominated Federalist John Marshall of Virginia to fill his place.[13] "[T]hey have retired into the judiciary as a stronghold," incoming President Jefferson bitterly observed. "There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased."[14] And from that battery might come as well, the members of the New England Mississippi Land Company hoped, a salvo sufficient to force even a Republican Congress to recognize or compromise their claims. With the election of Thomas Jefferson and the passage of the Judiciary Act of 1801, the New England Mississippi Land Company prepared to go to court.

The case that resulted from this determination was, of course, *Fletcher v. Peck*,[15] remembered among lawyers today not because of its ties to the Yazoo speculation but because it marked the first time the Supreme Court invalidated state legislation.[16] It thus stands as an important way station in the Marshall Court's steady transfer of power from the states to the central government and enhancement of the power of the federal judiciary. It is also the first case in which the Supreme Court ventured a definition of the real property right held by Native Americans,[17] a topic more thoroughly discussed in the Court's opinion in *Johnson v. M'Intosh*.[18] Among historians, however, and largely as a result of the work of Professor Magrath, *Fletcher* is remembered as illustrating the depths to which zealous attorneys can sink when in pursuit of lots of money.

As Professor Magrath recounts, the story runs roughly as follows. Rather than press their title claim by conventional means, the New England Mississippi Land Company shareholders and their attorneys put together a collusive case by which they might try their title claim without meaningful opposition. In June 1803, shareholder Robert Fletcher of Amherst, New Hampshire filed suit against shareholder John Peck of Newton, Massachusetts, in the United States Circuit Court for the District of Massachusetts, alleging breach of covenant in a fabricated deed between the

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[12] *See* 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, *in* HISTORY OF THE SUPREME COURT OF THE UNITED STATES 129–33 (1981).

[13] *See id.* at 103–04.

[14] Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), *in* 10 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 302 (Albert Ellery Bergh ed., 1907).

[15] 10 U.S. (6 Cranch) 48 (1810).

[16] *See Fletcher*, 10 U.S. at 78.

[17] *See id.* at 68.

[18] 21 U.S. (8 Wheat.) 240 (1823).

two purporting to convey 15,000 acres of the New England Mississippi Land Company's Yazoo lands.[19] According to Fletcher, the colluding purchaser, the deed contained five false covenants: (1) that at the time of the passage of the 1795 act, Georgia was legally seized of the lands; (2) that the Georgia legislature had a good right to sell and dispose of the land; (3) that the Georgia government had lawful authority to issue the grant by virtue of the act; (4) that all the title that Georgia had in the land had been legally conveyed to Peck; and (5) that the title to this land had been in no way constitutionally or legally impaired by virtue of any subsequent legislation of the Georgia legislature.[20] By consent of the parties, the Circuit Court continued the case until October 1806, when it was tried before a jury.[21] In October 1807, the court (comprised of Supreme Court Justice William Cushing and District Court Judge John Davis) rendered judgment for Peck.[22] At Fletcher's request, a writ of error to the Supreme Court of the United States was granted, and the case was set for argument at the Court's February 1809 term.[23] Before the Court, Peck would be represented by two former Yazoo agents, Robert Goodloe Harper (who had represented the now-defunct South Carolina Yazoo Company) and, ultimately, Joseph Story.[24] Victory for Peck would spell victory for the New England Mississippi Land Company. Fletcher, who was out to lose, retained Luther Martin, an experienced Supreme Court advocate but notorious inebriate. When the case was called on March 11, 1809, Chief Justice John Marshall reversed in part the circuit court's opinion for a deficiency in the pleadings, but intimated from the bench that when the case came properly before the Court he would rule for Peck.[25] Counsel for the parties stipulated a cure to the deficiency, and the case was set for final argument at the Court's February 1810 term.[26] When the case was called at the February 1810 term, Harper and Story presented a thorough case for Peck, while Martin offered a weak counterargument ignoring two of the principal disputed covenants.[27] Martin, it seems, was intoxicated; so much so

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[19]*See* MAGRATH, *supra* note 3, at 53–54.
[20]*See id.* at 54–55.
[21]*See id.* at 55.
[22]*See id.* at 55–56, 59.
[23]*See id.* at 59.
[24]*See id.* at 64, 68.
[25]*See Fletcher*, 10 U.S. at 70–71.
[26]*See* MAGRATH, *supra* note 3, at 67–68.
[27]*See id.* at 69.

that Chief Justice Marshall felt compelled to adjourn the Court until he dried out.[28]

On March 16, 1810, Marshall handed down the Court's decision affirming the validity of all the covenants.[29] The original act of sale, the Court held, had been a contract imposing obligations on the State of Georgia.[30] According to Article I, Section 10 of the Constitution,[31] no state may pass a law impairing the obligation of contracts. Georgia's repeal of the Yazoo grants was unconstitutional.

The *Fletcher* judgment provided the New England Mississippi Land Company a powerful weapon to employ against an intransigent Republican Congress. After the opinion, the House Committee of Claims was discharged from consideration of the New England Mississippi Land Company's

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[28]*See id.* There has been some debate over the years as to whether Martin was in fact intoxicated during the *Fletcher* argument. Magrath cites as his source for the story Henry P. Goddard's *Luther Martin: The "Federal Bull-Dog,"* an 1887 pamphlet published by the Maryland Historical Society. *See* MAGRATH, *supra* note 3, at 69 (citing HENRY P. GODDARD, LUTHER MARTIN: THE "FEDERAL BULL-DOG," No. 24, pt. 1, at 35). Goddard in turn writes that he heard the story from Judge John A. Campbell. *See* GODDARD, *supra* at 35 n.1. The *Fletcher* anecdote is but one of several Goddard offers to illustrate that "Luther Martin's besetting sin was indisputably love of, and excessive indulgence in, ardent spirits." *Id.* Another originated with Roger B. Taney, who tried a case with Martin in Hagerstown, Maryland, the night before which, Goddard writes, Taney entered Martin's room to find him "with hat, one boot, and all his clothes on, lying across the bed very much under the influence of liquor." *Id.* Goddard notes that Reverdy Johnson had a similar experience trying a case with Martin, who "got very drunk as usual" the evening before a trial in which they were jointly engaged, and subsequently, after Johnson "had been asleep some hours," entered Johnson's room, lit a candle, and began reading from the Book of Common Prayer. *Id.* at 36–37.

I would add to the debate over Martin's *Fletcher* intoxication that Martin's contemporary correspondence suggests that his evidently less tolerant opposing counsel, Robert Goodloe Harper, experienced something similar to Taney and Johnson. On February 17, 1810, Martin wrote a rather sarcastic and bitter note to Harper and "Messrs Lewis & Pendleton" at "Long's Hotel" in Washington, D.C., a boarding establishment that prior to February 17 had housed Martin as well. "I was yesterday informed by Mr. Long," Martin wrote, "that the members of Mess No. [ ]" [including Harper] "objected to my associating with them any longer and assured him that if I persisted in making use of that Room, they would leave his House. I asked Mr. Long who, in particular, of the Mess had made the observations; he answered, 'the whole of them.'" Letter from Martin Luther to Robert Goodloe Harper (Feb. 17, 1810), *in* ROBERT GOODLOE HARPER PAPERS (Library of Congress). Martin thereafter took "other Lodgings where," he assured Harper, he should "be equally comfortable and . . . enjoy at least as good company." *Id.*

[29]*See Fletcher*, 10 U.S. at 79. On May 25, Jefferson, in retirement at Monticello, denounced the decision as a "twistification[]." Letter from Thomas Jefferson to James Madison (May 25, 1810), *in* 11 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 141 (Paul Leicester Ford ed., 1905).

[30]*See Fletcher*, 10 U.S. at 75.

[31]U.S. CONST. art. I, § 10.

petition, which was tabled, pending Congress's consideration of *Fletcher*'s impact.[32] Congressman John Randolph of Virginia, who had led the opposition to the Yazooists, was livid. On April 17, 1810, Randolph took the floor of the House of Representatives to urge that the Supreme Court not be allowed to dictate a settlement of the Yazoo claims. "The House must be apprized," he intoned, "that a judicial decision, of no small importance, ha[s], during the present session of Congress, taken place" in relation to the Yazoo claim.[33] Randolph now feared "that an abandonment on the part of the House of an examination of that question, particularly at the time when it was abandoned, would wear the appearance abroad of acquiescence in that judicial decision."[34] Accordingly, he moved that the petition of the New England Mississippi Land Company be referred again to the Committee on Claims, with instructions that it report thereon to the House.[35] Georgia Congressman George M. Troup concurred, censuring *Fletcher* as "a decision which the mind of every man attached to Republican principles must revolt at."[36] At the prompting of several colleagues, however, given the lateness of the session, Randolph withdrew his motion for referral and moved instead that the House resolve "[t]hat the prayer of the petition of the New England Mississippi Land Company, is unreasonable, unjust, and ought not to be granted."[37] The House refused to consider the motion.[38] Finally, Randolph moved that the company be granted leave to withdraw their petition.[39] This provoked "a desultory debate" in which "[t]he great objection to the motion was, that it proposed a course which the petitioners themselves had not requested, and which was not usually pursued, unless where, after an investigation of a petition, it was deemed wholly improper to act on it."[40] Congressman Quincy moved that the motion be postponed, and, after some debate, the whole subject was tabled.[41] The confusion this back-and-forthing reveals is suggestive of the novelty of the litigation strategy employed and forecast the impediments many in Congress would attempt to place in the path of the victorious Yazoo speculators. That the speculators ultimately prevailed before Congress owes to the adroitness with which John Marshall and his colleagues secured the place of the Supreme Court and the power of

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[32] 11 ANNALS OF CONG., 1881 (1810).
[33] *Id.*
[34] *Id.*
[35] *See id.*
[36] *Id.* at 1882.
[37] *Id.*
[38] *Id.*
[39] *See id.* at 1883.
[40] *Id.*
[41] *See id.*

judicial review. Eleven years passed before Congress would vote compensation for the New England Mississippi Land Company, but the campaign had been won.

The charge that *Fletcher* was a scam arose during the debate over compensation. Doubting their power to challenge the Court as an institution, opponents directed their ire against the underlying litigation, attempting to undermine the opinion by pronouncing the litigation fraudulent.[42] Congressman Troup, for example, declared the case invalid because "two of the speculators combined and made up a fictitious case, a feigned issue for the decision of the Supreme Court . . . present[ing] precisely those points for the decision of the Court which they wished the Court to decide, and the Court did actually decide them as the speculators themselves would have decided them if they had been in the place of the Supreme Court."[43] Troup's colleague, Congressman Samuel Farrow of South Carolina, similarly railed in opposition to compensation that "[t]he case . . . was a feigned issue made up between Fletcher and Peck, with the aid of their counsel, for the purpose of obtaining a judgment of the Court against Fletcher, the plaintiff," and

> I never did hear of one who wished to lose his suit, but what he was by some means accommodated. I never did see a judge who had talents and ingenuity enough to overrule and defeat both parties and their attorneys, and award judgment to the plaintiff, contrary to their united efforts.[44]

Modern historians have adopted this view of the case's underlying sneakiness, and it has entered into our cultural history. History thus illuminates the process of the making of law.

While not entirely in disagreement with the charge of collusion, and well aware of the risk one runs in siding with rapacious land speculators and their even more rapacious counsel, I would like to throw something more into the mix. What the standard account misses, I believe, is an appreciation of the extraordinary constraints the early federal judicial system imposed on attorneys representing speculators with claims to western lands and of the rather different pleading climate in which disputes such as *Fletcher* were framed.

The United States Constitution had provided that the federal judicial structure would consist of a Supreme Court and such lower courts as Congress should establish.[45] In 1789, Congress established thirteen federal

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[42]*See* 12 ANNALS OF CONG. 857–58 (1813).
[43]*Id.*
[44]13 ANNALS OF CONG. 1896 (1814).
[45]U.S. CONST. art. III, § 1.

district courts and three federal circuit courts, the latter to be staffed by the district court judges and Supreme Court justices assigned to the particular circuits.[46] The jurisdiction of these lower federal courts was limited, both by the Judiciary Act of 1789, which created the courts, and by the common law, parts of which the federal system had inherited from Great Britain. Pursuant to the Judiciary Act, for example, the circuit courts were granted original jurisdiction in suits between the citizens of different states, but only if the amount in dispute exceeded $500.[47] In the case of speculators with western land claims, the Judiciary Act restrictions were not a problem. One common law restriction, on the other hand, proved well-nigh insurmountable.

Title to land in the early republic was tried by an action in "ejectment," essentially a tort action, heavily dependent on the use of legal fictions, in which the plaintiff alleged that his tenant, who in fact did not exist, had been driven violently ("*vi et armis*") from the disputed lands by a fictional tenant of the defendant.[48] At common law, questions of fact relating to the relative rights of these fictional tenants to the disputed land were triable only by a jury of the vicinage, or neighborhood, in which the lands lay. The rationale was that only neighbors familiar with the property would be sufficiently savvy to understand the interests at stake. The consequence, however, was that "those courts only could take jurisdiction of a case, who were capable of directing such a jury. . . ."[49] In other words, if a court lacked the jurisdiction to call a "neighbor" to jury duty in an ejectment action, it had no jurisdiction to entertain the action itself.[50] Subject matter jurisdiction over the ejectment action was dependent on jurisdiction over the prospective jurors.[51]

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[46]*See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73–75 (1845) (establishing judicial courts of United States); *see also* ORIGINS OF THE FEDERAL JUDICIARY *passim* (Maeva Marcus ed., 1992) (compiling essays on Federal Judiciary Act of 1789); WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789, 53–79 (Wythe Holt & L.H. LaRue eds., 1990) (describing organization of national courts under Judiciary Act of 1789).

[47]*See* 1 Stat. 78.

[48]These fictional tenants were invariably identified by fictional names in the pleadings. Usually they were called John Doe and Richard Roe; occasionally, however, more imaginative names were used. In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 141 (1816), for example, the fictional lessee of the defendant in error was identified in the initial pleading as "Timothy Tritle." *See* 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 148 (1919). The plaintiff's tenant appeared by title as the nominal plaintiff in the action: a typical case might be styled, for example, "DiFonzo's Lessee v. Shaw." For the history of the development of the ejectment action, see SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, 3–23, 57–81 (reprint 1937).

[49]Livingston v. Jefferson, 15 F. Cas. 660, 663 (C.C.D. Va. 1811) (No. 8,411).

[50]*See id.*

[51]*See id.*

Ejectment was for this reason styled a "local" action.[52] In fact, all common law actions had been "local" under the early English common law; over time, however, some of these actions, including contract actions, became "transitory" actions not subject to the same jurisdictional constraint. The reason certain actions ceased to be "local" traces to the broad geographical jurisdiction and limited traveling tolerance of the judges of the Crown courts, in particular the courts of King's Bench and Common Pleas. These courts, with a jurisdiction extending throughout England, were capable of directing juries anywhere in the country, and, as a practical matter, the vicinage requirement affected solely the question of venue, i.e., where the case should be held, and not the question of whether the court had jurisdiction to hear it. Over time, the burden of traveling to far localities led the courts to permit parties in certain actions, most notably contract actions, to aver that the relevant *situs*, e.g., the place of contracting—and thus the relevant vicinage—lay at a location convenient to the parties and the court. The plaintiff in an action for breach of a contract executed in Norwich might thus aver that the contract had been executed in Middlesex, thereby allowing the court to convene a London jury and try the case without ever having to leave home.[53]

The ejectment action remained a local action throughout the colonial period, both in England and America, and the characterization persisted throughout the early nineteenth century. In England, for the judges of the Crown courts, this made for inconvenience but was of no jurisdictional consequence. In the early federal system, on the other hand, the importation of the distinction between local and transitory actions and the characterization of ejectment actions as local worked effectively to preclude the bringing of certain claims before the federal courts.

To understand why, one must return to the Judiciary Act of 1789. For purposes of directing juries, the federal district courts were courts of limited geographical jurisdiction. The United States District Court for the District of Delaware, for example, had no jurisdiction to direct a jury in Georgia. Consequently, as a local action at common law, an ejectment complaint might only be tried in the district court for the district in which the land lay. This posed no problem for parties eager for Supreme Court resolution of disputes over lands in the originally constituted thirteen federal districts. Rival claimants to lands in Delaware might try their case before the federal district court there, before a Delaware jury, and eventually bring their claim before the Supreme Court. For claimants to lands outside those districts—like, for

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[52] *Id.* at 662.

[53] *See id.*; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *294 (describing jurisdictional difference between local and transitory actions).

example, the Yazoo lands, which lay in the Mississippi Territory—it proved a nightmare.

The problem for these claimants was that when Congress established the territorial courts, it had neglected to provide for superior federal court review of their decisions.[54] In 1800, in the wake of Jefferson's election, the only forum with jurisdiction to entertain an ejectment action brought by the New England Mississippi Land Company was thus the territorial court for the Mississippi Territory. An unappealable decision of this court in favor of the New England Mississippi Land Company was hardly likely to persuade a politically hostile Congress to recognize the Company's claims. The only judicial opinion of even theoretical value would be that of the Supreme Court of the United States. Were the Supreme Court to declare that a property right to the purchased lands had vested in the Companies, Congress could ignore that right only at the risk of violating the Fifth Amendment, which prohibited Congress from taking property without due process of law and just compensation.[55] That the Court had the power to invalidate unconstitutional congressional acts the Court would make clear in *Marbury v. Madison*,[56] delivered four months before *Fletcher* was filed. In 1800 the Supreme Court was entirely Federalist and would no doubt have happily received the case, if there had been some means to get it there. As it happened, the only body with the power to create such a means was the United States Congress.

Under the circumstances, counsel for the New England Mississippi Land Company did what lawyers everywhere do: looked for a means to get around a problem. To make the case triable in a federal district court, as opposed to a territorial court, they had to convert a local action into a transitory action. This they accomplished by employing a pleading form established in England and previously accepted by the Supreme Court: the "feigned issue." As noted above, it was the use of this form that most aroused the ire of anti-Yazooist congressmen. Understanding just how feigned issues worked and the role they played in early federal litigation is essential to evaluating the *Fletcher* conspiracy charge.

Feigned issues, like legal fictions, had developed in England to provide a means around jurisdictional impediments in a restrictive pleading environment. The feigned issue had entered English practice as a solution to

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[54]The Supreme Court confirmed that appeals would not lie from territorial courts in *Clarke v. Bazadone*. 5 U.S. (1 Cranch) 132 (1803); *see also* John R. Wunder, *Constitutional Oversight:* Clarke v. Bazadone *and the Territorial Supreme Court as the Court of Last Resort*, 4 THE OLD NORTHWEST 259, 271–73 (1978) (describing lack of appellate review of territorial court decisions).

[55]*See* U.S. CONST. amend. V.

[56]5 U.S. (1 Cranch) 87 (1803).

a dilemma posed in the late seventeenth-century when jurisdictional limitations collided with evidentiary practices. The predominant mode of receiving testimony in Chancery proceedings during the late seventeenth-century was by deposition.[57] Witnesses in equity matters did not testify live in court (*viva voce*), but were instead deposed by court examiners or special commissioners.[58] The questions posed during these depositions were drafted in advance by counsel, who were themselves not allowed to attend.[59] Consequently, these questions were invariably lengthy and detailed, often proving so technical as to defy witness comprehension.[60] Witnesses' oral responses to the interrogatories were interpreted and transcribed by the examiners.[61] Transcripts of depositions were then forwarded to the chancellor, who after reviewing them rendered decision.[62]

The flaws in this system, which Holdsworth called "productive of the most unconvincing testimony at the greatest possible expense,"[63] were readily apparent: cross examination was impossible, perjury was difficult to detect, and the risk of incorrect characterization of testimony was high.[64] Reformers, including equity judges, sought some means around these problems short of complete overhaul. Ultimately, they elected to preserve the system of trial by deposition for simple matters and avoid injustice in more difficult cases by imposing on the courts of common law. Common law courts permitted *viva voce* testimony and were empowered to impanel juries for the resolution of questions of fact. Equity judges began simply to refer difficult contested factual matters to the common law courts for disposition by a jury. Common law courts, however, were not empowered to try equity cases. To circumvent this jurisdictional bar, equity judges, prior to directing contested factual issues to common law courts, packaged them as issues at law. Thus was born the "feigned issue."[65] A variety of packages were available. According to Sir William Blackstone, the usual form by 1768 was the feigned "wager," in which

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[57] *See* 9 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 353–57 (Methes & Co. Ltd., 3d ed. 1966). *Viva voce* testimony, permitted during the 16th Century, was entirely supplanted during the late 17th Century; by 1737, "the constant and established proceedings of th[e Chancery] court . . . [were] upon written evidence[.]" Graves v. Eustace Budgel, Esq., 26 Eng. Rep. 283, 445 (ch. 1737).

[58] *See* HOLDSWORTH, *supra* note 59, at 354.

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.* at 357.

[63] *Id.* at 353.

[64] *Id.* at 356 (citing 15 H.C. JOUR. 198 (1705)).

[65] *Id.* at 351–64 (seriatim).

> an action [was] feigned to be brought, wherein the pretended plaintiff declares, that he laid a wager of [£5] with the defendant, that A was heir at law to B; and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity.[66]

The construction of feigned issues for common law resolution proved so attractive to English litigants that many began feigning entire cases and bringing them directly to the courts of common law even though no independent chancery action was pending. Such cases appear in the King's Bench Reports as early as the late seventeenth-century, and their appearance initially caused some misgiving.[67] Nevertheless by the mid eighteenth-century, according to Blackstone, they were "frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause."[68]

In the nascent United States, the problems of reliable testimony in equity causes and issue feigning were addressed during the debate over the Judiciary Act of 1789, which solved them by providing, in Section 30, that *viva voce* testimony and juries were to be available to litigants in all federal trials.[69] This solution did not enjoy universal support. Samuel Chase, soon to be elevated to the Supreme Court, urged that the Judiciary Act's effective consolidation of law and equity courts was misguided and that the quality and reliability of witness testimony by deposition in federal equity proceedings might equally be assured by allowing the parties and their counsel to attend depositions and expressly providing for the direction, where necessary, of feigned issues to federal common law courts.

Chase's support of feigned issues was shared by numerous of his colleagues at bench and bar and was likely reinforced by the problems arising from the jurisdictional limitations imposed by the 1789 Judiciary Act. In 1792, on motion of Attorney General William Bradford for "information, relative to the system of practice by which the Attornies and Counsellors of this court shall regulate themselves," the Supreme Court opened the door to the use of feigned issues by announcing that it "consider[ed] the practice of the courts of King's Bench and Chancery in England, as affording outlines

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[66]3 BLACKSTONE, *supra* note 55, at *452.

[67]For example, *Brewster v. Kitchin*, in which Chief Justice Holt ultimately delivered the opinion in a feigned case, but expressed that he "thought this feigned issue had been directed out of Chancery, else I would not have try'd it; do you bring fob actions to learn the opinion of the Court?" 90 Eng. Rep. 568, 568.

[68]3 BLACKSTONE, *supra* note 55, at *452.

[69]*See* 1 Stat. 77, 88 (1845).

for the practice of this court."[70] For the next twenty years, counsel construed this as an invitation to package feigned cases where jurisdictional limitations barred access to the Supreme Court. The most striking examples are *Hylton v. United States*[71] and *Pennington v. Coxe*.[72]

Hylton was brought to test the constitutionality of a 1794 federal tax on carriages.[73] The Judiciary Act of 1789 did not provide for federal question jurisdiction; thus, the only means to gain federal judicial review was via a diversity suit. Diversity jurisdiction in a Supreme Court action depended on the parties being citizens of different states and the amount in controversy equaling or exceeding a set minimum, then $2000. In Hylton's case, while diversity of citizenship was not a problem, the jurisdictional minimum requirement appeared a fatal bar. Hylton's total tax debt was $16. Determined to have the action brought, the parties agreed to circumvent this problem by stipulating to a fiction—that Hylton "owned, possessed and kept one hundred and twenty-five chariots . . . exclusively for [his] own private use, and not to let out to hire"—thus bringing the hypothetical amount of tax and penalty owed up to $2000.[74] The attorneys who prepared the pleadings were entirely up front about what they were doing. At the trial court, the parties stipulated that if Hylton lost, he would owe the United States $2000, "to be discharged by the payment of 16 dollars, the amount of the duty and penalty."[75] This stipulation was filed and appears upon the record.[76] The United States was represented by United States Attorney General Charles Lee and former Treasury Secretary Alexander Hamilton.[77] Appearing for Hylton were the U.S. Attorney for Virginia (a circumstance that today would raise a series of conflict of interest questions) and Jared Ingersoll, Pennsylvania's Attorney General.[78] Chief among the architects of the pleading strategy were Commissioner of the Revenue Tench Coxe and former U.S. Attorney General William Bradford.

Ten years later, Hylton's counsel Jared Ingersoll appeared before the Supreme Court with Robert Goodloe Harper and Luther Martin as counsel for Edward Pennington, a Philadelphia sugar refiner, in a feigned case brought to test the application of the federal refined sugar tax.[79] The 1794 act

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[70]Hayburn's Case, 2 U.S. (2 Dall.) 359 (1792).
[71]3 U.S. (3 Dall.) 136 (1796).
[72]6 U.S. (2 Cranch) 16 (1804).
[73]*See Hylton*, 3 U.S. at 136.
[74]*Id.*
[75]*Id.*
[76]*See id.*
[77]*See id.*
[78]*See id.*
[79]*See Pennington*, 6 U.S. at 16.

imposing the tax had been repealed by the republican Congress in 1802, and Commissioner of the Revenue Coxe initiated the action to determine whether Pennington could be assessed for sugar refined prior to the effective date of the repeal but not shipped until after that date.[80] Here again, as in *Hylton*, the amount of the tax on its face was insufficient to warrant Supreme Court review. This time counsel went straight to Blackstone: Coxe and Pennington feigned a wager in excess of $2500 (then the jurisdictional minimum) that the United States was entitled to collect the duty and suit was brought to collect on the bet.[81] Here, as in *Hylton*, the parties were open about the form of pleading, the reported decision itself beginning by acknowledging that "[t]his was a feigned issue."[82]

Hylton and *Pennington* caused scarcely a ripple, while *Fletcher* was—and is— condemned. Why? The principal reason seems to be that by 1810, the tide was turning against the use of feigned issues. Their use by the Yazoo land speculators may have been among the chief causes of this transformation. In March 1809, when *Fletcher v. Peck* first appeared before the Supreme Court, Chief Justice Marshall mentioned to Court Reporter William Cranch, as did Justice Livingston to Harper's then-co-counsel, John Quincy Adams, "the reluctance of the Court to decide the case at all, as it appeared manifestly made up for the purpose of getting the Court's judgment upon all the points. And although they have given some decisions in such cases," noted Adams, recounting these conversations in his diary, "they appear not disposed to do so now."[83] The Court, of course, did hear the case, but Justice Johnson took care to note in his separate opinion (dissenting in part):

> I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.[84]

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[80] *See id.* at 17.

[81] *See id.* at 16.

[82] *Id.*

[83] JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS, COMPRISING PORTIONS OF HIS DIARY FROM 1795 to1848, at 546 (Charles Francis Adams ed., 1874).

[84] *Fletcher*, 10 U.S. at 82. The Federalist credentials of the apparent principal users of the pleading device may also have played a role in its rejection.

In *The Problems of Jurisprudence*, Judge Richard Posner wrote, "[t]he most important thing that law school imparts to its students is a feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted."[85] Stated differently, good lawyering is about identifying the boundaries of legitimate legal discourse and using that knowledge for the benefit of your clients. Counsel for the New England Mississippi Land Company moved to circumvent limitations on the availability of an appeal route to the Supreme Court by employing pleading devices at the tail end of their legitimacy. Justice William Johnson's commentary on the character of the counsel appearing in *Fletcher* was an admonishment that the prevailing paradigm was about to shift.

Thus, the circumstances surrounding the construction and pleading of *Fletcher* do inform our cultural history, not by spotlighting the nefarious acts of a small group of greedy speculators and attorneys, but by cluing us in to how different the rules of the game once were. The culture of law in the early republic was far more tolerant than we might like to believe of manipulation and circumvention by fabrication. This is one aspect of the history of the case of which I think we need to be aware. But we should not, in shifting our attention backwards into this earlier culture, lose sight of either the difficulty faced by those persons condemned to live through this particular paradigm shift or its enormous unintended consequences. With no other means to circumvent the appeals restriction on western land claims, other land speculation companies seeking Supreme Court validation of their claims now had to await the statehood of regions in which their claims lay and the establishment there of federal district courts from which Supreme Court appeals might be taken. Most significantly, in admonishing Robert Goodloe Harper and his colleagues that breach of covenant actions would no longer be accepted to try title, Justice Johnson condemned another of Harper's clients, the United Illinois and Wabash Land Companies, to a 20 year delay in the prosecution of their own claim to lands in the Indiana Territory. The Illinois and Wabash claim would not reach the Supreme Court until 1823, when the case of *Johnson v. M'Intosh*[86] worked its way up following the admission of Illinois to the union. As I will discuss elsewhere, this delay profoundly affected the opinion in *Johnson* and, indeed, the entire structure of modern Federal Indian law.

Frederic Maitland observed that "each generation has an enormous power of shaping its own law."[87] He might have added that the laws of each generation define the universe of sanctioned tools with which this power can

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[85]RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 100 (1990).
[86]21 U.S. (8 Wheat.) 240 (1823).
[87]CANTOR, *supra* note 3.

be exercised. History—including the history of cooperation in the framing of the case—undoubtedly illuminates and informs our sense of the *Fletcher* decision itself, as its contemporary critics vigorously urged it should. But law—in particular, the contemporary rules of common law pleading—can illuminate this history to allow us more fully to assess the meaning of this cooperation.

Beyond *Plessy*: Space, Status, and Race In the Era of Jim Crow

Barbara Y. Welke[*]

In the 1896 case of *Plessy v. Ferguson*,[1] the United States Supreme Court held that a Louisiana law requiring separate but equal accommodations on railroads for white and black passengers did not violate the Fourteenth Amendment to the U. S. Constitution.[2] By the time of the Supreme Court's decision in *Plessy* every Southern state except the Carolinas and Virginia had a separate coach law similar to Louisiana's.[3] By 1900, every Southern state required racial separation of white and black passengers on railroads.[4] Within

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[1]163 U.S. 537 (1986), *aff'g* 45 La. Ann. 80, 11 So. 948 (La. 1892).

[2]*See id.* at 548, 550–51.

[3]Between 1887 and 1891, eight Southern states passed laws mandating equal but separate accommodations for white and black passengers on railroads: Florida (1887), Mississippi (1888), Texas (1889, 1891), Louisiana (1890, 1894), Alabama (1891), Arkansas (1891, 1893), Tennessee (1891), and Georgia (1891). *See* Law of May 19, 1887, ch. 3743, no. 63, 1887 Fla. Laws 3743, 116; Law of Mar. 14, 1888, ch. 26, 1888 Miss. Laws 26, 45; Law of Mar. 2, 1888, ch. 27, 1888 Miss. Laws 27, 48–49; Law of Apr. 5, 1889, ch. 108, 1889 Tex. Laws 108, 132–33; Law of July 10, 1890, no. 111, 1890 La. Laws 34; Law of Feb. 6, 1891, ch. 185, 1891 Ala. Laws 185, 412–13; Law of Feb. 23, 1891, act XVII, 1891 Ark. Laws XVII, 15–17; Law of Apr. 1, 1893, act CXIV, 1893 Ark. Laws CXIV, 200–01; Law of Mar.27, 1891, ch. 52, 1891 Tenn. Laws 52, 135–36; Law of Dec. 20, 1899, no. 369, 1899 Ga. Laws 369, 66–67 (extending coverage to sleeping cars); Law of May 24, 1892, ch. 40, 1892 Ky. Laws 40, 63–64.

[4]South and North Carolina and Virginia passed separate coach laws between 1898 and 1900. Finally, in 1904 and 1907, respectively, Maryland and Oklahoma joined in. *See* Law of Mar. 2, 1903, no. 53, 1903 S.C. Laws 53, 84; Law of Feb. 25, 1904, no. 249, 1904 S.C. Laws 249, 488–89 (extending coverage to steam ferries); Law of Feb. 23, 1906, no. 52, 1906 S.C. Laws 62, 76 (requiring separate dining rooms); Law of Mar. 4, 1899, ch. 384, 1899 N.C. Laws 384, 539–40; Law of Jan. 30, 1900, ch. 226, 1900 Va. Laws 226, 236–37; Law of Feb. 9, 1900, ch. 312, 1900 Va. Laws 312, 340 (extending coverage to steamboats); Law of Feb. 16, 1901, ch. 300, 1901 Va. Laws 300, 329–30; Law of Mar. 17, 1904, ch. 109, 1904 Md. Laws 109, 186–89 (extending coverage to steamboats); Law of Dec. 18, 1907, ch. 15, 1907, Okla. Laws 15, 201–04. *See generally* GILBERT T. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 207–36 (1910) (cataloguing "Jim Crow" laws in public conveyances).

another decade, what is widely called "Jim Crow" applied to every aspect of Southern public life.[5] In moving "beyond *Plessy*," I use the term *beyond* in a chronological sense because I want to move the discussion into the Jim Crow era itself, but I also use "beyond" in a broader conceptual sense.[6] It has been too easy to see *Plessy* as solely about the South and race relations within the South. I want to shift the discussion to another plane, to ask you to think of Jim Crow as a critical example of the emergence of the modern American state.

One of the distinctive features of modern America has been the transformation of space.[7] The Thirteenth and Fourteenth Amendments to the U. S. Constitution, for example, transformed the space of the individual within the American State. These amendments were crafted specifically to end slavery and give former slaves the rights of citizenship. In making self-ownership a constitutional guarantee and in vesting that guarantee with basic civil rights, the 13th and 14th Amendments fundamentally altered not only the rights of African-Americans, but the space of individuals generally vis-à-vis one another and vis-à-vis state and federal governmental power. They represented a critical metaphorical, psychic, and practical transformation of individual space and marked the beginning of a century-long expansion and constitutionalization of individual rights.[8] So too, the recognition of corpora-

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[5]In addition to Stephenson, *supra* note 4, *see* STATES' LAWS ON RACE AND COLOR (Pauli Murray & Verge Lake eds.) (compiling laws based on race in United States); CHARLES S. JOHNSON, PATTERNS OF NEGRO SEGREGATION 44–51 (1943) (compiling and analyzing racial segregation laws in United States); and CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 181–222 (1940) (cataloguing and discussing Jim Crow laws and regulations).

[6]Throughout this article I use "Jim Crow" to refer to the period, dating from the late 1880s, in which state laws imposing racial segregation were in place. In an earlier article I addressed the common law development of "separate but equal" prior to its' constitutionalization in *Plessy*. *See* Barbara Y. Welke, *When All the Women Were White, and All the Blacks Were Men: Gender, Class, Race, and the Road to* Plessy, *1855-1914*," 13 LAW & HIST. REV. 261–316 (1995).

[7]The work of social geographers has been particularly important in my thinking about space. For an introduction to the concepts of place, territoriality, and space in the literature of geography, *see* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., 1991); ROBERT D. SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY (1986); M. GOTTDIENER, THE SOCIAL PRODUCTION OF URBAN SPACE (1985).

[8]*See* Eric Foner, *Rights and the Constitution in Black Life during the Civil War and Reconstruction*, 74 J. OF AMER. HIST. 863–83 (1987); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War*, 92 AMER. HIST. REV. 45–68 (1987); J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313–74 (1997). On the history of constitutional rights consciousness, *see* Hendrik Hartog, *The Constitution of Aspiration and 'The Rights That Belong to Us All,'* 74 J. AMER. HIST. 1013–1034 (1987). On the critical role of religion in the reformulation of the right to self-ownership and its expression in law, *see* Elizabeth B. Clark, *'The Sacred Rights of the Weak': Pain, Sympathy,*

ations as persons under the Fourteenth Amendment gave corporations a bodily form even as they increasingly lost the fundamental properties of a body–those of being tangible and fixed in space. The U. S. Supreme Court's decision in *Santa Clara County v. Southern Pacific Railroad*[9] was part of a broader transformation in the law of corporations in the last third of the nineteenth century.[10] Corporations, in fact, played a central role in transforming space. There is no better example than railroads—the curving lines of track criss-crossing state and regional boundaries. The increasingly interstate character of corporations obscured the boundaries between state and federal space.

As this discussion suggests, I use the term space here in a whole range of senses. It refers to individual identity and self-ownership, to territory and jurisdiction, and to corporeality and police power. By using space, rather than one of these other terms, I hope to highlight the relationship among changing conceptions of individual rights, corporate power, state and federal jurisdiction and police power. What that relationship highlights, is the pressure, as the 20th century dawned, for governmental action to clarify, through law, the boundaries among individual, corporate, state, and federal space.

I am asking you to think of Jim Crow in this broader context of the transfiguration of space in modern America. Instead of solely seeing Jim Crow in terms of race or region, we should see it in terms of modern state formation. Jim Crow was modern in at least two senses: (1) in terms of the exercise of state power; and (2) in its use of space to mark status. Separate coach laws represented a dramatic extension of state power over corporations and individuals. Passed under the state's police power–that is, the power of the state to regulate in the interest of protecting the health, safety, and welfare of its citizens–separate coach laws were part of a dramatic extension

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and the Culture of Individual Rights in Antebellum America," 82 J. AMER. HIST. 463–93 (1995).

[9]118 U.S. 394 (1886). NOT SURE WHAT SHE WANTS HERE???

[10]Only in the mid-1870s did general incorporation statutes become the norm; prior to that, corporations in most states owed their existence to special charters granted by state legislatures. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 105–11 (1996); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173–224 (1985); Horwitz, *The Transformation of American Law, 1870-1960* (1992); Herbert Hovenkamp, *Enterprise and American Law*, 1836-1937 (1991); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 13–28 (1970). On the apparent incongruity of the acceptance of corporations as fictional persons when African-Americans and women were in significant measure denied that status, *see* Rowland Berthoff, *Conventional Mentality: Free Blacks, Women, and Business Corporations as Unequal Persons, 1820-1870*, 76 J. AMER. HIST. 753–84 (1989). 118 U.S. 394 (1886).

more generally of state regulatory power over corporations and individuals during the Progressive Era.

Railroads, like other corporations imbued with a public purpose, had always been subject to regulation by the state. Railroads owed their existence to state charters which limited their sphere of operations and imposed express obligations to the state. Moreover, like steamboats and stagecoaches, railroads were subject to the common law of common carriers.[11] But it had always been equally clear that many matters rested within the railroad's authority. The common law, although imposing obligations on carriers, also gave common carriers broad authority to adopt reasonable regulations relating to their operations, including setting rates, determining station stops, and regulating the conduct and seating of passengers on trains.[12] In the years before statutory Jim Crow, courts had uniformly held that railroads and other common carriers' obligation to protect the comfort and safety of their passengers gave them the right to regulate where passengers would sit. Exercising their corporate authority, railroads across the nation had long provided superior accommodations for women in the ladies' car, and had required men unless traveling with a woman to ride in the rougher accommodations of the smoking car.[13]

The end of slavery raised the question of where blacks would travel in the established structure of space. The space of the railroad coach came to symbolize the place of African-Americans in American society more generally. In the years after the war, carriers, including railroads, moved to bar blacks from first-class ladies' accommodations and blacks challenged their exclusion. Courts responded by upholding carriers' authority to regulate the conditions of passage, including the right, but not the obligation, to separate passengers on the basis of race. The common law as it developed in the postwar years imposed one important limitation on carriers' freedom: first-class fare required first-class accommodations.[14] But, railroads had little

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[11] *See* Inhabitants of Worcester v. The Western R. R., 45 Mass (4 Met.) 564, 566 (1842); The New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U. S. (6 How.) 344, 382-83 (1848); Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678, 682–83 (1872).

[12] *See* 1 BYRON K. ELLIOTT AND WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF RAILROADS *passim* (1891); JOSEPH K. ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND BY WATER (5th ed., rev. by John Lathrop, 1877); ISAAC F. REDFIELD, A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS (1855). *See generally* JOHN F. STOVER, AMERICAN RAILROADS (2d ed. 1997).

[13] *See, e.g.*, Bass v. Chicago & Northwestern Ry., 36 Wis. 450 (1874). *See generally* Welke, *supra* note 6, at 268–71.

[14] *See, e.g.*, Williams v. Toledo, Wabash & Western Co., 77 Ill. 351 (1875); Gray v. Cincinnati S. R.R., 11 F. 683 (C.C.S.D. Ohio 1882; Houck v. Southern Pac. Ry., 38 F. 226 (C.C.W.D. Tex. 1888). For a more complete discussion of suits brought by African-American women and the centrality of gender and class to the evolution of the separate but equal

economic incentive in providing first-class accommodations that were both separate and equal.[15]

As a result of the established gendered structure of space, the economics of railroads, and the common law, in the years before Jim Crow railroads never achieved an unassailable connection among space, status, and race. Whether in the 1870s or 1880s, a conductor on one train might bar a black woman from riding in first-class accommodations, while a conductor on the next train on the same line would allow her a seat in the ladies' car. Conductors who excluded a black woman from the ladies' car on one occasion, might allow her to ride on the next. Whether the ladies' car would be reserved exclusively for white passengers, might depend on so apparently arbitrary a factor as whether a black woman managed to take a seat in the car before the conductor or brakeman could block her path at the door.[16] And through the 1870s and 1880s, white men rode alongside black men and women in the space of the smoking car.[17]

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standard in the common law constitutionalized by the Supreme Court in *Plessy*, *see* Welke, *supra* note 6, at 277–95.

[15]For evidence relating to the relationship among race, the spatial organization of travel, and the economic incentives to relegate blacks to second-class accommodations, *see* Testimony of D. E. Grove (clerk, *Governor Allen*), Cap't. Thomas P. Leathers (both witnesses for defendant), 5, 7 February 1873, Transcript of Record at 24–25, 27–28, 29–30, Record & Briefs in *Hall v. Decuir*, 95 U. S. 485 (1877), U. S. S. Ct. Records & Briefs, Microfilm Reel 147, Univ. of Chicago (Chicago, IL) (hereinafter *Record & Briefs in Decuir*); Testimony of Wm. Murray (conductor, witness for defendant), Testimony of Dr. J. E. Blades (white physician, regular passenger), Dick Moody (black porter, both witnesses for defendant), Transcript of Record at 27–28, 35–37, Record & Briefs in *Wells v. The Chesapeake, Ohio and S.W. Ry. Co.* (1885), 85 Tenn. 613, 4 S.W. 5 (1887), Tennessee State Library and Archives (Nashville, Tenn.) (hereinafter *Record & Briefs in Wells*).

[16]*See* Declaration, 13 April 1883, Transcript of Record in *Logwood v. M. & C. R. R. Co.*, 23 F. 318 (C. C. W. D. Tenn. 1885), National Archives, Southeast Region (East Point, GA); Testimony of Ida B. Wells (plaintiff), 24 Dec. 1884, Transcript of Record at 20–23, *Record & Briefs in Wells*; Testimony of Lola Houck (plaintiff), Testimony of Charles Oaks (brakeman, witness for defendant railroad), Transcript of Testimony at 1–4, 28, 32, 11 Dec. 1888, Record & Briefs in *Houck v. Southern Pac. Ry. Co.*, 38 F. 226 (C.C.W.D. Tex. 1888), National Archives, Southwest Region (Fort Worth, TX) (hereinafter *Record & Briefs in Houck*).

[17]*See* St. Louis, Arkansas & Texas Ry. Co. v. Mackie, 71 Tex. 491, 492, 495, 9 S.W. 451, 452 (1888); Testimony of Alice Chilton (plaintiff's daughter), Testimony of Mary Jane Chilton (plaintiff), Record on Appeal (including Transcript of Testimony) at 13–16, 21, 25, Record in *Chilton v. St. Louis and Iron Mountain R. R. Co.*, 114 Mo. 88, 21 S.W. 457 (1893), Missouri State Archives (Jefferson City, Mo.); Testimony of Ida B. Wells (plaintiff), Silas Kerney, and G. W. Maseley (both passengers, witnesses for plaintiff), 24 Dec. 1884, Transcript of Record at 20–23, 24–25, *Record & Briefs in Wells*. In an 1870 Illinois case, the lawyer for the black female plaintiff commented on the apparent anomaly of allowing black passengers to ride in the smoking car with white men, but not in the ladies car with white women; "According to defendant's notion of propriety colored persons are plenty good enough to ride in the company of white gentlemen, however cultivated or refined, but they are by no means

The instability of the interior space of the railroad car in the years before Jim Crow also related directly to a second factor: the dramatic changes in the exterior space of Southern railroads. During the critical decade of the 1880s, railroad construction in the South matched, and at times outpaced, railroad construction in the nation as a whole. By 1890, rail mileage in the South amounted to 29,000 miles of track.[18] The dramatic increase in mileage meant that the railroad touched the lives of many Southerners, white and black, for the first time in the 1880s and connected them to other counties, towns, and cities. As historian Edward Ayers notes, "by 1890, nine of every ten Southerners lived in a railroad county."[19] The proliferation of railroads created a new pressure for standardization of race relations.

Even as railroads came more and more to shape the patterns of daily life, in the eyes of many local citizens and state legislators, railroad corporations increasingly seemed independent of the local communities they were constructed to serve. Like corporations more generally, corporate space seemed alien, foreign, and threatening. The increasing externality of the railroad from community, state, and regional boundaries fed the pressure not just for standardization, but for assertion of Southern state control. Defending the constitutionality of Mississippi's separate coach law before the state supreme court in 1889 against a challenge that it violated the commerce clause, the state attorney general summarized the railroad's argument,

> The proposition advanced is, . . . that where a corporation is created by the state, primarily for the benefit of her own people, . . . such a corporation is emancipated from state control . . . the very moment that, by connecting its line of railway with another extending beyond the state limits, it becomes engaged in interstate traffic; that the creature may thus lift itself above its creator.[20]

His phrase "that the creature may thus lift itself above its creator," portrayed railroad corporations as some sort of a Frankenstein, a hideous violation of nature. Seen in this light, Jim Crow was a challenge to the loss of local

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good enough to ride with white ladies." Appellee's Brief (Anna Williams) at 3, Record & Briefs in *Chicago & Northwestern Ry. v. Williams*, 55 Ill. 185 (1870), Illinois State Archives (Springfield, Ill.). *See also* EDWARD L. AYERS, PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 17 (1992).

[18]*See* JOHN F. STOVER, THE RAILROADS OF THE SOUTH, 1865-1900: A STUDY IN FINANCE AND CONTROL 255 (1955).

[19]Ayers, *supra* note 17, at 9.

[20]Argument of T. M. Miller, Mississippi Attorney General, reprinted in *Louisville & New Orleans & Texas Ry. Co. v. Mississippi*, 66 Miss. 662, 667–68 (1889).

control that had become the grim accompaniment to a maturing industrial society and which railroad corporations so graphically embodied.

Jim Crow built on the past, but it was not a return to the past, or even a codification of the past. Jim Crow was modern. State Jim Crow laws required equal and separate accommodations for the races. The common law mandate had been different: "if separate, then equal." To see the two as the same not only elides the distinction between state and corporate regulation, but also dismisses the critical qualifier "if." Jim Crow took from railroads not only the power to regulate the conditions of passage, but also forced carriers to act as the agents of the state, under penalty of law. Under the common law, carriers had retained the right to withdraw their regulations. And carriers sometimes did withdraw or modify policies, or more often, simply selectively enforce regulations.[21] Jim Crow made racial segregation mandatory, not permissible or negotiable and was an undeniable expression of state power. Under Jim Crow, railroad corporations had to add or partition cars, and had to police the spatial boundaries imposed by the state. Jim Crow imposed on conductors the legal obligation to determine the race of every passenger boarding a train and to assign them to the correct coach.[22] Every railroad station, in every town, along thousands of miles of road had to be remodeled to provide spatially separate spaces for white and black passengers.[23] The Illinois Central euphemistically referred to the racially segregated depots required under Jim Crow as their "Southern style depot."[24] The financial implications were tremendous. By 1900 five major lines—the Southern Railway, the Louisville and Nashville, the Atlantic Coast Line, the Seaboard Air Line, and the Illinois Central—accounted for 20,000 miles, or three-fifths, of Southern road.[25] And on those roads were thousands of cars, routes, and stations.

Railroad corporations and other carriers resisted Jim Crow with every power at their disposal. They challenged it, they insisted they had complied

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[21]*See* note 16 *supra* re selective enforcement of corporate regulations relating to race.

[22]*See, e.g.*, Law of Mar. 14, 1888, ch. 27, § 2, 1888 Miss. Laws 27, 48 (repealed) (stating that "conductors . . . are hereby required to assign each passenger to the car . . . used for the race to which such passenger belongs").

[23]*See, e.g.*, Laws of Louisiana, 1894, No. 98, 133–34; Law of Feb. 23, 1891, act XVII, § 2, 1891 Ark. Laws XVII, 15–16 (repealed) (same).

[24]*See* Ass't General Passenger Agent to J. Dwyer, Ass't General Freight Agent, 25 Aug. 1904, Blueprint for station at Beulah, Miss., Min. of Mtg. of Bd. of Dir., 21 Sept. 1904, Supporting Papers, Illinois Central Railroad Company Records, Newberry Library (Chicago, IL) (hereinafter cited as ICRR-NL); J.T. Hanrahan, V.P. to S. Fish, Pres. (regarding rebuilding depot at Nitta Yuma, Miss. destroyed by fire), 8 March 1904, Min. Mtg. Bd. Dir., 20 Ap. 1904, Supporting Papers, ICRR-NL.

[25]*See* Stover, Railroad of the South, *supra* note 18, at 275.

with it, and wherever they could get away with it, they ignored it.[26] In cases before the Interstate Commerce Commission, in legal proceedings brought by the state to enforce Jim Crow, and in civil damage suits brought by individuals, Southern railroads introduced extensive evidence relating to the economic burden of providing segregated coaches.[27] By 1920, carriers had taken five cases to the U. S. Supreme Court challenging the constitutionality of state laws relating to segregation on common carriers.[28] Before state courts as well, railroads vigorously resisted indictments and penalties for violations of state separate coach laws.[29] What was fundamentally at issue was not just cost, but corporate control and autonomy.

The complexities of law in mediating among corporate, individual, state, and federal space in the early 20th century, are exemplified by a lawsuit brought during the Jim Crow Era. The lawsuit was brought in 1910 by Pearl Morris against the Alabama & Vicksburg Railway Company alleging that she had suffered injury because the railroad had violated the Mississippi separate

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[26]Suits before the Interstate Commerce Commission offer some of the most detailed evidence of railroads' open disregard of Jim Crow. *See* Testimony of Winfield F. Cozart, Stenographer's Minutes of Hearing, 15 March 1909, at 3–8, Record & Briefs in *Cozart v. Southern Ry. Co.*, 16 I. C. C. 226 (1909), I. C. C. Docket #1718, RG 134, National Archives (Suitland, Md.). *See also* T. Montgomery Gregory, *The 'Jim Crow' Car, in* THE CRISIS, Feb. 1916 at 195–98 (citing specific violations of Jim Crow on railroads).

[27]*See* Transcript of Hearing, 17, 18, 19 Sept. 1908, Record in *Gaines v. Seaboard Air Line Ry.*, I.C.C. Docket #1468, RG 134, National Archives (Suitland, MD); South Covington & Cincinnati St. Ry. Co. v. Commonwealth of Kentucky, 252 U. S. 399, 401–02 (1920); Agreed Statement of Facts, 11 June 1915, Transcript of Record at 26–30, Record & Briefs in *Southern Ry. Co. v. Norton*, 112 Miss. 302, 73 So. 1 (1916), Mississippi Dep't. of Archives and History (Jackson, Miss.) (hereinafter *Record & Briefs in Norton*).

[28]*See, e.g.*, Hall v. Decuir, 95 U.S. 485–87 (1877) (Louisiana anti-discrimination law); Louisville, New Orleans & Texas Ry. Co. v. Mississippi, 133 U. S. 587, 591 (1890) (challenging Mississippi separate coach law); Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 389 (1900) (challenging Kentucky separate coach law); South Covington & Cincinnati St. Ry. Co. v. Commonwealth of Kentucky, 252 U.S. 399, 401 (1920) (same); Cincinnati, Covington & Erlanger Ry. Co v. Commonwealth of Kentucky, 252 U. S. 408, 409 (1920) (same). Railroads had been parties in three additional Supreme Court cases brought by individuals involving the application or constitutionality of Jim Crow laws. *See* Plessy v. Ferguson, 163 U. S. 537 (1896), Chiles v. Chesapeake & Ohio Ry. Co., 218 U. S. 71 (1910); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U. S. 151 (1914).

[29]In Kentucky, alone, for example, the state supreme court decided five cases between 1896 and 1911 involving state indictments of various railroad companies for violations of the state statute. *See* Louisville & Nashville R. R. Co. v. Commonwealth 99 Ky. 663, 37 S.W. 79, 80 (1896); Louisville & Nashville R. R. Co. v. Commonwealth, 117 Ky. 345, 785 S.W. 167, 167 (1904); Kentucky v. Louisville & Nashville R. R. Co., 27 Ky. Law Rptr. 932 (1905) (not to be reported); Chesapeake & Ohio Ry. Co. v. Commonwealth, 119 Ky. 519, 84 S.W. 566, 567 (1905); Commonwealth v. Illinois Cent. R.R. Co., 141 Ky. 502, 133 S.W. 1158, 1158 (1911).

coach law.[30] The Alabama & Vicksburg Railway's response in Pearl Morris's suit was characteristic of railroads' legal response to Jim Crow more generally. The railway argued that the Mississippi separate coach law did not apply to sleeping coaches; that the law authorized only a penalty not a private right of action; and that to apply the law in this case would violate the corporation's rights under the 14th Amendment to the U. S. Constitution, depriving it of property without due process of law.[31] The Mississippi Supreme Court brushed aside the railroad's arguments.[32] In this regard, the court's opinion fit within a larger pattern. Indeed, the court noted, "that a law found to be necessary in our state should be assailed by a corporation created by the state may account for the amount of the verdict in this case."[33]

Jim Crow itself and the Mississippi Supreme Court's opinion in *Morris* were part of a broader transformation in state authority that extended well beyond the issue of race. From the 1880s through the 1920s, states expansively used their police power to regulate a wide-array of relationships, and, in turn, state courts and the U. S. Supreme Court upheld state safety legislation against challenges that the laws violated the Commerce Clause or the 14th Amendment due process rights of corporations. Regulation of railroads was a mark of the time.[34] In these same years, Congress finally passed the Interstate Commerce Act and Southern states established or significantly strengthened state railroad commissions to oversee railroad

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[30]*See* Declaration, 26 March 1910, Transcript of Record in *Alabama & Vicksburg Ry. Co.* v. Morris, 103 Miss. 511, 60 So. 11, 11 (1912), Mississippi Department of Archives and History (Jackson, Miss.) (hereinafter "*Record & Briefs in Morris*").

[31]*See* Demurrers (Alabama & Vicksburg Ry. Co.), 8 Nov. 1910, Transcript of Record at 16–25, *Record & Briefs in Morris*.

[32]*See Morris*, 103 Miss. 514–20.

[33]*Id.* at 520.

[34]*See, e.g.*, New York, New Haven, & Hartford River R.R. Co. v. New York, 165 U. S. 628, 633–34 (1897) (affirming constitutionality of New York law banning steam railroads from heating passengers cars with stoves inside the cars); Erb v. Morasch, 177 U. S. 584, 587 (1900) (holding that a municipal ordinance restricting the speed of all trains within city limits to six miles an hour was a valid exercise of the state police power); Missouri Pac. Ry. Co. v. Larabee Flour & Co. Mills, 211 U. S. 612, 623 (1909) (dismissing argument that the establishment of the I.C.C. rendered further regulation of railroads by the states under the police power unconstitutional because " . . . the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens."); Chicago, Rock Island & Pacific Ry. Co. v. State of Arkansas, 219 U. S. 453, 466–67 (1911) (affirming constitutionality of Arkansas statute requiring railroads to man trains of more than 25 cars with three brakemen).

regulation.[35] A number of factors contributed to the dramatic rise across the nation in regulation directed at railroads, including growing anger at railroad rate discrimination, pooling and rebates, sensational railroad disasters and concerns relating to the financial management and stability of roads.[36]

A common thread running through the move to heightened state scrutiny and regulation was increasing acknowledgment that railroads were not "of" the state, but indeed were apart from it. Recognition of corporate personhood went hand-in-hand with increased regulation just as it did for individuals. Perhaps, in fact, rather than seeing Jim Crow as a reaction to and rejection of populism, we should see it as meeting the needs of populism in terms of bringing railroads to account. In his now classic, *The Strange Career of Jim Crow*, C. Vann Woodward highlighted populism as one of, what he called, the three "forgotten alternatives" to a policy of extreme racism which competed for the region's support in the years between the end of Reconstruction and the enactment of Jim Crow.[37] Shifting the focus from the strategies of populists, to their goals, among which state assertion of power over railroads was central, Jim Crow becomes part of the broader picture of the success of key components of the populist agenda.[38]

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[35]*See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as 49 U.S.C.A. § 10101-11916). On the Interstate Commerce Commission, *see* 1–4 ISAIAH L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1931). Although a few Southern states, including Virginia, for example, had adopted railroad commissions prior to the 1880s, most had not. Kentucky established a commission in 1880, Tennessee in 1883, Mississippi in 1884, Florida in 1887 (the same year that it mandated equal but separate rail accommodations), Texas in 1892, and Louisiana not until 1898. *See First Annual Report of the Railroad Commissioner of the State of Virginia* 5 (Richmond: R. F. Walker, 1877); *Report of the Railroad Commission of Kentucky to Dec. 1, 1880* at 3–4 (Frankfort: S. I. M. Major, 1881); *First and Second Annual Reports of the Railroad Comm'rs for the State of Tennessee* (Nashville: Albert B. Tavel, 1884); *Second Annual Report of the Railroad Commission of the State of Mississippi, 1887* at 140 (Jackson: R. H. Henry, 1887); *First Annual Report of the Railroad Commission of the State of Texas for the Year 1892* at iii (Austin: Ben C. Jones & Co., 1982); *First Annual Report of the Railroad Comm'n of Louisiana, May 1st, 1900* at 5 (New Orleans, 1900).

[36]*See generally* Stover, *American Railroad supra* note 12, at 104–42 ; GABRIEL KOLKO, RAILROADS AND REGULATIONS, 1877-1916 (1965); EDWARD CHASE KIRKLAND, INDUSTRY COMES OF AGE: BUSINESS, LABOR, AND PUBLIC POLICY 1860-1897 (1967); LEE BENSON, MERCHANTS, FARMERS, AND RAILROADS: RAILROAD REGULATION AND NEW YORK POLITICS, 1850-1887 (1969); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920 at 121–62, 248–84; LAWRENCE M. FREIDMAN, A HISTORY OF AMERICAN LAW 445–54 (2d ed. 1985).

[37]*See* C. VANN WOODWARD, The Strange Career of Jim Crow 60–64, 78–81, 89–90 (3d rev. ed., 1974).

[38]*See* C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913 (1971). On populism, *see generally* LAWRENCE GOODWYN, DEMOCRATIC PROMISE: THE POPULIST MOVEMENT IN AMERICA (1976), STEVEN HAHN, THE ROOTS OF SOUTHERN POPULISM:

But regulation was not just directed at railroads. In one venue after another, states were exercising power to protect individual autonomy in the age of the corporation. Corporate autonomy was superseded by the expanded police power of the state to legislate on behalf of the health, safety, and welfare of its citizens. For example, in the same years that Southern states passed Jim Crow laws, states across the nation embarked on an aggressive program of protective labor legislation. The historiographical debate over the attitude of American courts toward protective legislation at the turn of the 20th century has been a heated one. All too often the U. S. Supreme Court's 1905 decision in *Lochner v. New York*, striking down a state law regulating the hours of bakers as a violation of workers Fourteenth Amendment right to freedom of contract,[39] has been allowed to stand for the era as a whole. Yet giving *Lochner* such historical preeminence is both historically inaccurate and furthers a troubling tendency to define labor in male terms.[40] Just as federal and state courts upheld state separate coach laws, they upheld the vast majority of protective labor legislation.[41] What seems crucial to recognize is that the nature of the American state was undergoing a sea-change. Part of that change was a fundamental reconsideration of the nature of the state's power and obligation to protect the welfare of its citizens in an industrial environment transformed by corporate power. Numerous state court decisions and decisions of the U. S. Supreme Court affirmed the exercise of expansive state regulatory authority and were markers of a broader process of modern state formation. Seen in this light, Jim Crow is exemplary of the era and illustrates the breadth of power exercised by the early 20th century American state.

But if railroad corporations were subject generally to regulation it was not at all clear what governmental body–state or federal–had the power to regulate in Pearl Morris's suit against the Alabama's Vicksburg Railway

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YEOMAN FARMERS AND THE TRANSFORMATION OF THE GEORGIA UPCOUNTRY, 1850-1890 (1983).

[39]198 U.S. 45 (1905).

[40]*See* NANCY WOLOCH, MULLER V. OREGON, A BRIEF HISTORY WITH DOCUMENTS (1996); Alice Kessler-Harris, *Treating the Male as 'Other': Redefining the Parameters of Labor History*, 34 LABOR HIST.190–204 (1993).

[41]The two sides in the debate are clearly marked out in Melvin I. Urofsky, *State Courts and Protective Legislation during the Progressive Era: A Reevaluation*, 72 J. AMER. HIST. 63–91 (1985); and WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37–58 (1989); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WISC. L. REV. 767–817 (1985). Forbath is openly scornful of Urofsky's account. He emphasizes the critical impact on labor's radical vision of early key judicial losses. *See id.* It is important to bear in mind Forbath's focus. As his title suggests, his concern in evaluating the fate of protective labor legislation was its impact on the American labor movement as a movement, rather than on the changing nature of the American state.

Company. In addition to the arguments noted above, the railway company had insisted that the Mississippi separate coach law did not apply in Morris's suit. It did not matter that Morris was from Mississippi or that for part of her journey she would be traveling within the state. As the railroad insisted, she occupied federal space even when within Mississippi's state boundaries because she was an interstate passenger.[42]

Pearl Morris was traveling from her hometown of Vicksburg to New York City on what was called a "coupon ticket." She had bought her ticket and her Pullman berth from the agent for the Alabama & Vicksburg Railway Company. But in the course of her trip—while she would only change trains once—she would travel on the lines of several different railroads and pass through eight states. Just as many traveling by air today would be unable to say what states they passed over on their journey from one point to another, Morris was unclear about the states she passed through.[43] She had bought a through ticket from Vicksburg to New York and did not think of herself as traveling anywhere in between. The railway journey had created a new experience of external space.

Her journey reflected a mature American railway system. By 1910, there was 240,000 miles of track in the United States. Rail mileage in the U. S. would reach an all time high in 1916, only six years after Morris's suit, at 254,000 miles. The contrast between 1865 and 1916 was dramatic. At the end of the war, the American railroad network had amounted to only 35,000 miles. In each of the next two decades, total railroad mileage came close to doubling, so that by 1890 there were 164,000 miles of road.[44] Moreover, American railroads were increasingly integrated into a national railway system. In the first decade after the war, bridges over major rivers connected Southern lines to the North. Then in the 1880s, a series of dramatic changes transformed the space of the American railway system: standardization of track gauge across the country in 1886 facilitated connections between lines; shorter lines were consolidated into massive railway systems controlling thousands of miles of track criss-crossing state and regional boundaries; and finally, the shift—already beginning at the start of the decade and almost complete by 1890—to northern control and ownership of Southern railways.[45]

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[42]*See* Demurrers (Alabama & Vicksburg Ry. Co.), 8 Nov. 1910, Transcript of Record at 16–25, *Record & Briefs in Morris*.

[43]*See* Testimony of Pearl Morris, Transcript of Record at 153–60, *Record & Briefs in Morris*.

[44]*See* Stover, *American Railroads supra* note 12, at 62, 143.

[45]*See* Stover, *American Railroads supra* note 12, at 154–56 and Stover, *Railroads of the South supra* note 12, at 206–09.

Scholars seeking an answer to the question of why Southern States suddenly moved in the late 1880s to a system of legally mandated segregation on railroads have focused their attention on state politics, a new generation of African-Americans, and perceived Northern acquiescence in Southerners finding their own solution to the race problem.[46] In a sense, scholars' fixation with state boundaries has obscured the increasing, and all too threatening irrelevancy of state boundaries. Pearl Morris's case highlighted a defining feature of the 20th century American state: the overlapping and conflicting spaces of state and federal power and the role of law in mediating the boundaries between the two.

The U. S. Supreme Court had first addressed the balance between state and federal power with respect to interstate passenger travel in 1877, four decades before Pearl Morris's suit, in a case called *Hall v. Decuir*.[47] In *Decuir*, the Court struck down a Louisiana law that barred racial discrimination on common carriers on the ground that it was a regulation of interstate commerce and as such violated the Commerce Clause of the U. S. Constitution.[48] The carrier was a steamboat on the Mississippi River. Chief Justice Morrison R. Waite, writing for the Court, stressed that the Mississippi River passes through or along the border of ten different states. Authority to regulate commerce among the states was vested in Congress to avoid inconsistencies in regulations that would burden interstate commerce. The Louisiana law raised the specter of such inconsistency. Justice Waite presented the hypothetical case of a Mississippi River steamboat captain who faced a law in Mississippi that forced him to separate white and black passengers crossing into Louisiana where the law forbade him from making distinctions among passengers on the basis of race. Interstate commerce, the Court insisted, could not be burdened by such inconsistency.

State separate coach laws, adopted beginning in the late 1880s, were the mirror image of the Louisiana statute that the Supreme Court had struck down.[49] By 1890, American railroads were as seamless as the Mississippi

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[46]*See* Woodward, *supra* note 36; HOWARD N. RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH, 1865-1890 (1980).

[47]95 U. S. 485 (1877).

[48]*See id.* at 490–91.

[49]Whereas the Louisiana law had forbade any "discrimination" on account of race, separate coach laws mandated separation based on race. *Compare* Law of 1869, no. 38, 1869 La. Laws 38, 37; *with* Law of Mar. 2, 1888, ch. 27, 1888 Miss. Laws 27, 48–49. As the U. S. Supreme Court noted at the outset in its opinion in *Decuir*, both the trial court and the Louisiana Supreme Court had interpreted the Louisiana law to require "equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race." *Decuir*, 95 U. S. at 487; Decuir v. Benson, 27 La. Ann. 1 (1875); Reasons for Judgment, 14 June 1873, Fifth Dist. Ct. Parish of Orleans, Transcript of Record at 74–80, *Record &*

River and passed through as many, in fact, more states. Yet, in 1890, in a case involving Mississippi's separate coach law, the U. S. Supreme Court had upheld the state's right to segregate passengers on the basis of race.[50] The Court, intent on preserving some balance between state and federal power, distinguished *Decuir* on the ground that the state of Mississippi had held that its separate coach law applied only to intrastate passengers.[51]

Pearl Morris was not an intrastate passenger; her journey although beginning in Mississippi was to end in New York. She was, as the Alabama & Vicksburg Railway Company insisted, an interstate passenger, traveling on a through ticket. What looks like a plea by a corporation to be subject to federal rather than state regulation, was in fact an argument that would have left the Alabama & Vicksburg Railway in essentially the same regulatory framework with respect to race that railroads had been in before Southern states began mandating racial segregation in public transit. In its decision in *Decuir*, the U. S. Supreme Court had held that Congress had exclusive power to regulate interstate travel, but it had also held that in the absence of Congressional action, the private regulations of the carrier became a sort of federal common law.[52]

Two years before the Mississippi Supreme Court decided *Morris*, the U. S. Supreme Court reiterated its holding in *Decuir* in *Chiles v. Chesapeake & Ohio Railway Company*.[53] The Court held that in the absence of Congressional action, carriers had the power and the right to adopt reasonable rules and regulation for the carriage of interstate passengers, including regulations relating to racial segregation, even though states themselves were limited to regulating intrastate travel.[54] The Court's decision rested squarely on the

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Briefs in Decuir.

[50]*See Louisville, New Orleans & Texas Ry. Co. v. Mississippi*, 133 U. S. 587, 591–92 (1890).

[51]*See id.* at 589–91, referring to *Louisville, New Orleans & Texas Ry. Co. v. State*, 66 Miss. 662, 672–73 (1889).

[52]*See Decuir*, 95 U. S. at 490. The Court quickly dismissed the applicability of the Civil Rights Act of 1875 on the ground that it had been passed after Josephine Decuir's case arose. Five years later in *The Civil Rights Cases*, 109 U.S. 3, 19 (1883), the Court struck down the Civil Rights Act as beyond Congress's power under the 13th and 14th Amendments, refusing to consider whether the Act as it related to public conveyances might come under Congress's power to regulate commerce "as the sections in question are not conceived in any such view."

[53]218 U. S. 71 (1910), aff'g., 125 Ky. 299, 101 S.W. 386 (1907). Testimony of J. Alexander Chiles (plaintiff) Testimony of W. Ridgeway (conductor), Stenographer's Transcript, 22 May 1906, Transcript of Record at 20–21, 28–32, Supreme Court Record & Briefs in *Chiles v. Chesapeake & Ohio Ry.*, 218 U. S. 71 (1910), Microfilm Reel 834, University of Chicago Law School (Chicago, IL) (hereinafter *Record & Briefs in Chiles*).

[54]*See Chiles*, 218 U.S. at 76. The Court's insistence in *Chiles* on Congressional inaction was striking. In 1887, Congress had passed the Interstate Commerce Act, exercising its power under the Commerce Clause to regulate interstate commerce. In three cases brought shortly

distinction between the power of a state versus the power of a corporation to regulate interstate travel. "And we must keep in mind," Justice McKenna insisted in *Chiles*, "that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad company, and the distinction between state and interstate commerce we think is unimportant."[55] The Court chose to ignore the fact, so clear on the record before it, that the railroad's regulations were just the state's law applied to all passengers. In fact, the conductor who had ordered Alexander Chiles, a black man, out of the rear coach and into a compartment car, had relied expressly on Kentucky's separate coach law for his authority and testified at trial that "the rules of the company, or instructions, was, when the law was passed, we were to separate the colored and white races."[56] The railroad insisted that its regulations required conductors to separate all passengers on the basis of race and stressed these rules as a legal basis for the conductor's actions. What the facts of *Chiles* revealed was that, in recognizing the power of states to regulate intrastate travel, the Supreme Court had effectively given states power over all travel passing through the state. At least in day coaches, issues of economy and ease of administration alone dictated that railroads apply the same rules to interstate travel that applied to intrastate travel.[57]

But luxury accommodations, like the Pullman coach on which Morris was riding were entirely another matter. Having lost the battle on intrastate

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after the law's passage, the commission adopted an interpretation of Section 3 of the act which paralleled the common law standard "if separate, then equal" with respect to racial segregation. Councill v. Western & Atl. R.R.. Co., 1 I.C.C. 638, 638 (1887); Heard v. Georgia R.R. Co., 1 I.C.C. 719, 719 (1887); Heard v. Georgia R. R., 3 I. C. C. 111 (1889). In part the Court's silence reflected the parties' silence. The railroad did not mention the act and Chiles' only reference to the act was directed to his argument that Congress not states or railroads had authority to regulate interstate commerce. *See* Brief for Plaintiff in Error (J. Alexander Chiles) at 39, Brief for Defendant in Error (Chesapeake & Ohio Ry. Co.), *Record & Briefs in Chiles*. The Court's silence also reflects the fact that the Interstate Commerce Act did not on its face address racial discrimination; indeed the principal impetus for the act did not relate to passenger traffic at all. Congress finally had been goaded into passing the act largely by the Supreme Court's decision in *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U. S. 557, 576–77 (1886), holding that states had no power to regulate rates for interstate shipments. In Pearl Morris's case, as will become clear later in this essay, the Act was immediately relevant to the Alabama & Vicksburg Railroad.

[55]*Chiles*, 218 U. S. at 75.

[56]Testimony of W. Ridgeway (conductor, witness for defendant-railray), Transcript of Record at 32, *Record & Brief in Chiles*.

[57]For additional evidence relating to the impact of state Jim Crow laws on corporate regulations mandating racial segregation of intrastate as well as interstate passengers in regular coach travel, *see* Testimony of W. H. Tayloe (general passenger agent, Southern Ry. Co.), I. C. C. Hearing, Transcript of Hearing at 489–90, *Record & Briefs in Gaines*.

travel, railroads jealously guarded their remaining power. If the holdings in *Decuir* and *Chiles* applied to Pearl Morris's case, and they most surely did, the state of Mississippi and every other Southern state with a Jim Crow law would have had to admit that even within the physical boundaries of the state it was beholden to the power of the federal government and, equally repugnant from the state's perspective, beholden to the power of railroad corporations. Morris's case then explicitly pressed the state to reject the supremacy of both federal and corporate power over interstate passengers within state borders.

Seen in this light, it is not surprising that the Mississippi Supreme Court upheld the verdict for Morris against the Railway Company. The court insisted that in their earlier consideration of the state separate coach law both it and the U. S. Supreme Court had merely held that the law was valid as applied to intrastate traffic, not that it would be invalid if applied to interstate traffic, that the U. S. Supreme Court's earlier holdings including *Decuir* did not apply to the facts of this case, and that Mississippi's separate coach law applied to all passengers traveling within the state, regardless of where their journeys began or would end.[58] The Mississippi Supreme Court's decision in *Morris* was unquestionably unconstitutional even under the law as it stood in 1912. The court's insistence that the constitutionality of state regulation of interstate traffic was an open question amounted to willful ignorance. Had any state missed the U. S. Supreme Court's intent in *Decuir*, the Court had reiterated the distinction between state regulation of intrastate commerce (constitutional) and state regulation of interstate commerce (unconstitutional) in both *Chesapeake and Ohio Railway Company v. Kentucky*, and again in *Chiles*.[59]

But if the decision in *Morris* amounted to willful ignorance of the U. S. Supreme Court's holdings, the Supreme Court's holdings reflected willful ignorance of the realities of travel. The simple logic of the Court's "hook on another coach at the border" solution unraveled when the realities of travel were actually considered. Rail, and later bus, passengers traveling across state lines, while in Mississippi, or any other state, sat side-by-side those traveling only within the state. Moreover, by the 1880s, the basic day coach had been supplemented by ever more elaborate accommodations.

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[58]*Morris*, 103 Miss. 511, 514–20. The court relied on two main points in distinguishing *Decuir*. *See id.* at 515. First, that *Decuir* involved a steamboat licensed under federal laws relating to the coasting trade and operating on navigable waters, whereas the Mississippi law applied to railroads licensed by state law and operating within the state. And, second, that the Louisiana law was a regulation of commerce, whereas the Mississippi law was a state police regulation.

[59]Chesapeake and Ohio Ry. Co. v. Ky., 179 U.S. 388 (1900); *Chiles*, 218 U. S. 71, 75 (1910).

Economically there was no way railroads could afford to offer duplicates of these accommodations in black and white. And as the Mississippi Supreme Court explained in *Morris*, "A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate . . . ."[60] If the state's expressed rationale for adopting Jim Crow, that is, safeguarding against violence stemming from the commingling of the races, was taken seriously, then the color-line could not depend on the destination of a passenger. In a sense, both Mississippi's and the U. S. Supreme Court's holdings reflected the challenges of adjusting to the new realities of space.

Suits by individuals, like Pearl Morris, were not part of the original statutory vision of Jim Crow. On their face, separate coach laws created duties not rights.[61] Separate coach laws were regulatory measures in much the same sense as state legislators setting the speed at which trains could pass through urban areas or regulating the kinds of lamps or stoves they would use in their coaches while passing through the state.[62] A violation of a separate coach law by a railroad failing to provide separate or equal accommodations, or by a conductor failing to assign passengers to separate coaches, or by a passenger refusing to sit in his or her assigned coach, was a misdemeanor carrying a penalty with enforcement vested in the state. Separate coach laws were not civil rights statutes. In contrast, the Civil Rights Act of 1875 barring racial discrimination and similar state equal accommodation laws had been intended to acknowledge and safeguard individual civil rights. In keeping with their purpose, they had not only provided for suits by the governmental body, federal or state, but also specifically provided for suits by individuals with a penalty set by the statute.[63] But the U. S. Supreme Court had held the provisions of the Civil Rights Act of 1875 prohibiting discrimination in inns, public conveyances, and places of public amusement, as applied to the states, unconstitutional less than a decade after it was passed, and state equal accommodation laws had been repealed by separate coach laws.[64] Separate

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[60]*See id.*

[61]*See supra* note 21 and accompanying text.

[62]*See supra* note 33, relating to safety regulation directed at railroads.

[63]*See* Civil Rights Act of 1875, Sec. 1, 18 Stat. 336. For two examples of state anti-discrimination statutes, *see* Law of 1869, No. 37, 1869 La. Laws 37, 36–37 (held unconstitutional in *Decuir*); Law of 1873, ch. LXIII, 1873 Miss. Laws LXIII, 66-69.

[64]*See The Civil Rights Cases*, 109 U. S. 3, 13 (1883). The Court's holding left open the question of the Act's constitutionality as applied to the Territories, the District of Columbia, and upon the navigable waters of the United States. In a suit brought by Mary F. Butts, an African-American woman, alleging racial discrimination on a steam voyage from Boston to

coach laws contained no similar provision for private suits.[65] They were intended to take the regulation of public space out of corporate hands, out of federal hands, and out of individual hands. Yet just as violations of laws imposing speed limits on railroads or ordering streetcars to keep a "vigilant watch" for pedestrians and other vehicles became the basis for individual civil suits, separate coach laws became the basis for assertion of individual rights against railroads.[66] Men and women bringing civil damage suits argued that the contract they entered into with the company when they purchased a ticket implicitly included the statutory guarantees of Jim Crow.[67] Their suits, as reflected in *Morris*, served the ends of the state: individual suits furthered state interest in railroad compliance with the state's statutory mandate and extended the state's power. They served, as well, individual ends.

It is helpful here to return to Pearl Morris's suit against the Alabama & Vicksburg Railway Company and to address a critical fact in her case: Pearl Morris was white.[68] We are not accustomed to thinking of Jim Crow in terms of whites or whiteness.[69] In scholarship the road to and from Jim Crow

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Baltimore, the Court held the remainder of the law invalid. *See Butts v. Merchants Transp. Co.*, 230 U. S. 126, 138 (1913); Declaration, 1 Dec. 1908, Transcript of Record at 3–11, Brief of Plaintiff in Error, Record in *Butts v. Merchants Transp. Co.*, U. S. Supreme Court Record & Briefs, Microfilm Reel 933. Affirming the lower court judgment for the steamship line, the Court insisted that "it is not possible to separate that which is constitutional from that which is not." *Butts*, 230 U.S. at 138.

[65]North Carolina offers the one exception: "Any railroad company failing to comply in good faith with the provisions of this act shall be liable to a penalty of one hundred dollars per day, to be recovered in an action brought against such company by any passenger . . . who has been furnished accommodations . . . with a person of a different race in violation of the provisions of this act." Law of Mar. 4, 1899, ch. 384, § 5, 1899 N.C. Laws 384, 540.

[66]For examples of civil damage suits brought by individuals who were injured as a result of a railroad or streetcar company's violation of safety legislation, *see, e.g.*, Morey v. Lake Superior Terminal & Transfer Ry. Co., 125 Wis. 148, 103 N.W. 271 (1905) (where plaintiff was struck by speeding train); McHugh v. St. Louis Transit Co., 190 Mo. 85, 88 S.W. 853 (1905) (where plaintiff was injured when conductor allowed her to leave car while it was in motion in violation of city ordinance). *See also* Friedman, *supra* note 34 at 478–80 (regarding safety legislation and civil damage suits more generally).

[67]*See* Declaration, 26 March 1910, Amended Declaration, 13 Oct. 1910, Transcript of Record at 2–4, 7–17, *Record & Briefs in Morris*. For another example see, Petition, 30 Oct. 1893, Manuscript Record at 1–4, Records & Briefs in *Fannie Quinn v. Louisville & Nashville Ry. Co.*, 17 Ky. Law Rptr. 811, 32 S.W. 742 (1895), Kentucky Dep't for Libraries and Archives, Archives Center, Public Records Division (Frankfort, KY).

[68]*See* Amended Declaration (Pearl Morris), 13 October 1910, Transcript of Record at 7, *Record & Briefs in Morris*.

[69]A notable recent exception is GRACE E. HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940 (1998). Hale's work is part of a rich and important new literature addressing the cultural and legal construction of whiteness. *See*, in particular, DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991); ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON

understandably has been one about the rights of African-Americans.[70] In the debate as to the origins of segregation on public transit, scholars have sought to understand exactly what rights African-Americans enjoyed prior to Jim Crow, and why the attack on African-American's rights came when it did.[71] Throughout the years prior to Jim Crow, African-Americans challenged their exclusion from first-class accommodations on railroads and other forms of public transit.[72]

Black challenges continued in the Jim Crow era. The constitutional narrative of the law of race has obscured the fact that in the years between the Supreme Court's 1890 decision upholding the Mississippi separate coach law and the landmark decisions dismantling Jim Crow transit beginning in the 1940s, African-Americans kept up relentless pressure on carriers. African-Americans brought dozens of suits in state court demanding enforcement of their rights to separate and equal accommodations in public transit. Their suits addressed everything from step-boxes for alighting

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RACE, POLITICS, AND WORKING CLASS HISTORY (1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709–91 (1993); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993); and, most recently, LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999).

[70]On black Americans' struggle against Jim Crow transit and its place within the larger struggle for racial justice, *see* CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987); CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT (1983); JO ANN GIBSON ROBINSON, THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT: THE MEMOIR OF JO ANN GIBSON ROBINSON (David J. Garrow ed. 1987); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); Woodward, *supra* note 35; TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-1963 (1988).

[71]*See* LOFGREN, *supra* note 71, at 4–4; RABINOWITZ, *supra* note 46, at 182–84, 192–96, 218–19, 335–36; WOODWARD, *supra* note 36, at xv–xvi; Welke, *supra* note 6, at 263–63.

[72]For a discussion of some of these earlier cases, see Welke, *supra* note 6, at 295–313; LOFGREN, *supra* note 64, at 7–27; Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the 'Separate but Equal' Doctrine, 1865-1896*, 20 AM. J. LEGAL HIST. 17, 20–37 (1984). African-Americans had their greatest, if limited, successes in modifying corporate segregation practices on streetcars, where because blacks often made up a substantial portion of the passengers a boycott could produce genuine economic strain for companies. For discussion of black boycotts against streetcar companies, *see* August Meier & Elliott Rudwick, *The Boycott Movement against Jim Crow Streetcars in the South, 1900-1906*, *in* ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 267–89 (August Meyer & Elliot Rudwick eds., 1976); Roger A. Fischer, *A Pioneer Protest: The New Orleans Street-Car Controversy of 1867*, 53 J. OF NEGRO HISTORY (1968): 219–33; Walter E. Campbell, *Profit, Prejudice and Protest: Utility Competition and the Generation of Jim Crow Streetcars in Savannah*, 1905-1907, 70 GA. HIST. Q. LXX (1986): 197, 212–20.

passengers,[73] to equal toilet facilities,[74] to keeping whites out of "colored" coaches.[75] In addition to civil damage suits, African-Americans filed complaints with the Interstate Commerce Commission,[76] risked criminal prosecution by deliberately violating Jim Crow laws,[77] publicized the inequalities of Jim Crow transit, and kept up a steady stream of correspondence praising carriers when equal accommodations were provided, demanding action when they were not and promising their business to the lines that provided African-Americans' the best service.[78] The fact that blacks brought suit before as well as during Jim Crow and that their suits in both contexts were directed at railroads have masked the discontinuity of Jim Crow.

But along with the lawsuits by blacks were lawsuits by whites. Prior to state separate coach laws, there had been no lawsuits by whites. In the years before Jim Crow, whites sneered at and ridiculed blacks who sat in first-class accommodations; they cheered on conductors and captains who excluded blacks; all too often they violently removed blacks from first-class accommodations themselves.[79] Yet, in all of those instances—and there were many—when a black man or woman managed to ride physically and emotionally unassaulted in a ladies' car or other first-class accommodation, there seems to be no record of a white woman or man bringing suit arguing that she or he had been injured by the presence of a black man or woman in

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[73]*See, e.g.*, St. Louis-San Francisco Ry. Co. v. Loftus, 109 Okla. 141, 234 P. 607, 608 (1925.

[74]*See, e.g.*, Henderson v. Galveston, Harrisburg & San Antonio Ry. Co., 38 S.W. 1136, 1137 (Tex. Civ. App. 1896); Illinois Central R. R. Co. v. Redmond, 119 Miss. 765, 81 So. 115, 116 (1919).

[75]*See, e.g.*, Quinn v. Louisville & Nashville R. R. Co., 17 Ky. Law Rptr. 811, 32 S.W. 742, 743 (1895).

[76]*See, e.g.*, Edwards v. Nashville, Chattanooga & St. Louis Ry. Co., 12 I.C.C. 247, 250 (1907); Gaines v. Seaboard Air Line Ry., 16 I.C.C. 471, 471–72 (1909).

[77]Hart v. State, 100 Md. 595, 60 A. 457, 457 (1905); *State v. Omes*, 149 La. 676, 90 So. 20, 20 (1921).

[78]*See* Testimony of W. H. Tayloe (general passenger agent, Southern Ry. Co., witness for defendant railway), Transcript of Testimony at 520–24, 528–30, 533, 537–53, *Record & Briefs in Gaines*; Gregory, *supra* note 24, at 195–98.

[79]The trial records in any number of cases painfully and graphically highlight scenes in which white employees, passengers, and bystanders deliberately humiliated and terrorized black passengers seeking first class accommodations. *See, e.g.*, Testimony of Lola Houck, Transcript of Testimony at 1–17, *Record & Briefs in Houck* (Houck suffered a miscarriage after being locked out of the ladies' car and forced to ride on the platform of the coach over ninety miles in the rain with the conductor calling out to bystanders at each passing station that he had "a nigger" on the car); Councill v. Western & Atl. R.R., 1 I.C.C. 638, 639 (1887) (white passengers beat William Councill over head with lantern until he agreed to move into "colored coach"); Brinkley v. Louisville & Nashville R. Co., 95 F. 345, 345 (W.D. Tenn. 1899) (white passenger forced William A. Brinkley off train at gunpoint).

the coach or other accommodation and had a right of action against the carrier.[80] White passengers brought suit against railroads for any number of offenses where their injuries consisted primarily of inconvenience, aggravation, fear, or humiliation, including, most commonly, either the failure to let them off at the correct station or being wrongfully put off a train.[81] But these cases only serve to highlight the absence of cases prior to Jim Crow alleging injury as a result of having to share accommodations with a black passenger.[82] The silence ended with Jim Crow.

In the first four decades of the twentieth century, Southern state supreme courts decided at least thirty-seven cases brought by whites alleging injury as a result of a violation of state Jim Crow laws. Cases brought by whites arose in every state in the South. Although most cases arose between 1900 and 1930, whites continued to bring suit against carriers into the 1930s and '40s, even as courts began to dismantle Jim Crow.[83] The number of appellate

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[80]The evidence in suits like Lola Houck's and William Heard makes clear that, in many cases, African-Americans traveled unassaulted in first-class accommodations. Testimony of Lola Houck, Transcript of Testimony 1, *Record & Briefs in Houck*; Testimony of William H. Heard, Transcript of Hearing 3, *Record & Briefs in Heard*. *See also* WOODWARD, *supra* note 35, at 33–34; LOFGREN, *supra* note 71, at 9 (quoting an English observer who reported "in some areas 'the negro [was] allowed to enter the same street-cars or railroad cars' as occupied by whites").

[81]*See, e.g.*, East Tennessee, Virginia & Georgia R.R. Co. v. Lockhart, 79 Ala. 315, 316 (Ala. 1885) (child carried past station); St. Louis, Iron Mountain & S. Ry. Co. v. Bragg, 69 Ark. 402, 64 S.W. 226, 226 (1901) (female passenger put off short of station); Smith v. The Pittsburg, Fort Wayne and Chicago Ry. Co., 23 Ohio St. 10, 10 (Ohio 1872) (unlawful ejectment of male passenger); North German Lloyd Steamship Co. v. Wood, 18 Pa. Super. 488, 488–89 (Super. Ct. 1901) (female passenger forced to change staterooms); Houston & Texas Central R.R. Co. v. McKenzie, 41 S.W. 831, 831 (Tex. Civ. App. 1897) (female passenger carried past station); Texas & Pacific Ry. Co. v. Gott, 20 Tex. Civ. App. 335, 50 S.W. 193 (1899) (female passenger carried past station); Bresewitz v. St. Louis, Iron Mountain & S. Ry. Co. 75 Ark. 242, 87 S.W. 127, 128 (1905) (white male passenger ordered out of ladies' car).

[82]A Texas case hints at what such a suit might have looked like. *See* The St. Louis, Arkansas & Texas Ry. Co. v. Mackie, 71 Tex. 492, 9 S.W. 451, 452 (1888) (verdict for white plaintiffs erroneously given second-class tickets where proof showed second-class car was dirty, smoky, and "filled with negroes and coarse whites" causing wife and children to become ill). In *Mackie* the legal wrong was requiring the passengers to accept second-class accommodations when they had paid a first-class fare. The testimony relating to the other passengers in the car went to damages not the fundamental right of action, and rested heavily on the conduct of the passengers in the car and the car's condition.

[83]For a sense of the range of fact patterns presented in cases brought by whites, *see, e.g.*, O'Leary v. Illinois Cent. R. Co., 110 Miss. 46, 69 So. 713, 713 (1906) (white passenger brought suit for being forced to move from vestibule car to another car to make space for black passengers); Bradford v. St. Louis, Iron Mountain & S. Ry. Co., 93 Ark. 244, 124 S.W. 516 (1910) (intoxicated white male passenger brought suit after being forceably moved from newly designated black coach to available seats in white coach); Spenny v. Mobile & Ohio R. Co.,

cases itself is significant especially when compared to the complete absence of appellate cases brought by whites prior to Jim Crow. In the same period, Southern appellate courts decided a roughly equivalent number of civil damage suits brought by African-Americans. This is not to say that whites and African-Americans brought an equal number of claims. Appellate caseloads do not necessarily reflect the same balance that a study of trial court dockets and records would reveal in terms of who brought suit, the nature of their claims, or outcomes. Nor do the similar numbers suggest that African-Americans' and whites' experiences of Jim Crow were parallel. The evidence is only too clear that the twin promises of separate and equal were honored more in the breach than in fact in accommodations provided for African-American travelers. The very fact that any number of suits by whites were the result of being wrongly identified as black or for being required to ride in the "colored" coach where there were no parallel suits by blacks highlight that Jim Crow meant different things to white and black Americans. Moreover, in any study of legal records, scholars must be as attuned to the silences as to what is in fact there. Many blacks forwent travel to avoid the indignity of Jim Crow; many who traveled and faced unequal accommodations likely found recourse to law financially, emotionally, or socially impossible.[84]

Yet, the number of cases reaching Southern state supreme courts involving whites and the fact that in number they paralleled cases involving African-Americans is a critical indicator of the paradox that Jim Crow simultaneously extended new rights to whites, circumscribed "white" space and autonomy, and heightened racial anxiety. Suits by whites flag the discontinuity of Jim Crow. Jim Crow was not simply the codification of the common law as it had developed in the years since the Civil War. Jim Crow was new both in terms of the exercise of state power and in the use of space to mark status. Under Jim Crow there was not only a sign at the door of one coach or a portion of a coach that said "Colored," there was now also a sign at the door of another coach that said "White." Jim Crow "raced space." It marked "whiteness" as a category as certainly as it marked "color." Suits like Pearl Morris's help us see the shift from a system of corporate regulation sanctioned, but not mandated, under the common law, to regulation imposed

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192 Ala. 483, 68 So. 870, 870–71 (1915) (upholding assigment of white sheriff escorting black prisoner to "colored" coach); *Weller v. Missouri, Kansas & Texas Ry. Co.*, 187 S.W. 374, 375 (Tex. Civ. App. 1916) (white passengers with first class tickets brought suit for being forced to ride in coach partially-filled with Negroes). *See also infra* note 99.

[84]*See, e.g.*, W. E. B., DU BOIS, DARKWATER: VOICES FROM WITHIN THE VEIL 15–17, 228–30 (1920); Testimony of Bishop Henry M. Turner (petition), I. C. C. Hearing, 17 Sept. 1908, Transcript of Record at 121–122, *Record & Briefs in Gaines* (explaining that in absence of Jim Crow black travel would be significantly higher).

by the state. They also complicate what has been too easy to see solely in terms of the use of state authority to deny individual autonomy.

Pearl Morris was not only white, she was a woman—a young, unmarried woman traveling alone. When she boarded the Pullman sleeper on which she had a berth from her hometown of Vicksburg, Mississippi to New York City, she discovered that three black men were also passengers on the sleeping coach. The head or foot of her assigned sleeping berth abutted that of one of the black men. As Morris explained at trial, she found herself overwhelmed with fear. She demanded that the conductor put the black men off the coach. When he "rudely" refused, she pleaded to have her sleeping berth assignment changed. The conductor, in her memory, took his time about complying, finally offered her no. 16, saying that was the best he could do. When it came time to sleep, Morris, afraid even to undress, spent a fitful night fully clothed behind the curtains of her berth. She testified that by the time she arrived in New York City she was a shambles. In the nights that followed she found her sleep disturbed; she would wake suddenly in the night fearing for the safety of her person.[85] Four weeks later, after returning to Vicksburg, she filed suit in a Mississippi trial court against the railway company seeking $25,000 in damages.[86]

It is impossible to imagine a suit like Pearl Morris's brought by a man. The trope of sexual danger could be voiced only by a woman. But describing her fears as a trope is not meant to dismiss that she may well have felt afraid. A critical building block of the new racial order in the South had been the white incarnation of the black sexual threat to white womanhood. Whatever Morris in fact felt, she most certainly knew that if she claimed to have felt afraid, she would be believed.[87] And she was. In his oral argument to the

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[85]*See* Testimony of Pearl Morris, Transcript of Record at 146–53, *Record & Briefs in Morris*.

[86]*See* Declaration, 26 March 1910, Transcript of Record, at 4, *Record & Briefs in Morris*.

[87]*See* GLENDA E. GILMORE, GENDER & JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920, 91–118 (1996); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH 176–208 (1997); Jacquelyn Dowd Hall, *"The Mind That Burns in Each Body': Women, Rape, and Racial Violence," in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328, 334 (Ann Snitow et al. eds, 1983). For other cases involving white women, Pullman coaches, and black men, *see, e.g.*, Southern Ry. Co. v. Norton, 112 Miss. 302, 73 So. 1, 2 (1916); Ammons v. Murphree, 191 Miss. 238, 2 So.2d 555, 555 *aff'd on reh'g*, 2 So.2d 830 (1941); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 497 (1941). The final case, is of course, the case that any third year law student would recognize as the case establishing the doctrine of *Pullman* abstention. I learned Pullman the "old-fashioned way" and am indebted to Judith Resnik for recovering the underlying facts that never make it to a discussion in federal courts. *See* Judith Resnik, *Rereading The Federal Courts: Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, VAND. L. REV. 1021, 1038–41 (1994). For the record in the

jury, one of Morris's lawyers impressed upon the jurors what was at issue: this railroad had "willfully compelled this young lady to sleep with negroes."[88] He demanded a substantial verdict against the railroad, "so that if it ever happens that one of yours like this little woman, has to travel and use a Pullman car, there will be a reminder that will deter them [from allowing a Negro to ride in the same coach]."[89] The jury composed of all white men, awarded Pearl Morris $15,000.[90]

There had been no rough conduct, no advances, in fact no words exchanged between Morris and the black men. The berth to which the conductor had reassigned Pearl Morris placed her as far from the black men as was possible within the limits of the space of the coach. Finally, like all Pullman sleepers there was no segregation by sex; of the twenty passengers on the coach when Pearl Morris boarded, most had been white men.[91] Indeed, the conductor told a very different story of the events that day from that told by Pearl Morris on the witness stand. Contradicting Morris, the Pullman conductor testified that he "immediately" and politely responded to her request for a different berth; he denied that she had asked him to put the black men off the coach. Even accepting her version of the facts, the conductor would have been unlikely to grant her latter request. There was only one Pullman attached to the train. Had he forced the men to trade the luxury accommodations of the Pullman for the accommodations provided in the colored coach (described in the testimony as "second class" and in any event not offering accommodations substantially equal to those in the Pullman), the men would have had a claim against the railroad under the Interstate Commerce Act.[92] And the Pullman conductor well knew that they

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case, which includes extensive testimony by white women relating their fear of being alone in a Pullman coach with a black porter without a white conductor, *see* Records & Briefs in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), U.S. S. Ct. Record & Briefs, Microform Reel 283, Univ. of Chicago (Chicago, IL).

[88]Oral Argument of Pat Henry (on behalf of Pearl Morris), Transcript of Record at 103, *Record & Briefs in Morris*.

[89]*Id.* at 105.

[90]*See* Judgment of Court, Transcript of Record at 112, *Record & Briefs in Morris*.

[91]*See* Testimony of Pearl Morris (plaintiff), Testimony of E. A. Stedman (ticket agent, Queen & Crescent Line, witness for defendant railway), Testimony of F. W. Bozwell (Pullman conductor, witness for defendant), Transcript of Record at 165, 220–21, 230–31, *Record & Briefs in Morris*. One of the striking silences in the case was the absence of any action by any of the white male passengers on Morris's behalf. The Mississippi Supreme Court commented on this fact in its opinion: "Possessing the knowledge of local conditions common to all residents of our section, we confess some surprise that there was no sequel to the event described by the record." *Morris*, 103 Miss. at 519.

[92]*See supra* note 54, 74–80 and accompanying text. For two cases involving suits brought by African-American men traveling interstate following their ejectment from Pullman accommodations *see* State ex rel. Abbott v. Hicks, 11 So. 74, 74 (La. 1892); Thompkins v.

would likely have brought a suit against the carrier.[93] Yet relating his version of the facts before a jury of white Mississippians, the conductor must have known that his words were likely to be dismissed as an outright lie or, worse, the truth, sad proof that he was a corporate man with no will of his own. As one of Morris's lawyers derided in his closing argument—this man calls himself a "Southern man. . . . More the shame then I say unto him."[94]

Pearl Morris's case was striking in the size of the verdict, but not in its factual pattern or outcome. Between 1900 and 1940, state supreme courts decided more civil suits involving Jim Crow brought by white women than any other single group; white women appear to have been more likely to win at trial than any other group, and more likely as well to win on appeal.[95] The same cautions that I noted earlier in reference to the number of appellate decisions in civil suits involving Jim Crow brought by whites apply here.[96] Yet with these cautions in mind, the number of suits decided by Southern state supreme courts involving white women between 1900 and 1940 was significant. Twenty-one of the thirty-seven cases I have found involving whites, involved white women. Moreover, the white female plaintiffs had

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Missouri, Kansas & Topeka Ry. Co., 211 F. 391, 392 (8th Cir. 1914).

[93]The ticket clerk's testimony included the point that he made no distinction with respect to race in selling Pullman accommodations because the tariffs established by the Interstate Commerce Commission prohibited any distinction. Although he did not say so, the identity of the men and the circumstances of their travel likely also influenced both his and the conductor's response. *See* Testimony of C. S. Lumley (ticket clerk, Alabama & Vicksburg Ry.), Testimony of F. W. Bozwell (Pullman conductor), Transcript of Record at 199–204, 230, 235, 237; *Record & Briefs in Morris*.

[94]Oral Arg. of Hon. Pat Henry (lawyer for Morris), Transcript of Record at 96, *Record and Briefs in Morris*.

[95]For a sense of the range of issues raised in cases brought by white women, *see, e.g.*, Missouri, Kansas & Texas Ry. Co. v. Ball, 25 Tex. Civ. App. Rptr. 500, 61 S.W. 327 (1901) (only seats available in "colored coach"; conductor failed to find seats for white woman and children in white coach); *Baker*, 48 S.E. at 355 (white woman refused to move from "colored" section of streetcar); Southern Light & Traction Co. v. Compton, 86 Miss. 269, 38 So. 629, 629 (1905) (white woman asked to move forward to provide seating for standing black passengers); Louisville & Eastern R. R. Co. v. Vincent, 29 Ky. Law Rptr. 1049, 96 S.W. 898, 898 (1906) (black passengers allowed to ride in white coach); San Antonio Traction Co. v. Davis, 101 S.W. 554, 556 (Tex. Civ. Ct. App. 1907) (dispute over placement of sign dividing streetcar into white and colored sections); *Ritchel*, 147 S.W. at 412 (Jewish woman mistaken for black and forced into "colored" coach); Neal v. Southern Ry., 92 S. C. 197, 75 S.E. 405, 405–06 (1912) (white woman and her children forced to chose between using "colored" waiting room or standing outside in foul weather while white waiting room cleaned); Chicago, Rock Island & Pac. Ry. Co. v. Allison, 120 Ark. 54, 178 S.W. 401, 401 (1915) (white woman directed to ride in "colored" coach); *Shelton*, 201 S.W. at 521 (allowing black passengers to enter dining car before white passengers had left); *Ammons*, 2 So.2d at 555 (1941) ((black) Pullman porter given berth above white woman).

[96]*See supra* note 86 and accompanying text.

won at trial in seventy-six percent, sixteen of the cases. Over half (9) of those verdicts were affirmed on appeal and of the seven that were reversed over half (4) seem likely to have resulted in a verdict for the woman when retried. Moreover, although most of the verdicts for the defendant railroads and streetcar companies (5 out of 7) were affirmed on appeal, one was reversed and judgment entered for the woman and the other reversed on grounds favorable for the woman on retrial. Of the cases I have found, black men were the next most successful at trial and on appeal (16 civil cases; 7 of 9 verdicts for plaintiff affirmed, 3 of 6 verdicts for defendant reversed), followed by white men (16 civil cases; 3 of 8 verdicts for plaintiff affirmed, 4 of 8 verdicts for defendant reversed) and finally black women (15 civil cases; 4 of 6 verdicts for plaintiff affirmed, 3 of 10 verdicts for defendant reversed). Three points seem of particular significance. First, the ideology of white womanhood had long been critical to white supremacy. But in the years before Jim Crow white women appeared largely as props in the drama. In the Jim Crow era, gender retained its saliency and provided a base for white women's complicity and individual agency in framing the law and life of Jim Crow in the American South. Second, through their suits white women became dynamic agents in the creation and extension of modern state power. Third, their suits were illustrative of and contributed to a feminized image of human vulnerability which was a critical underpinning for the exercise of state power in the modern American "guardian" state.[97]

Suits by white women were new under Jim Crow, but suits by women were not. Prior to Southern states' adoption of separate coach laws, the overwhelming majority of suits brought by blacks involving public transit were brought by black women. The number of suits brought by black women prior to Jim Crow related to any number of factors, including the historic privileging of space for women in public travel, the danger black women faced in going into men's accommodations, and the burden of respectability borne by black women.[98] Under Jim Crow, black women continued to bring

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[97]For other scholarship highlighting the distinctive role women and arguments relating to women's vulnerability played in state-building at the turn of the century, *see generally*, KATHRYN KISH SKLAR, FLORENCE KELLEY & THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900 (1995); WOMEN, THE STATE, AND WELFARE (Linda Gordon, ed., 1990); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); Paula Baker, *The Domestication of Politics: Women and American Political Society, 1780-1920*, 89 AM. HIST. REV. 620 (1984).

[98]*See* Welke, *supra* note 6, at 277–90. On norms of respectability and African-American women *see* Gilmore, *supra* note 90; Evelyn Brooks Higginbotham, *Righteous Discontent: The Women's Movement in the Black Baptist Church, 1880-1920*, 185–229 (1993); Evelyn Brooks Higginbotham, *African-American Women's History and the Metalanguage of Race*, 17 SIGNS 251, 256–58, 273–74 (1992); Darlene Clark Hine, *Rape and the Inner Lives of Southern Black*

suit in substantial numbers and their suits were as marked by gender as was Pearl Morris's.[99]

But Jim Crow had ostensibly erased the boundaries of sex in public transit. Why did gender remain a fulcrum for status, in a context in which gender was not an element of the formal law? What seems essential to recall is that the traditional privileging of ladies' space in public transit had not been imposed by law; railroads had provided ladies' accommodations in keeping with widely held social norms relating to women's movements in public space that in turn rested on assumptions that linked status, space, and gender.[100] In this respect, it is critical to recognize that women's assertions of right in suits like Pearl Morris's were imbedded in a language of imperilment and that their agency served and furthered not only their own interests and those of the state, but also furthered the interests of white men. White women's suits under Jim Crow were part of a broader pattern described by historians including Glenda Gilmore, Nancy MacLean, and Grace Hale. As these scholars have shown, at the same time that Southern white women's daily lives increasingly moved beyond traditional venues of male authority, white women's agency depended upon their verbal acceptance of male protection and hence, furthered their own subordination.[101]

But it is equally important to recognize that men's role in women's suits reflected their own dependence upon women's vulnerability. White men affirmed their masculinity and safeguarded their status through suits by white women. In the arena of the courtroom, white men—lawyers, judges, jurors—argued and decided women's cases. Morris's lawyers spoke as men to men. Through analogies (the Pullman coach was "a little house on

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Women: Thoughts on the Culture of Dissemblance, *in* SOUTHERN WOMEN: HISTORIES AND IDENTITIES, 177, 181, 188–89 (Virginia Bernhard et al., ed., 1992); James Oliver Horton, *Freedom's Yoke: Gender Conventions among Antebellum Free Blacks*, 2 FEMINIST STUDIES 51, 56–64 (1986).

[99]Whereas black men's suits often related to inequality of accommodations, black women's suits more often involved the presence and conduct of white men in the "colored" coach. For a sense of the difference *compare* Illinios Central R.R. v. Redmond, 119 Miss. 765 (1919) (failure to provide two toilets and separate smoking compartment for black passengers where these accommodations were provided for white passengers) *and* Henderson v. Galveston, Harrisburg & San Antono Ry. Co., 38 S.W. at 1136 (Tex. Civ. App. 1896) (failure to provide drinking water or water-closet in compartment for black passengers where provided for white passengers), *with* Bailey v. Louisville & Nashville R. Co., 44 S.W. 105, 106 (Ky. 1898) (black woman riding in colored coach assaulted by two drunk white men), *and* Texas & Pac. Ry. Co. v. Baker, 215 S.W. 556, 556 (Tex. 1919) (black woman riding in colored coach violently assaulted and seriously injured by white man).

[100]*See* Welke, *supra* note 6, at 266–67, 298–306.

[101]*See* GILMORE, *supra* note 90, at 91–118; HALE, *supra* note 70, at 105–14; NANCY MACLEAN, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan at 200–01 (1994).

wheels") and carefully chosen words (the "berths" were "beds"), her lawyers wove the themes of sexual purity and home protection into an irrefutable argument of violation.[102] In suits like Morris's, white men could prove their manhood from the safety of a seat in the jury box. Moreover, they could vent a second level of anger, indeed they could see themselves in distinctly modern terms because it was the railroad they held accountable.

The law of Jim Crow was part of a broader process of modern state formation; it was modern as well in its use of space to mark status. Before the Civil War, the institution of slavery had marked the status of all whites as superior to all blacks, free or slave. As others have noted, spatial separation by race was unnecessary to safeguard status, in fact, propinquity was a necessary component of Southern life.[103] Neither Southern defeat in the Civil War nor the Thirteenth Amendment destroyed the connection between status and race which slavery had provided. Slavery cast a long shadow over the post-war years. So long as community remained undisturbed, memory intact, and custom in place, the connection between status and race was secure. But railroads disrupted community, memory faded over time, and blacks rightfully challenged racial custom.

African-Americans who brought suit against railroads before Jim Crow were fighting for recognition of status in personhood. Most suits brought by black men and women were brought from outside the space that a carrier had tried to assign to them. For example, a black woman who brought suit might have ridden on the platform of a car or not at all, rather than go into the smoking coach or a portion of a coach walled off for blacks. A black woman refusing to ride in a smoking car was rejecting the connection among space, status, and race that the carrier's direction suggested.[104] When black men and women in a letter to a railroad, or a legal complaint, did not mention their race in describing an incident, they were insisting that status not be defined by race and space.[105] Jim Crow closed off the pathway of status through personhood that had begun with the Thirteenth and Fourteenth Amendments

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[102]*See* Oral Arg. of Hon. Carl Fox (lawyer for Morris), Transcript of Record at 86–87, *Record & Briefs in Morris.*

[103]*See* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 267–69 (1974); ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH 31–32 (1988); WOODWARD, *supra* note 36, at 12–17.

[104]*See* Testimony of Lola Houck, Transcript of Testimony at 1–17, *Record & Briefs in Houck.*

[105]*See* Letter from J. C. Robinson to John A. Grant, Superintendent M. & C. R.R., 26 May 1879, Transcript of Record at 10, U. S. Supreme Court Records in *The Civil Rights Cases*, 109 U. S. 3 (1883) (*Robinson v. Memphis & Charleston R..R.. Co.*), Microfilm Reel 211, University of Chicago Law School (Chicago, IL).

to the U. S. Constitution. As the Supreme Court's decision in *Plessy* has long been understood, Jim Crow represented a dramatic loss of autonomy for African-Americans. During the reign of Jim Crow, blacks, were they to fight at all, had to fight from within the space defined as "colored," and the fight was limited to fighting for what the state had defined as permissible: separate accommodations that were nominally equal. The transition is dramatically marked in suits brought by African-American women. Having long resisted conductors' attempts to force them to ride in colored compartments or smoking cars, during the Jim Crow era black middle-class women for the first time began to bring suit from within accommodations defined as colored. In the documents they filed to begin a lawsuit, the gendered qualifier—"who is a lady"—following a woman's name was replaced by a racial qualifier, "she being a colored woman."[106]

Suits like Pearl Morris's further circumscribed African-Americans' rights. In *Morris*, the state of Mississippi held that the state separate coach law applied to every train and every car that crossed the state, even if not a single local passenger was on the train.[107] The railway company's most likely response to the decision was not to add another sleeping coach, but to make sure in the future that whenever a black applied for space in the sleeping coach, he or she was told that all the berths were sold. The evidence from other cases provides a guide here. In a suit filed with the Interstate Commerce Commission two years before Morris's by nine bishops of the A.M.E. church against a number of Southern railways, A.M.E. Bishop Wesley Gaines told of having to circumvent local ticket agents who refused to sell Pullman berths to blacks, and make arrangements in advance through officials of the road with whom they were personally acquainted. Even then, the railroad agent might require him to pay for an entire drawing room, at twice or even as much as four times the price of a single berth, to ensure that no white passengers would have to sleep near a black passenger.[108] There is some evidence that both these practices came into play in Morris's case. The ticket agent for the Alabama & Vicksburg Railway at trial described the black men as having "a letter from the representative of the Southern Railway of Washington, D.C." He also sold a ticket to a fourth bishop for the

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[106]*Compare* Declaration (E.P. Logwood and his wife Anna Laura Logwood), 13 Apr. 1883, Record in *Logwood v. Memphis & Charleston R. Co.*, 23 F. 318 (C. C. W. D. Tenn. 1885), National Archives and Record Administration, Southeast Region (East Point, Ga.), *with* Petition (Ella B. Wood and J. E. Wood, her husband), 27 Oct. 1893, Record in *Wood v. Louisville & Nashville R. R. Co.*, 101 Ky. 703, 42 S.W. 349 (1897), Kentucky Department for Libraries and Archives (Frankfort, Ky.).

[107]*See Morris*, 103 Miss. 513.

[108]*See* Testimony of Wesley J. Gaines (petitioner), I. C. C. Hearing, 17 Sept. 1908, (Formal Docket No. 1468) Transcript of Record at 23–25, NARA, RG 134 (Suitland, Md.).

next day to Atlanta, but that Pullman coach, unlike the one on which Morris had passage, had a "drawing room"—two berths and a sitting area which cost three and one-half times the cost of a single berth, and which was at one end of the car separated from the other berths. The record is silent on whether the bishop bought the more expensive accommodations by choice or, which seems more likely, was offered this as his only option. Gaines indeed may well have been one of these men.[109] For those without special connections, the more common result was no berth in the Pullman at all.[110]

Jim Crow meant something different for whites. Before Jim Crow, whiteness had not been marked in spatial terms. All space had been white space. Jim Crow circumscribed white space. To most whites the fact that Jim Crow laws applied to them as well as to blacks came as a surprise. Under separate coach laws, the state, acting through railroads, determined who—white and black—had a right to what space. Any number of suits brought by whites were premised on the insult of being asked to move because the space was assigned to or needed for black passengers. Their suits reflected hostility to both what they saw as abuses of state or corporate power and to the sense that yielding space was a statement about relative status.[111] Yet just as dark lines on a white piece of paper make the whiteness clearer, so Jim Crow reaffirmed the connection between status and race. From this perspective, Jim Crow was an exercise in state power to protect the individual autonomy of whites. This is the other side of *Plessy*. In a sense, Jim Crow universalized a kind of norm of which women always had to be

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[109]*See* Testimony of E.A. Stedman (ticket agent), Transcript of Record at 213, 224, 226–27, *Record & Briefs in Morris*. See also Deposition of Mr. Harris (conductor, The Georgia Railroad), read into the testimony by Joseph B. Cumming (general counsel, The Georgia Railroad), Hearing Before the Interstate Commerce Commission on Complaint Filed by W. H. Heard, 15 Dec. 1887, at 10–11, NARA, RG 134 (Suitland, Md.).

[110]*See* Gregory, *supra* note 25, at 195–96; Testimony of Bishop H. M. Turner (petitioner), I. C. C. Hearing, 17 Sept. 1908, Testimony of H. E. Perry (black insurance solicitor, witness for petitioners), I. C. C. Hearing, 18 Sept. 1908, Transcript of Record at 120, 132, 172–226; *Record & Briefs in Gaines*.

[111]*See, e.g.*, *Compton*, 38 So. at 629 (Charlotte Compton got off streetcar rather than moving forward to make space for black passengers); Testimony of J. B. O'Leary (plaintiff), Transcript of Record at 100, Record & Briefs in *O'Leary*, 69 So. at 713, Mississippi Dep't. of Archives and History (Jackson, Miss.) (describing his feelings on being asked by conductor to move to another coach to provide seating for black passengers, the white O'Leary said, "I was insulted and I resented it." "I was indignant over the way he had insulted me, and tried to run me out of there, he showed that he had no respect for us.") For examples of incidents involving white passengers in Little Rock, Arkansas, Augusta, Georgia, and Mobile, Alabama, *see* John William Graves, *Jim Crow in Arkansas: A Reconsideration of Urban Race Relations in the Post-Reconstruction South*, 55 J. S. HIST. 419, 443–44 (1989); Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893, 901–03, 913 (1986).

conscious. As historian Mary Ryan and others have shown so well, historically women's respectability, unlike men's, had depended on their location in public space.[112] Space and status were now connected for all individuals, white as well as black, men as well as women.

We can see the other side of *Plessy* well in Pearl Morris's suit. The three black men riding in the Pullman coach from Vicksburg with Pearl Morris could afford to pay for their passage. In all likelihood, Pearl Morris could not. The men were bishops of the African Methodist Episcopal Church (A.M.E.), the top of the hierarchy of the second largest black church in the United States. Pearl Morris, was a clerk at a dry good's store. She was traveling to New York on a ticket paid for by her employer to buy millinery goods for the store. The men had traveled from their posts in cities like Washington, D. C. and Cincinnati, Ohio for a conference of bishops in Vicksburg and were headed home.[113] But for Pearl Morris the law of Jim Crow rendered these facts irrelevant. Pearl Morris's status rested on her white identity; and she laid claim to her whiteness by occupying a coach with other white passengers from which blacks were excluded. At trial, the railroad company's lawyer asked her what if anything she had said to the conductor about whether she would leave the coach if he did not put the black men out of the car. She responded: "I didn't say anything about leaving the coach, I asked him to put them out of the coach, they had no right there."[114] In Pearl Morris's view, to force her to share the space of a railroad coach with black men was tantamount to saying they were her equals. Near the end of her testimony, the railroad's lawyer asked: "If these three men had been white men . . . everything would have been all right and there would have been no trouble?"[115] To which, Morris replied, "Been all right because I never have been put on an equality with negroes before."[116] As Pearl Morris's words and suit suggest, the state in the law of Jim Crow, had made status dependent upon the connection of race and space.

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[112]*See* MARY P. RYAN, WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825-1880, 58–94 (1990); JOHN F. KASSON, RUDENESS & CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 112–13, 117, 124 (1990).

[113]*See* Testimony of Pearl Morris (plaintiff), Testimony of E. A. Stedman (Ticket Agent, Queen & Crescent Line, witness for defendant), Transcript of Record at 146–47, 162, 214, 217–18, *Record & Briefs in Morris*. Morris's own lawyers specifically urged the jurors not to hold the fact that she was a working girl against her. *See* Oral Arg. Hon. Pat Henry (lawyer for Morris), Transcript of Record at 95.

[114]Testimony of Pearl Morris, Transcript of Record at 171, *Record & Briefs in Morris*.

[115]*Id.* at 179.

[116]*Id.*

The Alabama & Vicksburg Railway Company appealed the Mississippi Supreme Court's decision to the U. S. Supreme Court.[117] We can only guess at what the outcome might have been had the Court decided the case. After arguments, but before a decision, the Railway Company asked the high court to dismiss the case.[118] The record is silent as to why the company withdrew its appeal. Yet, what seems most likely is that the company settled the case. Although the Mississippi Supreme Court had upheld the verdict for Morris, it had reduced the damages from $15,000 to $2,000.[119] Pearl Morris, a clerk in a dry-goods store, may have been willing to settle for far less.

The dismissal left the Mississippi Supreme Court's decision standing. As a practical matter, the Mississippi Supreme Court's decision had the greatest impact in Pullman and other luxury accommodations provided primarily for interstate travel. Here a passenger's journey, like Pearl Morris's, meant crossing any number of state lines. And while some states, including Louisiana, Kentucky, and Maryland, held that their Jim Crow laws did not apply to interstate travel, others, including Tennessee and Oklahoma, joined Mississippi in holding that their laws applied to all passengers "within the state."[120] The expansive interpretation that states like Mississippi, Tennessee and Oklahoma adopted meant that any white traveler forced to share accommodations with a black passenger on a journey that passed through one of these states could bring suit there, even though in other states through which they passed the courts were likely to hold that the state Jim Crow law did not apply. The "space" of the railroad journey coupled with law to extend the power of states like Mississippi well beyond the physical boundaries of the state.[121] As bus travel filled the role that coach rail travel had earlier provided, the distinction between intrastate and interstate passengers became further blurred, so that in time across the South states effectively extended their Jim Crow laws to reflect the view that within the spatial boundaries of the state, the state, not the federal government or corporations, exercised absolute power over the relationship among space, status, and race.

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[117]*See* Writ of Error (Alabama & Vicksburg Ry. Co.), 19 Dec. 1912, *Record & Briefs in Morris*.

[118]*See* Mandate (Dismissing appeal on motion of Alabama & Vicksburg Ry. Co.), 8 Aug. 1914, *Record & Briefs in Morris*.

[119]*See Morris*, 103 Miss. at 520.

[120]*See* State ex rel. Abbott v. Hicks, 11 So. 74, 76 (La. 1892); Ohio Valley Ry. Receiver v. Lander, 104 Ky. 431, 475 S.W. 82 (1898); Hart v. Maryland, 100 Md. 595 (1905); Washington, B. & A. Electric R. Co. v. Waller, 289 F. 598, 600–02 (Ct. App. D. C. 1923) (applying Maryland law); Smith v. State, 100 Tenn. 494 (1898); Stratford v. Midland Valley R. Co., 36 Okla. 127 (1912).

[121]For an example of such a case, *see* Southern Ry. Co. v. Norton, 112 Miss. 302 (1916).

Thirty years after a white woman's suit extended the boundaries of Jim Crow through the Mississippi Supreme Court's decision in *Morris*, a new case provided a critical opening for the long and difficult process of dismantling Jim Crow. In 1946, an African-American woman named Irene Morgan brought her case before the U. S. Supreme Court.[122] Citing its decision in the 1878 case of *Hall v. Decuir*, the U. S. Supreme Court held that a state statute that required racial segregation of interstate bus passengers imposed an improper burden on interstate commerce and was unconstitutional. The Mississippi Supreme Court's decision in *Morris* in 1910 had been part of a broader shift at the beginning of the 20th century from corporate to state regulation, under the authority of state police power. The U. S. Supreme Court's decision in *Morgan*, thirty years later in 1946, marked a second critical shift in the exercise of the police power in 20th century America: the shift from the police power of the state to that of the federal government.

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[122]*See* Morgan v. Virginia, 328 U. S. 373 (1946).

Afterword and Response: What Digging Does and Does Not Do

*Patricia D. White**

I wish that I could tell you that I had discovered incontrovertible evidence that Pearl Morris had moved to Alaska and undertaken to become a salmon fisherwoman. But I tried and I was unable to. So I am going to have to do something else. I suspect that I was asked to comment on Professor Welke's paper not because I am an historian, because I am not, and not because I have any particular insight to offer on either the *Morris* case or *Plessy*, because I do not. But rather because I have long been of the view that something akin to what we are here calling "legal archaeology" is a useful tool in understanding cases. For some years, I have required my first year torts students to engage in what we might call a "dig." So I will not comment on the details of Professor Welke's paper on which I am fully prepared to take her word. Rather I will use it as an example in making some more general points.

Cases arise in context. Any lawyer knows that the full story of a case on which he or she has worked is not reflected in its judicial opinion. The facts as set forth by the court, for example, are often unrecognizable to either side. Sometimes they represent elements of the presentations of each or a compromise of the two. They have likely been pared down, edited as it were, by the court to reflect its view of relevance. In *Morris*, for example, none of the factual detail with which Professor Welke supplied us comes from the opinion. It all comes from other parts of the record. This is often the case. Similarly, any lawyer knows that the course and often the outcome of a case is affected, sometimes indeed determined, by strategic considerations. These include not only the obvious categories encompassed by the craft of the lawyer: how to use the rules of procedure; the choice of forum that you might make; what arguments and what cases to rely on; how to present the case; which witnesses to call; all those sorts of things. But it also includes less obvious strategic considerations. How, for example, to relate to opposing counsel; how to juggle your own cases in the context of your own workload, and the other pressures on you.

Another broad category of influential factors in the actual outcome of cases might be labeled "the contingencies of the case." These could include various personal or corporate motivations of the client. Often a lawyer's choices are driven by the client's temperament, by the client's economic

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commitment or means, by the desire or willingness of the client to compromise, by the client's ability to understand the case. Appropriately enough, clients very often will determine or greatly influence the course of your handling of a case. These features I regard as contingencies, very important contingencies. None of these is described in the typical appellate decision or in other written accounts of a case. Professor Welke's description of the railroads' political battle to retain their autonomy fits in a broad way into the category of a contingency of the case. It affected what the client was prepared or not prepared to do. This notion of contingency, of things which might constitute contingencies of a case, might also include a whole host of characteristics about the judge or about the jury whose fact finding will importantly bind an appeals court.

Then, too, there may be influences emanating from the social, political, cultural, and/or economic milieus in which a case sits. The practice of relying enormously on close analysis of the language of appellate opinions to teach the law to students necessarily misses much of the contextual richness of the law. And it doesn't very effectively convey to the student what it is that lawyers do or what they have to be prepared to contend with as they go about the business of practicing law. Nor, in my view, does it give a very complete picture of how the law itself evolved. For this reason, it has seemed to me make sense as a pedagogical matter to ask first year students, the ones whose curriculum consists most thoroughly of relatively contextless appellate opinions, to move backwards to reconstruct as much of the context of some single opinion as they can. I ask my first year tort students to choose an appellate decision and then to reconstruct what really happened in the making of that case. I have them begin by trying to retrieve the full record. I ask them to find the lower court transcripts. Often, of course, they discover that the transcripts do not exist or that they are hard to find. I am indifferent as to whether a student chooses a contemporary case or a case that happened a long time ago. I ask them to try to retrieve and read all the briefs at every level. I ask them to find and read any related social history that they can discover. I ask them, where there are living lawyers or living participants, to find as many of those lawyers, parties, witnesses, judges and jurors as possible and interview them. I ask them to consider going to visit the site where the events occurred and actually to see what the building looked like or what the geographical configuration was to see if that was relevant or not relevant. I ask them to look at photos, to read broadly, to look at contemporaneous news accounts and generally to be as imaginative as they can be in moving backwards to reconstruct what happened. To engage first year students in this way is to open their eyes to some of the interest, excitement, difficulty, power, and reality of legal practice. It also interestingly humanizes the law for them at a time when

they are often a little discouraged because they came to law school with a far different picture of what it would be like from what the first year is really like.

But this is a pedagogical technique which is justified only because it is not widespread. That is, the study of context gains pedagogical legitimacy and importance within the context of the heavy emphasis of the first year curriculum on relatively contextless appellate opinions. Ours is a legal system of rules. Particular cases themselves, often rich in history and driven by context, are transformed by our system into general rules and as such are more or less stripped of their content. They become, in a generalized state, a part of the context in which future cases will arise and be decided, a part of the context which a lawyer has to look to as he or she takes cases in their stripped-down sense to apply in the lawyers own legal analysis in the now current case which he or she has in front of himself or herself. This is, of course, the central feature of the theoretical basis of the common law. Understanding how to analyze, generalize, manipulate, and apply rules is the distinctive job of the lawyer precisely because it is the theoretical centerpiece of our legal system. Teaching students how to think like lawyers must be the principal pedagogical mission of the first year of law school. The kind of thing which I do in encouraging students to do legal archaeology in the sense that I ask them to, is, I think, only justified because it is not done by their other teachers. If everyone were doing it we would together be failing in our mission, which is to teach them how to operate as lawyers in a context of general rules. I think it is very important that we keep that in mind.

Similarly, as a scholarly enterprise, I think it is important to focus on what legal archaeology properly is and what it properly is not. In my view, legal archaeology is properly atheoretical. Its findings help us explain cases. Its findings help us describe cases. They help us understand what happened. They give us enormous insight about ourselves and about our society. As Parker aptly said at the outset, it teaches us about our institutional blind spots and it gives us both diagnostic tools and suggestions for remediation. But that is all. I think it is very important to understand that that is what we are doing when we are doing legal archaeology as scholars.

Professor Welke's fascinating account of *Morris* is in my view an example of the sort of insight that we can gain. I think that is what it should be taken for.

A Return to First Principles? *Saenz v. Roe* and the Privileges or Immunities Clause

Douglas G. Smith[*]

For over one hundred years, the Supreme Court consistently has shunned the Privileges or Immunities Clause of the Fourteenth Amendment as a source of substantive protection for the fundamental rights of American citizens. This reticence to appeal to the Clause, however, was relaxed last Term in *Saenz v. Roe*,[1] in which the Court relied in part on the Clause in striking down state residency requirements for welfare benefits as an unconstitutional interference with citizens' "right to travel."[2] This decision and, in particular, its reliance on the Privileges or Immunities Clause raises a number of

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[1]526 U.S. 489 (1999).

[2]*Id.* at 500–11. For a general discussion of the constitutional right to travel during various periods in the Court's history, see William Cohen, *Discrimination Against New State Citizens: An Update*, 11 CONST. COMMENTARY 73 (1994) [hereinafter Cohen, *Discrimination*]; William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 CONST. COMMENTARY 9 (1984); Robert C. Farrell, *Classifications that Disadvantage Newcomers and the Problem of Equality*, 28 U. RICH. L. REV. 547 (1994); Bernard Evans Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs*, 54 CAL. L. REV. 567 (1966); Katheryn D. Katz, *More Equal than Others: The Burger Court and the Newly Arrived State Resident*, 19 N.M. L. REV. 329 (1989); Stephen Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147 (1993); Thomas R. McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987 (1975); Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981); Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989); Stewart Abercrombie Baker, Comment, *A Strict Scrutiny of the Right to Travel*, 22 UCLA L. REV. 1129 (1975); David A. Donahue, Note, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 ST. JOHN'S L. REV. 451 (1998); Note, *Durational Residence Requirements from* Shapiro *Through* Sosna*: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622 (1975); Gregory B. Hartch, Comment, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457 (1995); Note, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873, 878–79 (1967); Note, *Residence Requirements in State Public Welfare Statutes—I*, 51 IOWA L. REV. 1080 (1966); Note, *The Right to Travel—Quest for a Constitutional Source*, 6 RUT.-CAM. L.J. 122 (1974); Comment, *The Right to Travel–Residence Requirements and Former Residents:* Fisher v. Reiser, 93 HARV. L. REV. 1585 (1980) [hereinafter *Harvard Comment*]; Duane W. Schroeder, Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 NEB. L. REV. 117 (1975).

unresolved questions concerning the direction of the Court's Fourteenth Amendment jurisprudence.

In *Saenz*, the Court examined the constitutionality of a California statute enacted in 1992, which limited the maximum welfare benefits available to newly-arrived residents in the state.[3] The limitations reduced the welfare payments that could be received by individuals residing in the state for less than twelve months to the amount they had been receiving in the state from which they migrated.[4] A federal district court had struck down the California residency requirement on the ground that it interfered with welfare recipients' right to migrate to the state,[5] and the Ninth Circuit affirmed that ruling.[6] In

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[3]*See Saenz*, 526 U.S. at 492–93. As the Court noted, a number of federal and state courts had considered the constitutionality of durational residency requirements imposed upon receipt of welfare benefits and had struck them down as infringing the constitutional right to travel among the states. *Id.* at 497 n.9. *See, e.g.*, Maldonado v. Houstoun, 157 F.3d 179, 190 (3d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999) (upholding preliminary injunction because plaintiffs were "likely to succeed in proving . . . [the] twelve month durational residency requirement is unconstitutional"); Westenfelder v. Ferguson, 998 F. Supp. 146 (D.R.I. 1998) (holding that "a durational residency requirement does not rationally further the purpose of encouraging welfare recipients to seek work and achieve self-sufficiency"); Hicks v. Peters, 10 F. Supp.2d 1003 (N.D. Ill. 1998) (holding that durational residency requirement is not rationally related to state's desire "to promote employment and to end welfare dependence"); Warrick v. Snider, 2 F. Supp.2d 720 (W.D. Pa. 1997), *aff'd*, 191 F.3d 446 (3d Cir. 1999) (holding that "a durational residency requirement designed to encourage new residents to seek employment . . . fails to satisfy the rational basis test"); Mitchell v. Steffen, 504 N.W.2d 198 (Minn. 1993) (holding that state plan allowing only sixty percent of benefits for first six months living in state violates constitutional right to travel); Sanchez v. Dep't of Human Servs., 713 A.2d 1056, 1067 (N.J. Super. Ct. App. Div. 1998) (holding that New Jersey twelve month residency requirement for welfare services violates state and federal constitutions).

Although most courts have labelled the constitutional right at issue in such cases the "right to travel," some commentators have argued that the real constitutional value at issue is some version of equal protection. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-48, at 1118 (1st ed. 1978) ("The right to travel rationale alone, under which the waiting periods are seen as deterrents or penalties for poor people desiring to start afresh in life . . . cannot quite support these decisions; it is at least as great a deterrent to travel when the second state provides no welfare assistance to all, or offers significantly lower benefits although with no waiting period; yet the right to travel has not been read to require any minimum level of welfare benefits. A large component of these decisions must therefore be the heightened level of evenhandedness . . . which the Court has imposed on programs purporting to provide for the needy." (footnotes omitted)).

[4]*See Saenz*, 526 U.S. at 493 n.1 (citing CAL. WELF. & INST. CODE § 11450.03 (West Supp. 1999) (providing that a family that had resided in state for less than twelve consecutive months immediately before applying could not receive assistance higher than "the maximum aid payment that would have been received by that family from the state of prior residence")).

[5]*See* Green v. Anderson, 811 F. Supp. 516, 521 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *judgment vacated*, 513 U.S. 557 (1995).

[6]*See* Green v. Anderson, 26 F.3d 95, 96 (9th Cir. 1994), *judgment vacated*, 513 U.S. 557 (1995).

the interim, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"),[7] which seemed to provide express sanction for such state practices.[8] While recognizing that there might be constitutional issues surrounding the enactment of durational residency requirements, Congress authorized the states to employ such requirements so that states could shield themselves from an influx of welfare recipients should they decide to provide more generous benefits than were available in other states.[9] Congress further recognized that durational residency requirements could also prevent states from engaging in a "race to the bottom"—lowering their own welfare benefits with the knowledge that welfare recipients might then have an incentive to migrate to some other state where benefits remained high.[10] Despite the state's argument that the enactment of the federal statute further supported its position, both the district court and the Ninth Circuit concluded that the federal statute did not affect the constitutional analysis.[11]

The Supreme Court granted certiorari to determine the constitutionality of California's durational residency requirement and the effect, if any, of PRWORA's implicit approval of that requirement.[12] The aggrieved welfare recipients argued that the durational residency requirement violated their right to travel among the states, tying that constitutional right not only to the general structure of the Constitution, but also to several specific constitutional provisions.[13] Although the Court in its past cases had only loosely referred to the text of the Constitution in outlining its "right to travel"

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[7]Pub. L. No. 104-193, 110 Stat. 2105.

[8]*See* 8 U.S.C. § 1621(a) (Supp. III 1997). Members of Congress were aware, however, that there were constitutional issues that might be implicated by such provisions. *See* H.R. REP. NO. 104-651, at 1337 (1996) ("The U.S. Supreme Court has invalidated some State laws that withheld aid from persons who had not resided there for at least 1 year. It has not ruled on the question of paying lower amounts of aid for incoming residents.").

[9]*See* 42 U.S.C. § 604(c) (Supp. III 1997).

[10]*See* H.R. REP. NO. 104-651, at 1337 (1996). Legal commentators, too, had recognized this potential problem and the Court's role in perpetuating it. *See, e.g.*, Todd Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 VAL. U. L. REV. 893, 893 (1997) ("*Shapiro*'s holding has created a 'race to the bottom' among state welfare policies, as state legislators have used the only means available to them—cutting Aid to Families with Dependent Children (AFDC) benefits—to prevent their states from becoming 'welfare magnets.'"); *id.* at 938 ("[E]ven the experimentation that welfare reform envisions will be hampered by the ability of recipients to migrate and avoid state time limits. This new factual context makes it time to overrule a decision that was wrongly decided in the first place.").

[11]*See* Roe v. Anderson, 134 F.3d 1400, 1404 (9th Cir. 1998).

[12]*See Saenz*, 526 U.S. at 492–93, 497–98.

[13]*See id.* at 500–10.

jurisprudence,[14] the welfare recipients attempted to link the "right to travel" to the Privileges and Immunities Clause of Article IV, Section 2, and the Privileges or Immunities, Equal Protection, and Due Process Clauses of the Fourteenth Amendment.[15] In contrast, the State of California argued that its

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[14]*See* Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986) (citing Shapiro v. Thompson, 394 U.S. 618, 630 (1969)) ("The textual source of the constitutional right to travel, or, more precisely, the right of free interstate migration, though, has proved elusive. . . . [I]n light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision."); Zobel v. Williams, 457 U.S. 55, 66–67 (1982) (Brennan, J., concurring) (quoting *Shapiro*, 394 U.S. at 630)) ("I note that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary. . . . [I]n light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to 'ascribe the source of this right to travel interstate to a particular constitutional provision.'"); *cf* United States v. Wheeler, 254 U.S. 281, 293 (1920) (commenting that citizens have "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom").

The lack of a textual grounding for the constitutional right to travel and the analysis provided in cases such as *Shapiro*, which eschewed tying the right to travel to the text of the Constitution, have been criticized by commentators analyzing the decision. *See, e.g.*, Hartch, *supra* note 2, at 457–58 ("Long recognized by courts, the right to travel is one of the few unenumerated constitutional rights which enjoys widespread rhetorical acceptance. In fact, no Supreme Court justice in American history has voiced opposition to the general concept of a right to travel. Nevertheless, the right to travel remains somewhat of an enigma—an ill-defined right emanating loosely from various penumbras within the Constitution." (footnotes omitted)); *id.* at 471 ("Although the right to travel has not engendered much public controversy, the costs of leaving the right poorly defined are great. As an unenumerated right, the right to travel is unconstrained by text and thus conducive to expansive interpretations that could interfere with the legitimate decision-making of legislative bodies."); McCoy, *supra* note 2, at 987 ("[T]he Court's acceptance and application of the *Shapiro-Dunn* reasoning . . . unintentionally demonstrated the intellectual inadequacy of that . . . line of reasoning."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1435 (1989) (criticizing Court's reasoning in *Shapiro*); Wildenthal, *supra* note 2, at 1557 (noting that Court's jurisprudence "forms a fragmented, complex, and confusing mass of interlocking, overlapping theories in dire need of some ordering principle or overarching explanation"); Zubler, *supra* note 10, at 893 ("[M]odern 'right to travel' jurisprudence is a doctrinal mess in need of both clarification and fundamental correction. In particular, *Shapiro* bears the blame for sending this area of jurisprudence down such a confusing and wrong path."); *id.* at 910 ("[T]he Court still has yet to ground either the right to travel or the right to migrate in any textual provision of the Constitution. Although this failing may not have troubled the justices of the Warren Court, interpretivist constitutional theory and the recent resurgence of textualism on the Rehnquist Court demand that a better effort be made on this front.").

[15]*See Saenz*, 526 U.S. at 500–10. A number of provisions of the constitutional text had occasionally been cited as a nexus for the constitutional right to travel. Among those provisions are: the Commerce Clause, *see* Edwards v. California, 314 U.S. 160, 173 (1941) ("[No burden]

residency requirement did not infringe on welfare recipients' right to travel

is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders."); the Due Process Clause of the Fifth Amendment, *see* Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."); the Privileges or Immunities Clause of the Fourteenth Amendment, *see* Edwards, 314 U.S. at 178 (Douglas, J., concurring) ("The right to move freely from State to State is . . . protected by the privileges and immunities clause of the Fourteenth Amendment. . . ."), Twining v. New Jersey, 211 U.S. 78, 97 (1908) (holding that "among the rights and privileges of National Citizenship recognized by this court [is] . . . the right to pass freely from State to State"); and the Privileges and Immunities Clause of Article IV, *see* Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) ("The right of a citizen of one state to pass through, or to reside in any other state . . . may be mentioned as [one] of the particular privileges and immunities of citizens. . . ."), Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) ("[W]ithout some provision of the kind . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."), *Zobel*, 457 U.S. at 74, 78–79 (O'Connor, J., concurring) ("Article IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.").

At times, however, the right to travel has been tied to the structure of the Constitution taken as a whole:

> [It] is clear from our cases [that] the right to travel achieves its most forceful expression in the context of equal protection analysis. But if, finding no citable passage in the Constitution to assign as its source, some might be led to question the independent vitality of the principle of free interstate migration, I find its unmistakable essence in that document that transformed a loose confederation of States into one Nation.

Zobel, 457 U.S. at 67 (Brennan, J., concurring); *see also Shapiro*, 394 U.S. at 629 ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.").

> At other times, the right to migrate has been tied to the fact of national citizenship: This Court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.

Edwards, 314 U.S. at 183 (Jackson, J., concurring); *see also* Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 623 n.14 (1985) (Brennan, J., concurring) ("[T]he Citizenship Clause of the Fourteenth Amendment 'does not provide for, and does not allow for, degrees of citizenship based on length of residence.'" (quoting *Zobel*, 457 U.S. at 69)); *Edwards*, 314 U.S. at 179 (emphasis omitted) (Douglas, J., concurring) ("[W]hen the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of national citizenship."); *id.* at 181 (emphasis omitted) ("The conclusion that the right of free movement is a right of national citizenship stands on firm historical ground."); Zubler, *supra* note 10, at 923 (emphasis omitted) ("If the Citizenship Clause thus reverses *Dred Scott*'s state citizenship rationale and makes state citizenship secondary to national citizenship, one can logically argue that the Citizenship Clause is the basis of the right to migrate.").

no matter where that right may be located in the constitutional text.[16] The state argued that its residency requirement was not aimed at precluding an influx of welfare recipients, but rather was a legitimate means of allocating limited government resources and ensuring that bona fide residents of the state were the primary beneficiaries of the program.[17]

In striking down the requirement, the Court discussed at length the manner in which the California requirement unconstitutionally interfered with the welfare recipients' right to travel.[18] Justice Stevens's opinion for the majority at the outset noted that the "right to travel" was nowhere expressly mentioned within the constitutional text.[19] Nonetheless, he proceeded to consider various aspects of this right as an outgrowth of a number of constitutional provisions, including, most significantly, the Privileges and Immunities Clause of Article IV and the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment.[20] Observing that the right to travel had long been recognized by the Court and was "firmly embedded in [the Court's] jurisprudence,"[21] Justice Stevens proceeded to divide the

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[16]*See Saenz*, 526 U.S. at 498–99, 506–07.

[17]*See id.*

[18]*See id.* at 500–10.

[19]*See id.* at 498 ("The word 'travel' is not found in the text of the Constitution.").

[20]*See id.* at 501–04.

[21]*Id.* at 498; *see also Soto-Lopez*, 476 U.S. at 901 (explaining that although right to travel is not found in the constitutional text, the Court has recognized it as a constitutional right); Memorial Hosp. v. Maricopa Cty., 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."); Shapiro, 394 U.S. at 629 (noting that Court "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement"); United States v. Guest, 383 U.S. 745, 758 (1966) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." (citations omitted)); *id.* at 757 ("The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."); *Kent*, 357 U.S. at 126 ("Freedom of movement across frontiers in either direction, and inside frontiers as well, was part of our heritage."); *Edwards*, 314 U.S. at 178 ("[A] boundar[y] to the permissible area of State legislative activity . . . [is] the prohibition against . . . any single State to isolate itself . . . by restraining the transportation of persons and property across its borders.").

The right to migrate was mentioned in a fairly long line of cases beginning in the nineteenth century. *See, e.g.*, *Paul*, 75 U.S. (8 Wall.) at 180 (explaining that "the [privileges and immunities] clause . . . gives them the right of free ingress into other States, and egress from them"); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43–44 (1867) (explaining that federal government's right to call "any or all of its citizens to aid in its service . . . cannot be made to depend upon the pleasure of a State over whose territory they must pass"); Passenger Cases, 48 U.S. (7 How.) 282, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through

right to travel into three separate "components" recognized by the Court in its past cases: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"; and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[22] In deciding whether the California requirement passed constitutional muster, Justice Stevens analyzed the third component of the right to travel which guaranteed to citizens "privileges" and "immunities" of resident citizens when moving to a new state.[23] This analysis led him to the conclusion that durational residence requirements of the sort enacted by the California legislature did indeed abridge the privileges and immunities of those citizens migrating to the state and seeking welfare benefits.[24]

In light of its precedents, the Court's decision in *Saenz* does not on its face appear particularly noteworthy.[25] The Court had already considered state

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every part of it without interruption, as freely as in our own States."). *But see* Railroad Co. v. Husen, 95 U.S. 465, 471 (1877) (noting that state may "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge"); *Passenger Cases*, 48 U.S. (7 How.) at 472 (Taney, C.J., dissenting) (observing that Constitution should not be interpreted such that "mass of pauperism and vice may be poured out upon the shores of a State in opposition to its laws, and the State authorities are not permitted to resist or prevent it").

[22]*Saenz*, 526 U.S. at 500.

[23]*See id.* at 502–04; *see also Hooper*, 472 U.S. at 623 ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State. . . .").

[24]*See Saenz*, 526 U.S. at 510–11.

[25]Indeed, it appears that Congress anticipated potential constitutional problems with durational residency requirements imposed on receipt of welfare benefits. *See* H.R. REP. NO. 104-651, at 1337 (1996). Nonetheless, Congress evidently thought such requirements were important to deter migration from low-benefit to high-benefit states. *See id.* ("States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States."); *States' Perspective on Welfare Reform: Hearing Before the Senate Comm. on Finance*, 104th Cong. 9 (1995) (statement of Sen. Bob Graham) ("[W]ith unequal standards, you could create incentives for populations to move from one State to another in order to access the higher benefits. . . . That is not in the nation's interest to be trying to stimulate that kind of population movement."); PAUL E. PETERSON & MARK C. ROM, WELFARE MAGNETS: A NEW CASE FOR A NATIONAL STANDARD (1990).

As one commentator has noted, Supreme Court decisions such as *Shapiro* may lead to an across-the-board reduction in welfare benefits:

> [I]f one accepts the plausibility of the welfare magnet phenomenon, one also has to recognize the tradeoff between high welfare benefits and the mobility of the poor in a decentralized welfare system. High welfare benefits will simply be unattainable in a federal system if the poor are perfectly mobile. How one should balance high welfare benefits versus the mobility of the poor is by no means an

laws imposing durational residency requirements in the context of access to divorce courts,[26] eligibility for free nonemergency medical care,[27] voting rights,[28] and a state dividend distribution plan.[29] More specifically, in *Shapiro v. Thompson*,[30] the Court already had declared that it was "constitutionally impermissible" for states to enact durational residency requirements completely precluding receipt of welfare benefits by newly-arrived citizens if enacted for the purpose of inhibiting their migration into the state.[31] The distinction between the provision considered in *Shapiro* and that considered in *Saenz* seems fairly minor. *Shapiro* involved an *absolute ineligibility* for welfare benefits during the first year of residency, whereas *Saenz* involved merely a *reduction* in welfare benefits.[32] Nonetheless, the State of California argued that, unlike the provision at issue in *Shapiro*, its durational residency requirement should not be subject to strict scrutiny, but rather to some intermediate level of constitutional review.[33] Whatever the wisdom or correctness of the Court's decision in *Shapiro*, the principle that states could not discriminate against newly-arrived citizens when awarding governmental welfare benefits had been fairly well-established prior to *Saenz*. Indeed, it appears that the Court undertook review of the California requirement in *Saenz* in order to resolve the "debate about the appropriate standard of review" that should be applied in right to travel cases, as well as to consider

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> easy policy question. *Shapiro*, however, constitutionalized that question by banning any limitation on mobility. In our decentralized welfare system, *Shapiro*'s holding—however well-intentioned—acted as the starter's gun in a race to the bottom.

Zubler, *supra* note 10, at 935.

[26] *See* Sosna v. Iowa, 419 U.S. 393, 396 (1975).

[27] *See Memorial Hosp.*, 415 U.S. at 251.

[28] *See* Dunn v. Blumstein, 405 U.S. 330, 331 (1972).

[29] *See Zobel*, 457 U.S. at 56.

[30] 394 U.S. 618 (1969).

[31] *Id.* at 632–33. The Court in *Shapiro* rejected the argument that such distinctions were permissible as an attempt to measure "past contributions" to the public fisc out of which welfare monies are drawn:

> Appellants argue further that the challenged classification may be sustained as an attempt to distinguish between new and old residents on the basis of the contribution they have made to the community through the payment of taxes. . . . Appellants' reasoning would . . . permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

[32] *Id. See also Zobel*, 457 U.S. at 63 (rejecting similar argument made by State of Alaska); *Saenz*, 526 U.S. at 498–501.

[33] *See Saenz*, 526 U.S. at 500–01.

the purported effect on the constitutional analysis of the federal statute sanctioning such durational residency requirements.[34]

Nonetheless, the Court's discussion in *Saenz* is noteworthy for the credence it gives to the welfare recipients' argument that the right to travel is based, at least in part, upon the Privileges or Immunities Clause of Section One of the Fourteenth Amendment.[35] Given the Court's discussion of the Clause in *Saenz*, one could speculate that the decision signals an awakening of the Court to this long-abandoned clause, or merely a blip on the Court's radar occasioned by the fact that the Court had already cited the related Privileges and Immunities Clause of Article IV in its prior right to travel cases.

This Article explores the possible effects on Fourteenth Amendment jurisprudence should the Court in the future abandon the Due Process Clause as a foundation for fundamental rights in favor of the Privileges or Immunities Clause. While *Saenz* does not signal an abandonment of substantive due process, such an abandonment could have significant consequences for the nature of the guarantee afforded under the Fourteenth Amendment. Not only the scope of the Amendment's coverage, but also the type of protection afforded might be altered should the Court undertake such a move. Indeed, resorting to the Privileges or Immunities Clause while undertaking a thorough examination of the Clause's original meaning may be a significant first step toward clarifying the Court's substantive due process jurisprudence, which, as some members have noted, lacks coherence.[36]

Part I of this Article examines the majority and dissenting opinions in *Saenz* in order to determine the extent of the Court's reliance on the Privileges or Immunities Clause and the decision's likely effect on future rulings. Part II then discusses the effect that abandoning substantive due process might have on the Court's enumeration of fundamental rights guaranteed under the Fourteenth Amendment. Similarly, Part III explores whether the nature of the protection afforded fundamental rights under the Amendment would change were substantive due process abandoned by the Court. Part IV discusses the effect that abandoning the Court's present substantive due process/equal protection analysis might have on the scrutiny applied by the Court in reviewing legislation under the Amendment. Part V

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[34]*Id.* Not surprisingly, the Court concluded that the federal statute did not alter the constitutional analysis, reasoning that "Congress may not authorize the States to violate the Fourteenth Amendment." *Id.* at 507.

[35]*See id.* at 502–04.

[36]*See infra* note 175 and accompanying text. *See also* Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992) (noting that "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended").

presents one possible context in which the Court might invoke the Privileges or Immunities Clause of the Amendment to remedy defects in its prior substantive due process jurisprudence. Finally, Part VI offers a brief conclusion.

I. DOES *Saenz* SIGNAL A RESURRECTION OF THE PRIVILEGES OR IMMUNITIES CLAUSE?

While a number of legal commentators have focused on the Privileges or Immunities Clause as a guarantee of fundamental rights under the Fourteenth Amendment,[37] the Supreme Court has not. Ever since its decision in the *Slaughter-House Cases*,[38] in which it gave an exceedingly narrow construction to the Clause's guarantee against state abridgement of the "privileges" and "immunities" of citizens of the United States,[39] the Court has generally refrained from invoking the Clause in striking down state legislative enactments. Rather, it has relied primarily on the closely linked Equal

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[37] *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d ed. 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089–95 (1953); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 341–51 (1985); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14–30 (1980); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869 (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992); Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405; Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989).

[38] 83 U.S. (16 Wall.) 36 (1873).

[39] *See id.* at 73–83 (determining that Fourteenth Amendment only protected privileges and immunities of United States citizenship and not privileges and immunities of state citizenship); *see also* Snowden v. Hughes, 321 U.S. 1, 6–7 (1944) ("The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and the Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law."). Some members of the Court have, however, at times acknowledged that the "legislative history" of the Amendment indicates that its substantive guarantee was intended to flow from the Privileges or Immunities Clause. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 164 (1970) (Harlan, J., concurring in part and dissenting in part) ("Since the Privileges and Immunities Clause was expected to be the primary source of substantive protection, the Equal Protection and Due Process Clauses were relegated to a secondary role, as the debates and other contemporary materials make clear.").

Protection and Due Process Clauses of the Amendment to invalidate legislation that discriminates or is in some sense substantively flawed. The Court's reliance on these two clauses and neglect of the Privileges or Immunities Clause stems directly from the Court's pronouncement in the *Slaughter-House Cases* that the phrase "privileges or immunities of citizens of the United States" employed in the Amendment extends only to certain limited privileges of national citizenship, such as the right to navigate rivers and bring suit in federal courts.[40] Motivated by a concern that the Amendment not be construed in a manner that might erode the federal structure and the sovereignty of the state governments,[41] the majority chose to limit the enumeration of the fundamental rights guaranteed under the Privileges or Immunities Clause in order to ensure that the Clause would restrict the states only in very limited circumstances.[42]

Given this history, the Court's reliance upon the Privileges or Immunities Clause in *Saenz*, while not unique, is certainly unusual. Indeed, Chief Justice Rehnquist in his dissent went so far as to state that "[t]he Court today breathes new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment—a Clause relied upon by this Court in only one other decision, . . . overruled five years later."[43] Justice Thomas echoed this conclusion in his dissent, noting that "it comes as quite a surprise that the majority relie[d] on the Privileges or Immunities Clause at all."[44] While on the one hand it is not particularly surprising that the Court discussed the Clause in the context of the constitutionally protected right to travel, since in prior cases various members had referenced the related Privileges and

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[40]*See Slaughter-House*, 83 U.S. (16 Wall.) at 79–80. The Privileges or Immunities Clause "speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States." *Id.* at 74.

[41]Indeed, the conclusion of Justice Miller's opinion for the majority sounded a resonating affirmation of the federal structure established under the Constitution:

> [W]hatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts.

Id. at 82.

[42]*See id.*

[43]*Saenz*, 526 U.S. at 511 (Rehnquist, C.J., dissenting).

[44]*Id.* at 527 (Thomas, J., dissenting). Justice Thomas similarly observed in his dissent that "[u]nlike the Equal Protection and Due Process Clauses, which have assumed near-talismanic status in modern constitutional law, the Court all but read the Privileges or Immunities Clause out of the Constitution in the *Slaughter-House Cases*." *Id.* at 521–22 (Thomas, J., dissenting) (citation omitted).

Immunities Clause of Article IV as a source of the constitutional guarantee, it is surprising given that the Court had not in the past rigidly tied the constitutional right to travel to any particular constitutional provision.

The majority opinion authored by Justice Stevens sought to remedy the lack of textual analysis in the Court's prior right to travel cases by anchoring the constitutional guarantee in the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment.[45] Justice Stevens's discussion of the Privileges or Immunities Clause begins with the observation that "[d]espite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, . . . it has always been common ground that this Clause protects the third component of the right to travel."[46] This "third component" of the right to travel cited by Justice Stevens was the entitlement of "newly arrived citizen[s] to the same privileges and immunities enjoyed by other citizens of the same State."[47]

At this point we must pause to analyze Justice Stevens's statement of applicable law. First, the third component of the right to travel arguably requires no support from the Privileges or Immunities Clause. The Privileges and Immunities Clause of Article IV provides the same guarantee barring discrimination against non-native citizens of a state which Justice Stevens cites as forming a component of the right to travel.[48] Indeed, the Article IV clause arguably serves as a more sound foundation for the analysis, since the Court had long recognized that such an antidiscrimination principle flowed from the Clause's guarantee of "privileges" and "immunities."[49] Nonetheless, Justice Stevens chose to engage in an arguably unnecessary appeal to the Privileges or Immunities Clause of the Fourteenth Amendment in order to establish that this aspect of the right to travel flowed not only from an individual's status as a citizen of one of the states, but also from his status as a citizen of the United States.[50] As a result, one might infer that the majority's

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[45] *See id.* at 500–01.

[46] *Id.* at 503.

[47] *Id.* at 502.

[48] *See id.* at 502–04.

[49] *See, e.g.*, Williams v. Bruffy, 96 U.S. 176, 183 (1877) ("[The Privileges and Immunities Clause] has been held, in repeated adjudications of this court, to prohibit discriminating legislation by one State against the citizens of another State, and to secure to them the equal protection of its laws, and the same freedom possessed by its own citizens in the acquisition and enjoyment of property.").

[50] *See Saenz*, 526 U.S. at 502 ("What is at issue in this case, then, is this third aspect of the right to travel–the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States.").

citation of the Clause signals its resurrection as a source of the constitutional protection afforded the fundamental rights of citizens of the United States.

However, a second observation calls this conclusion into question. The right to travel is arguably fairly unique in the panoply of fundamental rights. While there is no explicit textual mention of this right, the Court has long cited the Privileges and Immunities Clause of Article IV as a source for at least the right of citizens to migrate from one state to another and to become citizens of whatever state they choose.[51] Citation of the Privileges or Immunities Clause of the Fourteenth Amendment is therefore natural in this context given that that provision borrowed language from the Article IV clause.[52] Citation of the Privileges or Immunities Clause might not be so natural, however, in the context of fundamental rights not explicitly tied to the Privileges and Immunities Clause of Article IV.

Third, the foundation for the majority's discussion of the Privileges or Immunities Clause indicates that the Court has not abandoned its traditional, narrow construction. In writing the majority opinion, Justice Stevens relied upon the Court's decision in the *Slaughter-House Cases* as the primary source for determining what the framers of the Fourteenth Amendment intended by that provision.[53] While acknowledging that both the "majority and dissenting opinions" in *Slaughter-House* support the conclusion that certain aspects of the right to travel were thought to be guaranteed by the Clause, Justice Stevens relied principally upon Justice Miller's majority opinion.[54] That opinion, however, was and still is widely viewed as eviscerat-

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[51]*See supra* note 15 and accompanying text.

[52]Another consideration in this context is the Court's recent emphasis on the importance of federalism in our constitutional structure. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring) (noting that "intrusion on state sovereignty" caused by Gun-Free School Zones Act of 1990 "contradicts the federal balance the Framers designed"). The Privileges and Immunities Clause of Article IV and the concomitant right to migrate and establish citizenship in other states is essential to this structure in that it allows citizens to reap the benefits of competition among the states wishing to retain population which may freely migrate from state to state if they find such a move desirable.

[53]*See Saenz*, 526 U.S. at 503.

[54]*Id.* Justice Stevens observed that the Miller majority had recognized that the Privileges or Immunities Clause incorporated the privileges and immunities guarantee of the Article IV Privileges and Immunities Clause, stating that "one of the privileges conferred by [the Privileges or Immunities] Clause 'is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State.'" *Id.* (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 80). Nonetheless, Justice Stevens found it useful to observe that Justice Bradley in his *Slaughter-House* dissent had gone even further:

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein,

ing the Privileges or Immunities Clause, leading to an almost complete absence of discussion of the Clause in the succeeding hundred years.[55] The Miller majority in the *Slaughter-House Cases* limited the scope of the Clause by construing it to guarantee solely the fundamental rights of *national* citizenship.[56] Justice Miller's enumeration of those rights is particularly parsimonious, including relatively limited rights such as the right to use the navigable waterways of the United States.[57] Justice Stevens's reliance on *Slaughter-House*, therefore, undercuts any conclusion that the Court is ready to revise its interpretation of the scope of the Clause. Rather, the Court was content in *Saenz* merely to follow Miller's cramped interpretation which explicitly enumerated the right to travel as a component of the Clause's guarantee.[58] On the other hand, it was not necessary for the Court to go beyond that interpretation in *Saenz* since even Justice Miller's parsimonious enumeration of the fundamental rights guaranteed under the Clause included some form of the right to migrate from state to state.[59]

On balance, then, those who fervently desire that the Court right its Fourteenth Amendment jurisprudence by engaging in an extensive examination of the history surrounding ratification of the Privileges or Immunities Clause should not take much comfort in the Court's opinion in *Saenz*.[60] The

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> and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.

Id. at 503–04 (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 112–13).

[55] *See* NELSON, *supra* note 37, at 156–64; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1257–59 (1992); Walter F. Murphy, Slaughter-House, *Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 1–8 (1987).

[56] *See Slaughter-House*, 83 U.S. (16 Wall.) at 78–80.

[57] *See id.* at 79.

[58] *See Saenz*, 526 U.S. at 503–04.

[59] *See Slaughter-House*, 83 U.S. (16 Wall.) at 79.

[60] *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 110 (1999) ("[S]ome saw the Supreme Court's sudden revival of the Fourteenth Amendment's Privileges or Immunities Clause in *Saenz v. Roe* as heralding a shining new era of fundamental rights predicated on the constitutional clause that ought to have been the basis for such a jurisprudence for more than a century—a century characterized by misguided efforts to ground such rights in the concept of due process. As this essay suggests, however, *Saenz* is unlikely to signal such a development." (footnote omitted)). *But see* Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 646 (2000) ("[D]oes *Saenz* signal an out-and-out 'Privileges or Immunities Revival?' Only time will tell. At the very least, however, the decision seems to indicate a willingness on the part of the current Court to reconsider the role, if any, that the Privileges or Immunities Clause ought to play in modern constitutional law." (footnote omitted)). *Cf. Zubler*, *supra* note 10, at 917 ("Overruling *Slaughter-House* and resurrecting this dead clause at this late date

right to travel context is arguably unique, and Justice Stevens's majority opinion is not easily construed as signaling a resurrection of the Clause. Rather, the Court in *Saenz* appears to have employed the Clause merely to supplement its analysis of the right to travel in one particular context—indeed, one in which the related Privileges and Immunities Clause of Article IV had been referenced by the Court in the past.[61] Thus, even if the Court were to appeal to the Clause in some other context, it is likely that a majority of the current Court would employ the Clause as a supplement to, and not a replacement for, analysis under the Due Process Clause.

Even if the Court were to revisit its interpretation of the Privileges or Immunities Clause, the analysis in *Saenz* should not give critics of the Court's current Fourteenth Amendment jurisprudence comfort. As Justice Thomas noted in his dissent, the majority's almost complete lack of historical analysis of the Clause and its original meaning should give proponents of its resurrection some pause.[62] While Justice Thomas stated that in his opinion "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of [the Court's] Fourteenth Amendment jurisprudence," he cautioned that "the Privileges or Immunities Clause [might] become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'"[63] In order to avoid such a result, Justice Thomas suggested that the Court should "endeavor to understand what the framers of the Fourteenth Amendment thought [the] Privileges or Immunities Clause meant [and should] consider whether the Clause should displace, rather than augment, portions of [the Court's] equal protection and substantive due process jurisprudence."[64] As Justice Thomas's remarks portend, invocation of the Clause might serve to make the Court's Fourteenth Amendment jurisprudence less, rather than more, coherent.

In the alternative, even if the Privileges or Immunities Clause were to supplant the Due Process Clause in the Court's fundamental rights jurisprudence, it is questionable whether this change would have any real effect. The Court might choose to employ the same analysis while paying lip service to the constitutional text and history. In *Saenz* itself, the majority's analysis

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seems far-fetched, however. For better or for worse, we must assume that we are stuck with the *Slaughter-House* interpretation of the Privileges or Immunities Clause.").

[61]*See Saenz*, 526 U.S. at 503–04.

[62]*See id.* at 527–28 (Thomas, J., dissenting).

[63]*Id.* at 528 (Thomas, J., dissenting) (quoting Moore v. East Cleveland, 431 U.S. 494, 502 (1977)). *Cf. Hartch*, *supra* note 2, at 471 ("[I]f the Court persists in leaving the right to travel ill-defined, it provides a precedent for the creation of other similarly nebulous rights and thus cheapens the existence of rights that truly are fundamental.").

[64]*Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).

seems to have consisted solely of dragging the Privileges or Immunities Clause of the Fourteenth Amendment into the context of the Court's somewhat convoluted right to travel jurisprudence and its only somewhat more coherent Article IV Privileges and Immunities Clause jurisprudence.[65] At any rate, while *Saenz* cannot easily be interpreted as embodying a reawakening of the Privileges or Immunities Clause, these are some of the questions the Court must address should it choose to make a fundamental change in this area.

II. ENUMERATION OF FUNDAMENTAL RIGHTS

Should the Court resort to the Privileges or Immunities Clause rather than the Due Process Clause, this development might, theoretically, alter the enumeration of rights recognized as being guaranteed under the Fourteenth Amendment. The Court's substantive due process jurisprudence has suffered, arguably, from its *ad hoc* nature. The Court has attempted to enumerate on a case-by-case basis those rights that it deems fundamental and therefore guaranteed under the Clause. One could plausibly argue that the ad hoc nature of the Court's jurisprudence is attributable at least in part to the lack of historical basis for grounding the substantive guarantee in the Due Process Clause. As many have noted, the evidence supporting any extension of that clause beyond a procedural guarantee to the substantive realm is rather weak.[66] In contrast, however, there is a body of historical material concerning what constitute "privileges" and "immunities" under the Amendment from which the Court might draw in outlining those rights that are guaranteed. The terms "privileges" and "immunities" were lifted from the corresponding provision found in Article IV, Section 2, which stated that citizens of the several states would be guaranteed certain "privileges and immunities" when traveling outside their home state.[67] A wealth of case law interpreting the

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[65]*See id.* at 500–04.

[66]Raoul Berger has made the point quite forcefully:

> Under the guise of substantive due process, . . . the Court has invaded the exclusive jurisdiction of a sister branch; it has violated the injunction of the separation of powers, made explicit in the 1780 Massachusetts Constitution, that "the judiciary shall never exercise the legislative power." And it has encroached on the sovereignty reserved to the States by the Tenth Amendment. It has done this in the name of a self-created doctrine to legitimate the exercise of the power once rationalized under the garb of natural law. But neither the Framers of the Constitution nor of the Fourteenth Amendment entertained such notions.

BERGER, *supra* note 37, at 274 (footnotes omitted); *see also* BORK, *supra* note 37, at 43 (stating that because Due Process Clause "was designed only to require fair procedures in implementing laws, there is no original understanding that gives it any substantive content").

[67]*See* U.S. CONST. art. IV, § 2, cl.1.

Clause, primarily in the commercial context, had been developed prior to ratification of the Fourteenth Amendment.[68] Moreover, members of Congress charged with drafting the Amendment pointed to this body of law, and in particular Justice Bushrod Washington's early opinion in *Corfield v. Coryell*,[69] as conveying the meaning and effect that should be attributed to the language they incorporated into the proposed amendment.[70]

Thus, should the Court adopt the Privileges or Immunities Clause as the primary source of substantive protection for fundamental rights under the Fourteenth Amendment, it may be able to define those rights referenced as "privileges" and "immunities" of citizens of the United States in such a way that its fundamental rights jurisprudence becomes more coherent. As Justice Stevens noted in the *Saenz* majority opinion, however, there is much debate concerning the scope of the Clause as originally intended.[71] The majority in *Saenz* found it unnecessary to discuss the Clause's scope, noting only that the Court already had recognized in the *Slaughter-House Cases* that within its scope fell the sorts of rights that had been guaranteed under its precursor in Article IV.[72] Thus, some form of the "right to travel" was encompassed by the "privileges" and "immunities" language of the Fourteenth Amendment because such a right was traditionally recognized as falling under the "privileges" or "immunities" language of the Comity Clause.

Nonetheless, the Court in *Saenz* seems to have deviated from the historical understanding of this right in that it construed the "right to travel" in an extremely broad fashion, stating that "since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty."[73] The Court distinguished the case before it from those instances in which it considered a citizen's length of residence as indicative of an intention to remain a citizen of the state.[74] In

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[68] *See generally* Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 809 (1997) (analyzing case law arising under Privileges and Immunities Clause of Article IV prior to ratification of Fourteenth Amendment) [hereinafter Smith, *Privileges and Immunities Clause*].

[69] 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (holding that privileges and immunities include "[p]rotection by the government [and] enjoyment of life and liberty"). Justice Field in his dissent in the *Slaughter-House Cases* also cited Justice Washington's discussion, concluding that it was "a sound construction of the clause." 83 U.S. (16 Wall.) at 97 (Field, J., dissenting). Similarly, Justice Bradley in his dissent noted that Washington's language was "often-quoted." *Id.* at 116 (Bradley, J., dissenting).

[70] *See infra* note 92 and accompanying text.

[71] *See Saenz*, 526 U.S. at 502–04.

[72] *See id.*

[73] *Id.* at 505.

[74] *See id.*

the past, the Court had been more deferential to residency requirements in the divorce[75] and college tuition[76] contexts. However, here the Court appeared to be troubled by requirements it believed might be designed to deter welfare applicants from migrating to California.[77] The Court stated that enactment of such requirements with such an intended purpose would be impermissible for three reasons: (1) empirical evidence indicated that the number of individuals falling within the restricted category was small;[78] (2) the Court had already held in *Shapiro v. Thompson* that such a purpose was impermissible;[79] and (3) mindful of the *Shapiro* ruling, the state had represented that the legislation was not enacted to deter migration of welfare recipients.[80] The Court also

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[75]*See Sosna*, 419 U.S. at 407 ("A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere. Until such time as Iowa is convinced that appellant intends to remain in the State, it lacks the 'nexus between person and place of such permanence to control the creation of legal relations and responsibilities of the utmost significance.'" (quoting Williams v. North Carolina, 325 U.S. 226, 229 (1945)).

[76]*See* Vlandis v. Kline, 412 U.S. 441, 453–54 (1973). Indeed, in *Shapiro*, the Court observed:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Shapiro, 394 U.S. at 638 n.21.

[77]*See Saenz*, 526 U.S. at 505–06.

[78]*See id.* at 506. The Court's reasoning here arguably is circular. On the one hand, the Court states that the residency requirement presents a barrier to migration to California by welfare recipients. On the other hand, it observes that the empirical data show that the restriction applies only to a small fraction of the welfare population within the state. Presumably, if the residency requirement were lifted, the barrier to migration the Court recognizes would be lifted, and the fraction of newly-arrived individuals within the California welfare population would increase. Thus, this first ground for the Court's conclusion that the residency requirement is impermissible is somewhat troubling.

[79]*Id.* at 506–07. This ground is convincing only insofar as one adheres to a fairly rigid view of stare decisis. Indeed, the dissenters in *Saenz* appeared perfectly willing to reverse the Court's ruling in *Shapiro* on the grounds that the residency requirement effected no real deterrence to citizens' exercise of their "right to travel." *Id.* at 514–16, 519–21 (Rehnquist, C.J., dissenting).

[80]*See id.* As with the first ground for the Court's conclusion that the residency requirement was impermissible, this last ground too is dubious. Presumably the only reason the state made this representation was because it was aware that the Court had already ruled in *Shapiro v. Thompson*, 394 U.S. 618 (1969), that states may not enact regulations with the purpose of deterring migration of welfare recipients into the state. From the state's point of view, it was easier to argue that the case is consistent with the Court's prior ruling in *Shapiro* than to argue that that ruling was incorrect and should be overturned. Moreover, as the Court itself seems to have noted, the aspect of the right to travel most directly implicated in the case

rejected the State of California's argument that its residency requirement was justified on the grounds that it resulted in a cost savings to the state's welfare program.[81] The Court reasoned that the state could easily have imposed an across-the-board cut in welfare benefits without unconstitutionally discriminating against newly-arrived citizens.[82] Thus, the Court clearly viewed the "right" to receive welfare benefits as a "privilege" or "immunity" of citizens of the state which was unconstitutionally abridged when the state imposed its residency requirement.

In so ruling, the Court arguably deviated from the original meaning of the Privileges or Immunities Clause without explicitly delving into its history. Indeed, this was the position expressed by Justice Thomas in his dissent, stating that in his view, "the majority attribute[d] a meaning to the Privileges or Immunities Clause that likely was unintended when the Fourteenth Amendment was enacted and ratified."[83] While it may be that in addition to a substantive guarantee of fundamental rights there is a corresponding antidiscrimination guarantee under the Clause,[84] whatever guarantee is provided is extended solely to those rights that are "privileges" and "immunities" of citizens. The Court in *Saenz* seems to be saying that, at least in the case of welfare benefits, because the statute discriminates between newly-arrived citizens and citizens of the state who have resided there for a year, it violates the Privileges or Immunities Clause for the sole reason that it results in an inequality in a "right" provided under the law of the state to all citizens. This reading of the Clause seems to signal an expansion of fundamental rights recognized under the Amendment rather than a contraction. Arguably, however, a faithful adherence to the original meaning of the Clause would result in a more circumscribed enumeration of rights recognized as being guaranteed.

As Justice Thomas noted in his dissent, the plain language of the Privileges or Immunities Clause extends a guarantee against state abridgement only of historically recognized "privileges" and "immunities" of citizens of the United States.[85] Justice Thomas traced the meaning of these terms from the various colonial charters that employed similar language,

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is not the alleged barrier to migration, but rather the purported denial of equal "privileges" and "immunities" to the newly-arrived welfare recipients.

[81] *See Saenz*, 526 U.S. at 506–07.

[82] *See id.*

[83] *Id.* at 521 (Thomas, J., dissenting). Justice Thomas similarly concluded that "[a]lthough the majority appears to breathe new life into the [Privileges or Immunities] Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence." *Id.* at 527.

[84] *See* Smith, *Privileges and Immunities Clause*, *supra* note 68, at 890–919.

[85] *See Saenz*, 526 U.S. at 521–28 (Thomas, J., dissenting).

referencing the "privileges," "liberties," "franchises," and "immunities" of Englishmen, to the Privileges and Immunities Clause of the Articles of Confederation, to the similarly worded clause found in Article IV of the revised Constitution.[86] The historical background canvassed by Justice Thomas indicates that the terms "privileges" and "immunities" had a well-defined and circumscribed meaning by the time they were incorporated into the text of the Fourteenth Amendment.

Indeed, while the majority and the dissenters in the *Slaughter-House Cases* differed concerning the meaning of the terms "privileges" and "immunities," all offered concrete notions of their scope. As already noted, the majority construed the terms in a narrow fashion, which arguably was unsupported by the text or the history surrounding ratification of the Amendment, to extend only to certain privileges of "national" citizenship, many of which it enumerated.[87] The dissenters, on the other hand, pointed to English history, the colonial charters, and the constitutional text itself as sources for discerning what were the "privileges" and "immunities" of citizens of the United States referenced in the Amendment.[88] While judicial

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[86]*Id.* at 522–23 (Thomas, J., dissenting).

[87]*See Slaughter-House*, 83 U.S. (16 Wall.) at 73–80.

[88]*See id.* at 97–111 (Field, J., dissenting); *id.* at 113–21 (Bradley, J., dissenting). Justice Bradley in his *Slaughter-House* dissent was fairly emphatic in pointing to the text of the Constitution as it stood prior to ratification of the Fourteenth Amendment in determining the scope of the terms "privileges" and "immunities":

> The Constitution, it is true, as it stood prior to the recent amendments, specifies, in terms, only a few of the personal privileges and immunities of citizens, but they are very comprehensive in their character. The States were merely prohibited from passing bills of attainder, *ex post facto* laws, laws impairing the obligation of contracts, and perhaps one or two more. But others of the greatest consequence were enumerated, although they were only secured, in express terms, from invasion by the Federal government; such as the right of *habeas corpus*, the right of trial by jury, of free exercise of religious worship, the right of free speech and a free press, the right peaceably to assemble for the discussion of public measures, the right to be secure against unreasonable searches and seizures, and above all, and including almost all the rest, the right of *not being deprived of life, liberty, or property, without due process of law.* These, and still others are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States, or, what is still stronger for the force of the argument, the rights of all persons, whether citizens or not.

Id. at 118–19 (Bradley, J., dissenting). Nonetheless, Bradley also made clear that certain "privileges" were not expressly enumerated in the pre-ratification constitutional text:

> [E]ven if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they now are. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens; the privilege of buying, selling, and enjoying property; the privilege of engaging in any lawful employment for a

restraint might caution against announcing the full scope of the Clause when such an analysis is unnecessary to the resolution of the case, in *Saenz* the lack of historical analysis arguably led the majority to make certain pronouncements concerning the meaning of the Clause that were inaccurate. The guarantee of the Amendment did not extend to bar discrimination between newly-arrived and long-term citizens under all circumstances. Rather, it did so only when certain fundamental privileges and immunities—privileges and immunities *of citizens*—were implicated.

Again, this point was emphasized in the Thomas dissent. Citing Justice Washington's decision in *Corfield v. Coryell*,[89] Justice Thomas noted that historically a distinction was made between the common property of a state, with respect to which the state governments were free to discriminate on the basis of state citizenship, and the fundamental rights of citizens, which were the subject of the constitutional guarantee.[90] In *Corfield*, Justice Washington, riding circuit, was charged with determining whether a New Jersey law prohibiting those who were not "actual inhabitant[s] and resident[s]" of New Jersey from harvesting oysters from New Jersey waters violated the guarantee of "privileges" and "immunities" found in Article IV of the Constitution.[91] Justice Washington proceeded by providing a widely-cited partial enumeration of some of those fundamental rights that were contemplated by the Framers to fall within the categories "privileges" and "immunities."[92] Based

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> livelihood; the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before.

Id. at 119 (Bradley, J., dissenting).

[89]6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

[90]*See Saenz*, 526 U.S. at 526–27 (Thomas, J., dissenting).

[91]*Corfield*, 6 F. Cas. at 550.

[92]Justice Washington made the following remarks concerning the original meaning of those terms as used in Article IV:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; . . . the elective franchise, as regulated and established by the laws or constitution of the state in which it is

on Justice Washington's discussion in *Corfield*, Justice Thomas concluded that the Privileges and Immunities Clause did not guarantee access to all "public benefit[s]" that were "established by positive law," but only guaranteed those rights that were "fundamental."[93]

One might dispute whether *Corfield's* recognition of a distinction between common property and "privileges" and "immunities" extends to exclude welfare "rights" from the panoply of privileges covered by the Amendment. One might argue that common property, such as wild game, fish, or even oyster beds, is not analogous to the provision of welfare benefits by the states. Nonetheless, such a position seems to give an unwarrantedly narrow construction to *Corfield* and to miss the fact that *Corfield* merely evidences a broader distinction between fundamental and special privileges and immunities recognized during the nineteenth century.[94]

Justice Thomas's observations suggest an important insight on his part concerning the original meaning of the Privileges or Immunities Clause. I have argued elsewhere that the terms "privileges" or "immunities," when used in the context of citizenship as under Section One of the Fourteenth Amendment, were understood to refer only to those powers or capacities of citizenship existing anterior to the establishment of government.[95] Welfare benefits and other such governmental benefits do not constitute "privileges" and "immunities" under this reading of the Clause. As Justice Thomas noted

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> to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities. . . .

Id. at 551–52. As Justice Thomas noted in his dissent, "Justice Washington's opinion in *Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment." *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting). In particular, Justice Thomas cited Senator Howard's introduction of Section One of the Fourteenth Amendment to Congress, in which Howard quoted the above passage from *Corfield* to explain the meaning of the terms "privileges" and "immunities" as used in the Amendment. *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866)).

[93]*Saenz*, 526 U.S. at 526–27 (Thomas, J., dissenting). In an earlier case, the Court had stated in an offhand manner that "vital" government benefits were within the purview of the Privileges and Immunities Clause of Article IV, while at the same time stating that in some cases durational residency requirements placed upon receipt of certain benefits would be constitutionally permissible. *See Memorial Hosp.*, 415 U.S. at 261 ("[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."). Thus, it appears that the Court recognizes that not every government benefit is covered by the Privileges and Immunities Clause.

[94]*See* Smith, *Privileges and Immunities Clause*, *supra* note 68, at 873–85 (discussing distinction between special and fundamental privileges and immunities).

[95]*See* Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681 (1997) (discussing this interpretation of Privileges or Immunities Clause).

in his dissent, they are not fundamental rights.[96] They are more properly characterized as governmental property, much like the oyster beds at issue in *Corfield*, which newly-arrived citizens do not have a constitutional right to share on an equal basis with long-established citizens.

Indeed, Justice Thomas's recognition of this important historical distinction inhering in the Privileges or Immunities Clause is not unique. In the past, other members of the Court have recognized that the Privileges and Immunities Clause of Article IV was originally understood as only guaranteeing those rights of the citizen that were deemed "fundamental." The best illustration of this interpretation is found in *Baldwin v. Montana Fish & Game Commission*.[97] In that case, decided after the Court's broad interpretation of the right to travel in *Shapiro*,[98] the Court held that the Privileges and

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[96]*See Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

[97]436 U.S. 371 (1978). *Baldwin* is somewhat unique in that it is a "common property" case much like *Corfield*. *See id.* at 384–86. A critique of the "ownership theory" in the context of regulation of fish and game was earlier made in *Toomer v. Witsell*:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

334 U.S. at 402 (1948). Despite the somewhat unique aspects of *Baldwin*, subsequent cases underscored its limitation of the Privileges and Immunities Clause. *See, e.g.*, Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64–65 (1988) (observing that it is "'[o]nly with respect to those "privileges" and "immunities" bearing on the vitality of the Nation as a single entity' that a State must accord residents and nonresidents equal treatment." (quoting *Baldwin*, 436 U.S. at 383)); Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985) (same); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221–22 (1984) (noting that abridged activity must be "'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause" (quoting *Baldwin*, 436 U.S. at 388)).

[98]For an argument that the Court's analysis of the right to travel in *Shapiro* was essentially vague as compared with earlier right to travel cases, see Amicus Brief of the Commonwealth of Pennsylvania et al., Saenz v. Roe, 526 U.S. 489 (1999) (No. 98-97), 1998 WL 798877, at *1. The brief outlined three fundamental criticisms of the *Shapiro* approach:

> *Shapiro* was problematic in several respects. First, unlike earlier cases, *Shapiro* not only failed to ground its analysis in the text of the Constitution, but explicitly disavowed any need to do so; and it disregarded not only the constitutional text but the relevant history and tradition. Second, its dismissal of the States' asserted interest—discouraging those who would migrate in search of larger benefits—was supported only by what seemed raw policy choices about who was and was not "deserving." Finally, while it emphasized that not all durational residency requirements "penalized" travel, it gave no further guidance about what would or would not constitute a "penalty."

Id. at *8; *see also Harvard Comment*, *supra* note 2, at 1590 ("Although the resolution of a claim requires definition of the scope of the right to travel, *Shapiro* offered no clear guidance

Immunities Clause of Article IV applied only to those "privileges" and "immunities" that were deemed "fundamental" and that, as a result, the State of Montana could constitutionally impose distinctions between residents and nonresidents where no "fundamental" right was involved.[99] Specifically, the Court upheld a distinction in licensing fees charged to residents and nonresidents on the ground that nonresidents had no fundamental right to hunt Montana game, which was the common property of the state's citizens.[100] In the course of its analysis, the Court expressly relied upon Justice Washington's statements in *Corfield*.[101] Thus, at times the Court has recognized a distinction between fundamental and non-fundamental privileges and immunities, although its jurisprudence is by no means particularly coherent or consistent in this area.[102]

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for locating the bounds of the right."). The majority in *Saenz* seemed to pay heed to some of these criticisms at least superficially in that it went to great lengths to ground the right to travel in the constitutional text. *See Saenz*, 526 U.S. at 500–04.

[99]*Baldwin*, 436 U.S. at 388 ("Whatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them."); *see also id.* at 393 (Burger, C.J., concurring) ("[T]he Privileges and Immunities Clause does not prevent a State from preferring its own citizens in granting public access to natural resources in which they have a special interest. Thus Montana does not offend the Privileges and Immunities Clause by granting residents preferred access to natural resources that do not belong to private owners."). In her concurrence in *Zobel*, Justice O'Connor also cited this holding of *Baldwin*, observing that the "Privileges and Immunities Clause affords no protection" where the nonresident is engaging in conduct that is not deemed "fundamental." *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring); *cf.* DeShaney v. Winnegabo Cty. Dep't Soc. Servs., 489 U.S. 189, 196 (1989) (observing that Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual"); *Memorial Hosp.*, 415 U.S. at 278 n.3 (Rehnquist, J., dissenting) ("This Court has noted that citizens have no constitutional right to welfare benefits."); Dandridge v. Williams, 397 U.S. 471, 487 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."). *But cf. Memorial Hosp.*, 415 U.S. at 259 ("[G]overnmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.").

[100]*See Baldwin*, 436 U.S. at 388.

[101]*See id.* at 384 (noting, based on its reading of *Corfield*, that "[i]t appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obliged to share those things they held in trust for their own people"). *But see id.* at 385 ("In more recent years, . . . the Court has recognized that the States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute.").

[102]Indeed, Justice Brennan's dissent argues for a recognition that the Court had in fact abandoned an analysis concerning whether a particular privilege was "fundamental" and therefore covered by the Privileges and Immunities Clause:

I think the time has come to confirm explicitly that which has been implicit in our

In this context, it is ironic that the *Saenz* majority cited *Paul v. Virginia*,[103] an early case construing the Privileges and Immunities Clause of Article IV.[104] For in *Paul*, the Court made clear that there was a distinction between "special" privileges that were not recognized under the Clause and "fundamental" privileges—privileges and immunities of citizens—which were the subject of the Clause.[105] In *Paul*, the Court ruled that the Privileges and Immunities Clause did not cover "[s]pecial privileges enjoyed by citizens in their own States [which] are not secured in other States."[106] The "special" privilege at issue in *Paul* was the grant of a corporate charter, which the Court ruled was not binding outside the state that granted it.[107] Nonetheless, the Court distinguished such "special privileges" from "fundamental" privileges guaranteed under the Clause such as "the acquisition and enjoyment of property" and "equal protection" of the laws.[108]

The final irony concerning the Court's analysis of the Privileges or Immunities Clause in *Saenz* is its recent insistence in its substantive due process cases on examining "[o]ur Nation's history, legal traditions, and practices"[109] before declaring new fundamental liberty interests covered by

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> modern privileges and immunities decisions, namely that an inquiry into whether a given right is "fundamental" has no place in our analysis of whether a State's discrimination against nonresidents—who "are not represented in the [discriminating] State's legislative halls"—violates the Clause. Rather, our primary concern is the State's justification for its discrimination.

Id. at 402 (Brennan, J., dissenting) (citation omitted).

[103]75 U.S. (8 Wall.) 168 (1868).

[104]*See Saenz*, 526 U.S. at 501–02.

[105]*See Paul*, 75 U.S. (8 Wall.) at 180 ("Special privileges enjoyed by citizens in their own States are not secured in other states by [the privileges and immunities] provision."). For a discussion of the distinction between special privileges and immunities and fundamental privileges or immunities recognized in *Paul*, see generally Smith, *Privileges and Immunities Clause*, *supra* note 68, at 873–90.

It is interesting to note that *Paul* was cited for this distinction by Justice Field in his *Slaughter-House* dissent. Field concluded that *Paul* was irrelevant as precedent in *Slaughter-House* because it dealt with *special* privileges, and not *fundamental* privileges:

> The whole purport of [*Paul*] was, that citizens of one State do not carry with them into other States any special privileges or immunities, conferred by the laws of their own States, of a corporate or other character. That decision has no pertinency to the questions involved in this case. The common privileges and immunities which of right belong to all citizens, stand on a very different footing.

Slaughter-House, 83 U.S. (16 Wall.) at 100 (Field, J., dissenting).

[106]*Paul*, 75 U.S. (8 Wall.) at 180–81.

[107]*See id.* at 183–85.

[108]*Id.* at 180.

[109]Washington v. Glucksberg, 521 U.S. 702, 721 (1997). The Court has resisted expansion in this area because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125

the Due Process Clause of the Fourteenth Amendment. The arguable lack of historical analysis in *Saenz* under the Privileges or Immunities Clause seems at odds with this more recent approach. If the Court had engaged in a more detailed historical analysis it would be required to address the distinction between fundamental and special privileges traditionally recognized under the Clause, which arguably would have changed the outcome of the case. Thus, the cautionary note sounded by Justice Thomas in his dissent appears warranted.

While there is a theoretical possibility that resorting to the Privileges or Immunities Clause might result in either a contraction or expansion of the fundamental rights of citizens recognized as being guaranteed under the Fourteenth Amendment, the Court's ruling in *Saenz* does not address this issue head-on. Rather, the Court seems to have unthinkingly followed recent "right to travel" precedents in ruling that the right to receive welfare benefits falls within the purview of the phrase "privileges or immunities of citizens" such that any discrimination regarding their issuance is prohibited.[110] Nonetheless, in the future should the Court more expressly adopt the Clause as the source of fundamental rights protection under the Amendment, it might more fully address the scope of the rights afforded the constitutional guarantee.

III. PROTECTION AFFORDED FUNDAMENTAL RIGHTS

In the previous section, I examined the evidence indicating that there are limitations on the scope of the terms "privileges" and "immunities" as originally understood by those responsible for ratifying the Fourteenth Amendment. These limitations arguably preclude application of the Amendment in the context of welfare benefits. However, even if the receipt of welfare benefits were a "privilege" or "immunity" of citizenship under the Fourteenth Amendment, the original understanding of the Privileges or Immunities Clause still might not afford plaintiffs a remedy for discrimination they endured during the one-year residency period. The phrase "privileges or immunities of citizens" indicates an intent on the part of the ratifiers to extend the Amendment's guarantee only to the fundamental capacities of citizenship that were contemplated by the language the ratifiers used, and not to any particular mode or manner of exercise of those privileges. The ratifiers recognized a distinction between the fundamental right and the mode or manner in which the right might be exercised as

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(1992).

[110] *See Saenz*, 526 U.S. at 498–510.

prescribed by regulations issued by the state legislatures.[111] The former was the subject of the guarantee; the latter was not. Members of Congress responsible for drafting the Amendment emphasized again and again that they did not intend to eviscerate the federal system by affording the federal government the power to prescribe particular criminal or civil codes for the states.[112] The states were to remain free to prescribe the regulations they saw fit as long as they did not cross the line and "abridge" the underlying fundamental privilege or immunity of citizenship being regulated.[113] Thus, even if governmental benefits were "privileges" or "immunities" of citizenship—a conclusion that is dubious given the historical evidence—courts must further inquire concerning whether the examined regulation constitutes an "abridgement" of the underlying privilege or a legitimate exercise of the state's regulatory power.[114]

In connection with this observation, it is useful to examine the analysis of both the majority and dissenters in the *Slaughter-House Cases*. Despite the majority's arguably erroneously narrow construction of the scope of the Privileges or Immunities Clause, both the majority and the dissenters in *Slaughter-House* recognized that even if a particular right were covered by the Clause, the states still remained free to pass legitimate regulations of fundamental rights pursuant to their traditionally recognized police powers.[115] This point of agreement seems to be lost on modern commentators. Nonetheless, the similarity in the positions of the majority and the dissenters is striking. At the outset of his opinion for the majority, Justice Miller observed:

> The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details. . . . This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.[116]

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[111]*See* Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 407–17 (1997) [hereinafter Smith, *Natural Law*]; Douglas G. Smith, *Fundamental Rights and the Fourteenth Amendment: The Nineteenth Century Understanding of "Higher" Law*, 3 TEX. REV. L. & POL. 225, 270–74 (1999).

[112]Smith, *Natural Law*, *supra* note 111, at 409–15.

[113]*See id.* at 418.

[114]*See id.* at 418–19.

[115]*See id.* at 409–15.

[116]*Slaughter-House*, 83 U.S. (16 Wall.) at 62 (citation omitted).

Thus, the majority's conclusion that the Louisiana regulation was constitutional rested on two separate grounds. The first is the one that has received the most recognition. The Court concluded that the Privileges or Immunities Clause covered only those privileges and immunities of "national" citizenship.[117] Therefore, the Clause was not implicated in a case involving privileges that traditionally were regulated by state law, such as the right to pursue one's calling.[118] The second has received less notice. The majority concluded that, even if the Privileges or Immunities Clause did apply, the regulation at issue was a legitimate exercise of the state's police power and therefore survived review.[119] In particular, the majority concluded that the establishment of a slaughter-house monopoly was permissible despite evidence that under English law such monopolies were considered impermissible infringements on subjects' right to pursue a lawful calling since in the United States:

> the legislative bodies . . . have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges—privileges denied to other citizens—privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied.[120]

For the majority, the essential difference between the English and American monopolies seems to have been that in the United States monopolies were established only after a legislative process where the interests of the people were represented due to our democratic traditions.[121] In England, however, the monarch unilaterally established monopolies without the consent of the governed.[122] This latter conclusion is arguably dicta since it was not necessary to resolve the case once the majority had concluded that the Privileges or Immunities Clause did not apply. Nonetheless, the majority felt it necessary to express its opinion on this subject,[123] and indeed its conclusion

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[117] *See id.*

[118] *See id.* at 87 (Field, J., dissenting), 120 (Bradley, J., dissenting), 124 (Swayne, J., dissenting).

[119] *See id.* at 81.

[120] *Id.* at 66.

[121] *See id.* at 65–66.

[122] *See id.*

[123] One could argue that the majority's two conclusions outlined above really should not be bifurcated. Perhaps the majority's conclusion that the Privileges or Immunities Clause applies only to privileges of national citizenship was just another way of saying that the states remained free to pass legislation concerning non-national privileges without any interference by the federal courts. While this reading seems somewhat plausible, the language of the

that the exercise of the police power by the Louisiana legislature was legitimate would have been sufficient grounds for allowing the law to stand.

The *Slaughter-House* dissenters, too, agreed that the states remained free to exercise their police powers without interference from the federal government even after ratification of the Fourteenth Amendment. For example, Justice Field made clear that the sole provisions at issue in the case were those establishing the "exclusive privileges conferred by the act."[124] The other provisions in the Louisiana regulation were classic examples of legitimate exercises of the state's police powers.[125] Nonetheless, Justice Field made it equally clear that legislatures could not "under the pretense of prescribing a police regulation . . . be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment."[126] Justice Field concluded that because government-established monopolies had been forbidden under the fundamental laws of England, they were also forbidden under the Fourteenth Amendment.[127] Thus, while the

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majority opinion appears to render the two conclusions distinct.

[124]*Slaughter-House*, 83 U.S. (16 Wall.) at 84 (Field, J., dissenting). Field concluded that "[t]he provisions of the fourteenth amendment, which is properly a supplement to the thirteenth, cover, in my judgment, the case before us, and inhibit any legislation which confers special and exclusive privileges like these under consideration." *Id.* at 93.

[125]Justice Field outlined those provisions as follows:

> In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant to a corporation created by it of special and exclusive privileges by which the health of the city is in no way promoted.

Id. at 87 (Field, J., dissenting).

[126]*Id.* (Field, J., dissenting).

[127]*See id.* at 101–02 (Field, J., dissenting). Justice Field concluded: "All monopolies in any known trade or manufacture are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law in the great *Case of Monopolies*, decided during the reign of Queen Elizabeth." *Id.* (Field, J., dissenting); *see also id.* at 104 (Field, J., dissenting). ("The common law of England . . . condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade."). As a backup, Justice Field also reviewed the relevant civil law since Louisiana law had originated from the French. His conclusion was no different:

> If it be said that the civil law and not the common law is the basis of the jurisprudence of Louisiana, I answer that the decree of Louis XVI, in 1776, abolished all monopolies of trades and all special privileges of corporations, guilds, and trading companies, and authorized every person to exercise, without restraint, his art, trade, or profession, and such has been the law of France and of her colonies ever since, and that law prevailed in Louisiana at the time of her

state might remain free to regulate the slaughter-house trade in order to ensure the health and safety of its citizens, it could not do so by granting a slaughter-house monopoly to a favored few.

In his separate dissent, Justice Bradley also pronounced that the establishment of a slaughter-house monopoly was unconstitutional, while clearly delineating the two issues presented to the Court.[128] At the outset of his dissent, he first asked: "Is it one of the rights and privileges of a citizen of the United States to pursue such civil employment as he may choose to adopt, subject to such reasonable regulations as may be prescribed by law?"[129] He framed the second issue as follows:

> Is a monopoly, or exclusive right, given to one person to the exclusion of all others, to keep slaughter-houses, in a district of nearly twelve hundred square miles, for the supply of meat for a large city, a reasonable regulation of that employment which the legislature has a right to impose?[130]

As had Justice Field, Justice Bradley concluded that the case did implicate a privilege or immunity of citizens of the United States referenced in Section One of the Fourteenth Amendment and that the Louisiana regulation did exceed the state's legitimate police power in establishing a monopoly.[131] Justice Bradley reasoned that

> [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.[132]

While Justice Bradley, like Justice Field, concluded that certain provisions in the Louisiana law were legitimate police regulations, he also concluded, like Justice Field, that the establishment of the monopoly was not.[133] Justice

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cession to the United States.

Id. at 105 (Field, J., dissenting).

[128]*See id.* at 111–12 (Bradley, J., dissenting).

[129]*Id.* at 112.

[130]*Id.*

[131]*See id.* at 111.

[132]*Id.* at 114.

[133]Justice Bradley stated his conclusion as follows: "That portion of the act which requires all slaughter-houses to be located below the city, and to be subject to inspection, &c., is clearly a police regulation. That portion which allows no one but the favored company to build, own, or have slaughter-houses is not a police regulation, and has not the faintest semblance of one." *Id.* at 120.

Bradley stated flatly that such a measure unconstitutionally precluded citizens who were not granted the monopoly from "choos[ing] a lawful calling" and was therefore "an infringement of personal liberty."[134] Thus, for the dissenters, the primary issue in *Slaughter-House* was whether the Louisiana legislature had abridged the fundamental rights of the citizenry during the course of exercising its police powers.

As noted above, in contrast to the dissenters, the majority concluded that the state legislatures could constitutionally establish monopolies during the course of exercising their police powers. One wishes that this had remained the sole expressed disagreement between the dissenters and the majority. The majority arguably erroneously extended its analysis to the scope of the guarantee under the Privileges or Immunities Clause, concluding that only "national" privileges were guaranteed.[135] Such an extension arguably was not necessary to support the majority's goal of underscoring the fact that the federal system remained intact after ratification of the amendment. Even if the Clause extended its protections to those privileges traditionally regulated by state law, both the majority and dissenters made clear that the states retained broad police powers they could exercise without running afoul of the constitutional guarantee. Perhaps the majority thought that the scope of the states' police powers was so ill-defined that, unless it announced some further barrier to erosion of the federal structure, that erosion would indeed occur as

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[134]*Id.* (Bradley, J., dissenting). Like Justice Field, Justice Bradley too looked to English history in coming to this conclusion. *See id.* ("The statute of 21st James, abolishing monopolies, was one of those constitutional landmarks of English liberty which the English nation so highly prize and so jealously preserve."). Like Justice Field, Justice Bradley also sought to distinguish between the type of public franchise that was constitutional from the sort of monopoly at issue in *Slaughter-House*. *See id.* at 120–21. His argument seems to boil down to a statement that just because many legislatures have issued a certain type of regulation doesn't make it constitutional:

> It has been suggested that this was a mere legislative act, and that the British Parliament, as well as our own legislatures, have frequently disregarded it by granting exclusive privileges for erecting ferries, railroads, markets, and other establishments of a public kind. It requires but a slight acquaintance with legal history to know that grants of this kind of franchises are totally different from the monopolies of commodities or of ordinary callings or pursuits. These public franchises can only be exercised under authority from the government, and the government may grant them on such conditions as it sees fit. But even these exclusive privileges are becoming more and more odious, and are getting to be more and more regarded as wrong in principle, and as inimical to the just rights and greatest good of the people. But to cite them as proof of the power of legislatures to create mere monopolies, such as no free and enlightened community any longer endures, appears to me, to say the least, very strange and illogical.

Id.

[135]*See id.* at 79–80.

federal courts whittled away at the borders of the states' legislative powers. Nonetheless, such concerns, despite having some validity (witness the progression of the Court's jurisprudence in this area), are not wholly meritorious. Indeed, *Slaughter-House* itself shows that determining the borders of the police power may involve bright-line rules that are not subject to judges' individual policy preferences concerning the wisdom of particular legislation.

The dispute among the majority and the dissenters boiled down to determining whether states could establish monopolies as part of their police powers. That question had an answer. It could be determined by resort to the historical traditions of the states. The majority pointed to unchallenged practice among the states.[136] The dissenters pointed to the English precedent.[137] While one might dispute the majority's conclusion that state-created monopolies were constitutionally permissible or the majority's reasoning in arriving at this conclusion, the question does have a determinate answer that is not subject to judicial predilections. Indeed, based on the majority's analysis, *Slaughter-House* might well have come out no differently had the majority relied solely upon its evaluation of the history of state-created monopolies and not strayed into defining the privileges or immunities guarantee more narrowly than seems to be historically warranted.

In *Saenz*, these considerations were not wholly absent. Chief Justice Rehnquist in his *Saenz* dissent seems to have recognized the historically-based requirement that states must be given leeway in regulating the fundamental rights of the citizenry.[138] While concluding that the "right to travel" may indeed constitute a "privilege" or "immunity" of citizens, he also forcefully objected to the majority's striking down what he considered "a reasonable measure falling under the head of a 'good-faith residency requirement.'"[139] He found it particularly inappropriate that the Court employ

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[136]*See id.* at 62.

[137]*See supra* note 88 and accompanying text.

[138]*See Saenz*, 526 U.S. at 512–19 (Rehnquist, C.J., dissenting).

[139]*Id.* at 511. Chief Justice Rehnquist had earlier observed in dissent in *Zobel* that excessive judicial interference in state policymaking under the guise of "right to travel" adjudication was inappropriate and inconsistent with "'the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.'" *Zobel*, 457 U.S. at 84 (Rehnquist, J., dissenting) (quoting *Dandridge*, 397 U.S. at 486).

The full Court had made a similar acknowledgment in *Edwards*, while at the same time stating that there are limits on the state's police power:

> We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties.
>
> But this does not mean that there are no boundaries to the permissible area of

a "provision relied upon for only the second time since its enactment 130 years ago" in striking down what he considered a reasonable governmental regulation.[140]

Chief Justice Rehnquist agreed with the majority that rigid barriers to migration such as the state law struck down by the Court in *Edwards v. California*,[141] which precluded transportation of indigent persons into the State of California, were unconstitutional.[142] Citing *Paul v. Virginia*,[143] he

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State legislative activity.

Edwards, 314 U.S. at 173 (quoting Olsen v. Nebraska, 313 U.S. 236, 246 (1941)). More specifically, however, the Court in *Toomer v. Witsell* had earlier recognized that the states retained leeway to regulate the privileges and immunities of citizens as they saw fit, even though the Privileges and Immunities Clause of Article IV ensured that all citizens would enjoy fundamental privileges outside their home state:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principal that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

334 U.S. at 396 (footnote omitted). *See also Friedman*, 487 U.S. at 67 (noting that "we repeatedly have recognized that the [Privileges and Immunities] Clause, like other constitutional provisions, is not an absolute. The Clause does not preclude disparity in treatment where substantial reasons exist for the discrimination and the degree of discrimination bears a close relation to such reasons" (citations omitted)). Indeed, the Justices further invoked the Tenth Amendment to underscore the fact that the states retained a large measure of their power even though the federal Constitution set some limits:

> Like other provisions of the Constitution, the [Privileges and Immunities] Clause . . . must be read in conjunction with the Tenth Amendment to the Constitution. This clause presupposes the continued retention by the States of powers that historically belonged to the States, and were not explicitly given to the central government or withdrawn from the States. . . . This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States.

Toomer, 334 U.S. at 407–08 (Frankfurter, J., concurring). The Court has similarly recognized in the context of the Fourteenth Amendment that the states were to retain their police powers and pass regulations governing the exercise of fundamental rights: "The amendment does not take from the States those powers of police that were reserved at the time the original Constitution was adopted." Giozza v. Tiernan, 148 U.S. 657, 662 (1893).

[140] *Saenz*, 526 U.S. at 511 (Rehnquist, C.J., dissenting).

[141] 314 U.S. 160 (1941).

[142] *See Saenz*, 526 U.S. at 511–12 (Rehnquist, C.J., dissenting).

[143] 75 U.S. (8 Wall.) 168 (1868).

agreed that the "right to travel" could be tied to the "protections afforded by the Privileges and Immunities Clause of Article IV, § 2."[144] He further agreed with the majority that the traditional aspect of the right to travel—preclusion of obstacles to entry into a state—was not implicated in *Saenz*.[145] However, based on these conclusions, he further argued that the Privileges and Immunities Clause was inapplicable in *Saenz* because the welfare recipients had expressed a desire to remain in California and become citizens, thereby rendering inapplicable the protection afforded out-of-state citizens under the Privileges and Immunities Clause of Article IV.[146] Chief Justice Rehnquist similarly argued that the majority's linkage of the right of a citizen of the United States to become a citizen of any of the several states under the Fourteenth Amendment with the right to travel was inapposite. According to Chief Justice Rehnquist, "[a] person is no longer 'traveling' in any sense of the word when he finishes his journey to a State which he plans to make his home."[147] Thus, the right to travel and the right to become a citizen of the state of one's choosing must be distinct.[148]

Most significantly, however, Chief Justice Rehnquist further argued that even if the residency requirement did implicate the right to travel, the State of California did not unconstitutionally exceed its regulatory power by enacting the requirement.[149] Chief Justice Rehnquist objected that the Court was "ignor[ing the] . . . State's need to assure that only persons who establish

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[144]*Saenz*, 526 U.S. at 512 (Rehnquist, C.J., dissenting).

[145]*See id.* at 512–14.

[146]*See id.* In *Zobel*, the Court came to a similar conclusion that durational residency requirements did not implicate the Privileges and Immunities Clause of Article IV because they did "not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.'" 457 U.S. at 59 n.5 (quoting *Toomer*, 334 U.S. at 395).

[147]*Saenz*, 526 U.S. at 513 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued, in particular, that dicta in the *Slaughter-House Cases* supported his argument that the right to become a state citizen and the right to travel were distinct under the Privileges or Immunities Clause of the Fourteenth Amendment: "The same dicta from the *Slaughter-House Cases* quoted by the Court actually treats the right to become a citizen and the right to travel as separate and distinct rights under the Privileges or Immunities Clause of the Fourteenth Amendment." *Id.* (citing 83 U.S. (16 Wall.) at 79–80).

[148]*See id.* at 512–13. Chief Justice Rehnquist acknowledged that the Court's recent right to travel jurisprudence had "conflated" this distinction. *Id.* at 514. In particular he cited the Court's decisions in *Shapiro*, 394 U.S. 618 (1969) (striking down one-year residence requirement imposed on receipt of welfare benefits), *Dunn*, 405 U.S. 330 (1972) (striking down one-year residence requirement imposed on right to vote in state elections), and *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 280 (1974) (striking down one-year county residence requirement imposed on entitlement to nonemergency hospitalization or emergency care).

[149]*See Saenz*, 526 U.S.. at 514–20 (Rehnquist, C.J., dissenting).

a bona fide residence receive the benefits provided to current residents of the State."[150] In particular, Chief Justice Rehnquist cited the Court's decisions in cases upholding residency requirements imposed upon receipt of in-state tuition rates at state universities,[151] eligibility to obtain divorces in state courts,[152] and voting in primary elections[153] as evidencing an acknowledgment by the Court that states retain the power to establish residency requirements under certain circumstances.[154] Chief Justice Rehnquist saw no difference

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[150]*Id.* at 516. Chief Justice Rehnquist concluded after reviewing the Court's prior case law that

> [e]ven when redefining the right to travel in *Shapiro* and its progeny, the Court has "always carefully distinguished between bona fide residence requirements, which seek to differentiate between residents and nonresidents, and residence requirements, such as durational, fixed date, and fixed point residence requirements, which treat established residents differently based on the time they migrated into the State."

Id. (quoting *Soto-Lopez*, 476 U.S. at 903 n.3); *see also* Martinez v. Bynum, 461 U.S. 321, 328–29 (1983) ("A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. . . . A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents."); *Kline*, 412 U.S. at 453–54 (noting that state may "establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates"); Cohen, *Discrimination*, *supra* note 2, at 79 ("United States citizens become citizens of the states wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide.").

[151]*See, e.g.*, Sturgis v. Washington, 414 U.S. 1057 (1973) (upholding one-year residence requirement for in-state tuition); Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g* 326 F. Supp. 234 (D. Minn. 1970) (same).

[152]*See, e.g.*, *Sosna*, 419 U.S. at 406–09 (upholding one-year residence requirements for divorce eligibility).

[153]*See, e.g.*, Rosario v. Rockefeller, 410 U.S. 752, 760–62 (1973) (upholding political party registration restrictions creating durational residency requirements for primary election voting).

[154]*See Saenz*, 526 U.S. at 516–17 (Rehnquist, C.J., dissenting). Indeed, the Court had earlier stated in *Baldwin* that there were a number of circumstances under which residency requirements were constitutionally permissible, and indeed a desirable implication of our federal system:

> It has not been suggested . . . that state citizenship or residency may never be used by a State to distinguish among persons. Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective

between those rights and the right to welfare benefits at issue in *Saenz*. He reasoned that "[i]f States can require individuals to reside in-state for a year before exercising the right to educational benefits, the right to terminate a marriage, or the right to vote in primary elections that all other state citizens enjoy, then States may surely do the same for welfare benefits."[155] As in those cases, Chief Justice Rehnquist concluded that residency requirements were legitimate means of ensuring that "programs are not exploited."[156]

Chief Justice Rehnquist's conclusion that, even if some form of the constitutional right to travel were implicated in the context of durational residency requirements, the states could still regulate the fundamental rights of the citizenry in reasonable ways seems to be on firm historical ground. There is a fairly long historical tradition dating back to English law of residency requirements imposed upon receipt of welfare benefits.[157]

> office of the State. Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States.

436 U.S. at 383 (citation omitted).

[155] *Saenz*, 526 U.S. at 518 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist reasoned that

> there is no material difference between a 1-year residence requirement applied to the level of welfare benefits given out by a State, and the same requirement applied to the level of tuition subsidies at a state university. The welfare payment here and in-state tuition rates are cash subsidies provided to a limited class of people, and California's standard of living and higher education system make both subsidies quite attractive. Durational residence requirements were upheld when used to regulate the provision of higher education subsidies, and the same deference should be given in the case of welfare payments.

Id. (Rehnquist, C.J., dissenting). He also rejected the majority's attempt to argue that welfare benefits were less "portable" than college tuition, for example, and therefore there should be a constitutional distinction between the two types of cash subsidies for purposes of the privileges and immunities analysis. *See id.* at 518–19. Not only did Chief Justice Rehnquist reject this distinction as fabricated, but also he concluded that "this foray into social economics demonstrates that the line drawn by the Court borders on the metaphysical, and requires lower courts to plumb the policies animating certain benefits like welfare and to define their 'essence' and hence their 'portability.'" *Id.* at 520 (citation omitted).

[156] *Id.* at 521.

[157] *See* Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871, 956 (1995) ("Paupers who remained in a community in which they were not settled were to be excluded or expelled from the community and returned to the community of settlement."); Raoul Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853, 855–56 (1981) (examining durational residency requirement derived from local responsibility principle of Elizabeth Poor Law); Loffredo, *supra* note 2, at 154 ("From the

Nonetheless, the Court, beginning in *Edwards*, while recognizing this historical tradition, turned away from it as anachronistic in the context of federalization of government benefits.[158] Thus, despite the Court's rejection

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founding of the Republic, states and localities have endeavored to prevent the migration of indigents into their jurisdictions."); Daniel R. Mandelker, *Exclusion and Removal Legislation*, 1956 WIS. L. REV. 57, 58 ("The English Statute of 1662 . . . contained a provision authorizing the compulsory removal to his place of residence of any person 'likely to become chargeable.'"); James R. Kristy, Note, *A Showdown Between* Shapiro *and the Personal Responsibility and Work Opportunity Reconciliation Act: Infringement of the Right to Travel*, 20 WHITTIER L. REV. 449, 452 (1998) ("Welfare residency requirements survived from our English heritage. The Poor Laws of the Great Depression empowered states to remove indigent migrants and to prevent people from transporting them into the state." (footnote omitted)); William P. Quigley, *Backwards Into the Future: How Welfare Changes in the Millennium Resemble English Poor Laws of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 106 (1998) (discussing three-year residency requirement of 1536 Statute for those unable to work).

One striking piece of evidence that historically such restrictions on the movement of paupers were considered appropriate is to be found in the proto-comity clause found in Article IV of the Articles of Confederation, which provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States, and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.

ARTICLES OF CONFEDERATION, Art. IV. Commentators have picked up on this language in criticizing the Court's jurisprudence. *See, e.g.*, Hartch, *supra* note 2, at 477 ("[T]he Articles of Confederation explicitly excluded 'paupers, vagabonds, and fugitives' from enjoying the right to travel. At most, therefore, the Privileges and Immunities Clause gives rise to a much more modest formulation of the right to travel." (footnote omitted)); Loffredo, *supra* note 2, at 154 n.39 ("Some have argued that the Constitutional Convention intended the Privileges and Immunities Clause of Article IV to embody the 'pauper' and 'vagabond' exception to the privileges and immunities principle of the Articles of Confederation."); Kristy, *supra*, at 453 (noting that "[i]nitially, the United States continued the practice of excluding the poor through settlement requirements"); Zubler, *supra* note 10, at 915 ("[E]ven if the Comity Clause could support some version of the right to migrate, it could not be the basis for striking down welfare waiting periods. If Justice O'Connor wants to argue that the Comity Clause's scope mirrors that of its Articles of Confederation predecessor, she will have to take the bitter with the sweet." (footnote omitted)).

Nonetheless, the Court itself has recognized the ancient origin of such durational residency requirements. *See, e.g., Shapiro*, 394 U.S. at 628 n.7 ("The waiting-period requirement has its antecedents in laws prevalent in England and the American Colonies centuries ago which permitted the ejection of individuals and families if local authorities thought they might become public charges.").

[158]Specifically, the Court recognized that laws which restricted the immigration of indigents into states had a "firm basis in English and American history." *Edwards*, 314 U.S. at 174. Indeed, the Court recognized that states had the right to interfere with the interstate transportation of paupers on the grounds that it is "as competent and as necessary for a state

of historical tradition, it is likely that the drafters of either the Privileges and Immunities Clause of Article IV or the Privileges or Immunities Clause of the Fourteenth Amendment would have viewed such residency requirements as falling within the legitimate exercise of the states' police powers.

IV. SCRUTINY APPLIED IN REVIEWING ALLEGED ABRIDGEMENTS OF FUNDAMENTAL RIGHTS

Revision of the Court's substantive due process and equal protection jurisprudence may alter not only the enumeration of rights guaranteed under the Fourteenth Amendment and the nature of the protection afforded those rights, but also the type of scrutiny the Court employs in reviewing alleged constitutional violations. More specifically, the Court might conceivably discard the elaborate structure of differential scrutiny the Court affords to different categories of legislation.

The Court generally affords legislation allegedly infringing civil rights "strict" scrutiny, whereas it affords legislation impinging upon "economic"

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to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported . . . ." *Id.* at 176 (quoting City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142–43 (1837)). Nonetheless, the Court reasoned that this historical tradition should be overturned in the face of the nationalization of government programs wrought during the New Deal:

> [T]he theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well.

Id. at 174–75 (citing the social security laws, works programs, and farm security laws); *see also id.* at 173 ("The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders."). Moreover, in concurrence Justice Jackson stated:

> We should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. "Indigence" in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color. I agree with what I understand to be the holding of the Court that cases which may indicate the contrary are overruled.

Id. at 184–85 (Jackson, J., concurring).

rights only "rational basis" scrutiny. Indeed, most legislation is subject to rational basis review under which the challenged legislation is upheld if it "bear[s] some rational relationship to legitimate state purposes."[159] If, however, a law "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution," the law is subjected to "strict" scrutiny.[160] To survive strict scrutiny, the classification must promote a compelling government interest and be narrowly tailored to serve that interest.[161]

The underlying rationale for this distinction is in large part that structural weaknesses in the democratic process warrant increased intensity of judicial review for certain types of fundamental rights.[162] This rationale was first enunciated by the Supreme Court in the famous footnote four of *United States v. Carolene Products*.[163] Where the democratic process is judged by the courts to adequately weigh conflicting interests, the courts apply minimal rational basis scrutiny.[164] However, where the courts determine that those affected by legislative action cannot defend their interests effectively in the political arena, courts employ heightened scrutiny.[165] As many commentators have noted, the scrutiny applied by the Court often is outcome-determinative since the Court almost never strikes down legislation

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[159]San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 40 (1973). *See also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

[160]*Rodriquez*, 411 U.S. at 17; *see also* Plyler v. Doe, 457 U.S. 202, 216–17 (1982) ("[W]e have treated as presumptively invidious those classifications that disadvantage a 'suspect class,' or that impinge upon the exercise of a 'fundamental right.'").

[161]*See Shapiro*, 394 U.S. at 634.

[162]*See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4, at 371 (4th ed. 1991) (discussing application of strict scrutiny standard in cases involving fundamental rights); JOHN HART ELY, DEMOCRACY AND DISTRUST 105–80 (1980) (examining political process and equal protection jurisprudence).

[163]*See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (articulating view that "searching judicial scrutiny" should be applied to legislation burdening "discrete and insular minorities" or restricting the democratic process); *see also* Gayle Lynn Pettings, Note, *Rational Basis with Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 781 (1987) ("The primary source of strict scrutiny review was Justice Stone's famous footnote four in the *Carolene Products* case." (footnotes omitted)). *But see* K.G. Jan Pillai, *Phantom of the Strict Scrutiny*, 31 NEW ENG. L. REV. 397, 408 (1997) ("In recent years, . . . the Court has discarded the *Carolene Products* rationale, and cast the blemish of suspectness on all racial and ancestral classifications, regardless of the historical experience, political strength or the discrete and insular characteristics of the parties burdened by such classifications.").

[164]*See Dandridge*, 397 U.S. at 485.

[165]Courts apply strict scrutiny where a suspect class identified by the Court is impacted or where a fundamental right is implicated. *See Rodriquez*, 411 U.S. at 16.

after applying rational basis review, whereas it frequently strikes down legislation after applying strict scrutiny.[166]

To make matters more complicated, the Court has indicated that some other level of scrutiny falling between strict scrutiny and rational basis review may be appropriate in certain circumstances.[167] For example, the Court has indicated that some intermediate level of scrutiny is required under the Due Process and Equal Protection Clauses in cases involving discriminatory classifications based on sex or illegitimacy,[168] state statutes withholding funds

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[166]*See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 69–70 (1981) ("[L]evels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1452 (2d ed. 1988) ("[T]here are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights."); Gerald Gunther, *Forword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that strict scrutiny was "'strict' in theory and fatal in fact" and that minimal scrutiny was "minimal . . . in theory and virtually none in fact"); Pillai, *supra* note 163, at 403 ("Strict scrutiny, however, is an indeterminate standard, devoid of empirically ascertainable contents, and easily susceptible to judicial spinning in order to arrive at preordained outcomes."). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

[167]An "intermediate" level of scrutiny is more apparent in the equal protection context. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 969 (1987) ("Mid-level review gives the Court flexibility in adjudicating equal protection claims involving classifications which it deems troubling but not impermissible *per se*. Thus, the government's interest in 'administrative ease and convenience' may be dismissed as not substantial enough to justify a gender classification."). However, intermediate review has also snuck into the due process context. *Id.* ("In substantive due process cases as well, the Court has fashioned a third test, falling between 'strict scrutiny' and 'mere rationality.' This mid-level standard is the product of a regime of judicial review that seeks both to protect non-textual 'fundamental rights' and to avoid criticism that the Court is operating beyond the bounds of the Constitution."). *See also* Note, *Substantive Due Process-Intermediate Level Scrutiny*, 106 HARV. L. REV. 210, 215 (1992) ("In at least two sets of circumstances, the Court has used intermediate levels of scrutiny to evaluate substantive due process claims. First, the Court has relaxed its ordinarily strict scrutiny of alleged violations of fundamental rights when the governmental action has involved complex issues that the Court recognizes it is ill-suited to resolve. Second, the Court has applied heightened scrutiny to issues that would ordinarily warrant only rational basis review when they arise in the context of confinement." (footnote omitted)). *But cf.* Zubler, *supra* note 10, at 945 ("The Supreme Court has traditionally been reluctant to employ an intermediate level of scrutiny because of the inherent indeterminacy and manipulability of such a test. Instead, the Court has employed a two-tier categorical approach that ostensibly precludes judicial manipulation—virtually no statute survives strict scrutiny and virtually all statutes pass rational basis scrutiny.").

[168]*See* Clark v. Jeter, 486 U.S. 456, 461–62 (1988); Craig v. Boren, 429 U.S. 190, 197 (1976).

for the education of children of undocumented aliens,[169] restrictions on commercial speech,[170] and discrimination against nonresidents prohibited by the Privileges and Immunities Clause.[171] The result has been confusion among the federal courts in various contexts concerning the appropriate level of scrutiny to apply in reviewing legislative enactments that may tread on individuals' due process or equal protection rights.[172] Indeed, it appears that in *Saenz* itself one of the primary reasons certiorari was granted was to resolve confusion concerning the appropriate level of scrutiny—whether strict or intermediate—to apply in reviewing the durational residency requirements enacted by the California legislature.[173] In examining the issue, Justice Stevens seemed to dispel the notion that some lesser form of scrutiny could be applicable. The majority concluded that

> [n]either mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year. The appropriate standard may be more categorical than that articulated in *Shapiro*, . . . but it is surely no less strict.[174]

It is no wonder the lower courts suffer from confusion in cases such as *Saenz*. The analytical framework crafted by the Court on a case-by-case basis repeatedly has come under attack as incoherent, inconsistent, and result-

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[169]*See Plyler*, 457 U.S. at 224.

[170]*See* Florida Bar v. Went for It, Inc., 515 U.S. 618, 623–24 (1995).

[171]*See* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985).

[172]Chief Justice Rehnquist wrote the following about intermediate review in the equal protection context:

> I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

Craig, 429 U.S. at 220–21 (Rehnquist, J., dissenting).

[173]*See Hartch*, *supra* note 2, at 473 (noting confusion over appropriate level of review since "[i]n *Shapiro*, the Court adopted a strict scrutiny review but in subsequent years at times applied an intermediate standard or rational basis test" (footnotes omitted)).

[174]*Saenz*, 526 U.S. at 504.

oriented.[175] The first problem with this set of principles is that it is wholly judicially-crafted and apparently has no foundation in the history of the Amendment. Not only has the Court transformed what was arguably intended to be a purely procedural guarantee into a substantive guarantee under the Due Process Clause, but it has also crafted upon that foundation a wholly artificial and convoluted structure consisting of different levels of scrutiny it will apply in reviewing different categories of rights. These distinctions are nowhere found in the text of the Fourteenth Amendment. There is no evidence that the drafters or ratifiers of the Amendment understood that there would be different levels of "scrutiny" for various categories of rights. Thus, for anyone who agrees that an originalist approach to constitutional interpretation is appropriate, the interjection of this framework into analysis under the Amendment is problematic.

This framework is particularly problematic in the context of "economic" rights. There is a wealth of evidence indicating that certain rights, currently classified by the Court as "economic" and therefore subject only to rational basis scrutiny, were deemed fundamental by those responsible for drafting and ratifying the Fourteenth Amendment. The Civil Rights Act is a good example. It is commonly viewed as an important precursor and perhaps the primary motivating factor behind Section One of the Fourteenth Amendment. Importantly, the Civil Rights Act explicitly conveyed a guarantee for certain rights that may be deemed "economic."[176] Section One of the Act mentioned

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[175]*See* Aleinikoff, *supra* note 167, at 969 (including equal protection mid-level review in discussion on criticisms of balancing tests); Hartch, *supra* note 2, at 471 ("[T]he muddled history of right to travel has already proved difficult for lower federal courts to interpret and led to a wide array of largely facetious challenges based on the right to travel." (footnote omitted)). Even the Justices have questioned certain aspects of this structure. For example, Justice Stevens wrote the following concerning the various levels of review in the Court's equal protection jurisprudence in concurrence in *City of Cleburne v. Cleburne Living Center*: "[O]ur cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' the other. I have never been persuaded that these so-called 'standards' adequately explain the decisional process." 473 U.S. 432, 451 (1985) (Stevens, J., concurring); *see also Craig*, 429 U.S. at 212 (Stevens, J., concurring) ("I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.").

[176]For example, Justice Field in his dissent in *Slaughter-House* stated that the Civil Rights Act enumerated certain privileges and immunities of citizens:

> What, then, are the privileges and immunities which are secured against abridgment by State legislation?
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> In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right "to make and enforce

the right to contract and to bring suit as well as the right to possess property, among others, as the sorts of rights intended to be guaranteed to the citizens of the nation regardless of race.[177] Thus, the reduced scrutiny applied to economic rights under current Fourteenth Amendment doctrine is particularly troublesome in light of the fact that one of the motivations behind the Amendment was to ensure that all citizens would be secure in all of the property rights which allowed their full participation in the national economy.

Another more practical problem with this framework is that it gives the lower federal courts perverse incentives not to recognize even well-established fundamental rights. As soon as a court deems a right "fundamental," it must apply strict scrutiny in reviewing the constitutionality of disputed legislation and must in almost every case strike down the legislation. Thus, under the current framework, members of the judiciary may be reluctant to recognize even those rights that history shows us were most likely deemed "fundamental" lest they be compelled to strike down legislation regulating those fundamental rights in even the most legitimate fashion.

This dynamic may also explain the emergence of intermediate scrutiny as a tool for reviewing certain categories of rights. Intermediate scrutiny acts as a safety valve, allowing courts to identify important rights that should be subject to more searching judicial review while at the same time allowing them to refrain from striking down legislation touching those rights.[178] As a

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> 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." That act, it is true, was passed before the fourteenth amendment, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation of a similar character, extending the protection of the National government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress re-enacted the act under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment.

83 U.S. (16 Wall.) at 96–97 (Field, J., dissenting).

[177] *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

[178] *See* Aleinikoff, *supra* note 167, at 969–70 ("[T]he usefulness of [a] balancing approach [in the substantive due process context] is apparent. The Court may recognize a new right (and hence permit further growth) without imposing stringent new burdens on the state."); Pillai, *supra* note 163, at 416 (noting that in the equal protection context intermediate scrutiny "functioned like a buffer zone between quasi-suspect gender classifications and the rigors of strict scrutiny"); *see also* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 301 (1992) ("No amount of bureaucratic lingo in the formulas of intermediate scrutiny . . . can wholly dispel that Lochnerian feeling one can get from intermediate scrutiny's shifting bottom line." (footnote omitted)); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny As Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 300 (1998) ("Intermediate scrutiny is one of the Court's most frequently employed balancing techniques."); *id.* at 322 ("The critics of

result, courts may classify certain rights as falling into the category of rights subject to intermediate scrutiny even though there is considerable historical evidence that they were deemed "fundamental" at the time of the framing of the Amendment.

V. A POTENTIAL CONTEXT FOR REEXAMINING THE CLAUSE

Having considered potential consequences should the Court abandon the Due Process Clause in favor of the Privileges or Immunities Clause as a source of substantive protection for fundamental rights, it is now worthwhile to examine how such a change would play out in a concrete example. One area where the effects might be significant is in review of juvenile curfews.[179]

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intermediate scrutiny have one thing right: Intermediate scrutiny is not a deeply principled, highly theorized response to problems of constitutional law. It is instead a compromise position that lies between two more-or-less theorized and principled poles."); Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1412 (1982) ("Unfortunately, standards of middle level review give the courts relatively little guidance in individual cases.").

[179] A number of commentators have examined the various approaches taken to review of juvenile curfews. *See generally* Katherine Hunt Federle, *Children, Curfews and the Constitution*, 73 WASH. U. L.Q. 1315 (1995); Michael Jordan, *From the Constitutionality of Juvenile Curfew Ordinances to a Children's Agenda for the 1990's: Is It Really a Simple Matter of Supporting Family Values and Recognizing Fundamental Rights?*, 5 ST. THOMAS L. REV. 389 (1993); David L. Levy, *The Dade County Juvenile Curfew Ordinance: A Retrospective Examination of the Ordinance and the Law that Supports its Constitutionality*, 9 ST. THOMAS L. REV. 517 (1997); Tona Trollinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949 (1996); Paul M. Cahill, Note, *Nonemergency Municipal Curfew Ordinances and the Liberty Interest of Minors*, 12 FORDHAM URB. L.J. 513 (1984); Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131 (1997); Frank DeLucia, Comment, *Connecticut's Juvenile Curfew Ordinances: An Effective Means for Curbing Juvenile Crime, or an Unconstitutional Deprivation of Minors' Fundamental Rights?*, 15 QUINNIPIAC L. REV. 357 (1995); Susan L. Freitas, Note, *After Midnight: The Constitutional Status of Juvenile Curfew Ordinances in California*, 24 HASTINGS CONST. L.Q. 219 (1996); Murray Goldman, Case Note, 12 U. MIAMI L. REV. 257 (1957); Donald M. Hall, Note, *Constitutional Law – "Locomotion' Ordinances as Abridgment of Personal Libert*, 32 TUL. L. REV. 117 *passim* (1957); Sam R. Hananel, Note, QUTB v. Strauss*: The Fifth Circuit Upholds a Narrowly Tailored Juvenile Curfew Ordinance*, 69 TUL. L. REV. 308 (1994); Martin P. Hogan, Note, Waters v. Barry*: Juvenile Curfews—The D.C. Council's "Quick Fix" for the Drug Crisis*, 1 GEO. MASON. U. CIV. RTS. L.J. 313 (1990); Susan M. Horowitz, Comment, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381 (1991); Craig M. Johnson, Comment, *It's Ten O'Clock: Do You Know Where Your Children Are?:* QUTB v. Strauss *and the Constitutionality of Juvenile Curfews*, 69 ST. JOHN'S L. REV. 327 (1995); Scott A. Kizer, Note, *Juvenile Curfew Laws: Is There a Standard?*, 45 DRAKE L. REV. 749 (1997); Brian J. Lester, Comment, *Is It Too Late for Juvenile Curfews?:* QUTB *Logic and the Constitution*, 25 HOFSTRA L. REV. 665 (1996); Jill A. Lichtenbaum, Note, *Juvenile Curfews: Protection or Regulation?*, 14 N.Y. L. SCH. J. HUM. RTS. 677 (1998); Martin E. Mooney, Note, *Assessing the*

The lower federal courts as well as the state courts have decided a number of cases involving juvenile curfews, which in recent years have become a popular mechanism for addressing juvenile crime.[180] Despite the fact that many of these laws differ in their particulars, some issues remain constant.

Review of juvenile curfews presents issues similar to those confronted by the Court in its prior right to travel cases. The alleged infringement on liberty caused by juvenile curfews is fairly similar to that allegedly caused by durational residency requirements—both sorts of regulations are attacked on the grounds that they infringe upon citizens' freedom of movement. Residency requirements are alleged to restrict interstate migration, while juvenile curfews are alleged to unconstitutionally restrict movement within a given jurisdiction. Thus, juvenile curfews present an interesting context in which the Court could clarify its fundamental rights jurisprudence.

Indeed, the confusion among the lower courts regarding the type of scrutiny to apply in various contexts in reviewing fundamental rights claims under the Fourteenth Amendment is evidenced in a stark way in the context

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Constitutional Validity of Juvenile Curfew Statutes, 52 NOTRE DAME L. REV. 858 (1977); Peter L. Scherr, Note, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163 (1992); Kevin C. Siebert, Note, *Nocturnal Juvenile Curfew Ordinances: The Fifth Circuit "Narrowly Tailors" a Dallas Ordinance, But Will Similar Ordinances Encounter the Same Interpretation?*, 73 WASH. U. L.Q. 1711 *passim* (1995); Regina M. Ward, Comment, 1 VILL. L. REV. 51 (1956); Natalie M. Williams, Comment, *Updated Guidelines for Juvenile Curfews:* City of Maquoketa v. Russell, 79 IOWA L. REV. 465 (1994); Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163 (1984) [hereinafter *Harvard Note*]; Note, *Constitutional Law–Juvenile Rights–Juvenile Curfew Ordinance Does Not Violate Constitutional Rights of Minors*, 54 TEX. L. REV. 812 (1976); Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PA. L. REV. 66 (1958); Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693 (1994); Note, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109 (1977) [hereinafter *Michigan Note*].

[180] *See* Johnson, *supra* note 179, at 333–34 ("Statistics indicate . . . that juvenile curfews, once implemented, can significantly reduce the levels of juvenile crime."); Federle, *supra* note 179, at 1328 ("Juvenile curfew laws are enjoying a resurgence despite the unconstitutionality of most curfew laws applicable to adults. Municipal and county governments promulgate a majority of the juvenile curfew laws through the exercise of their general police powers and, in recent years, the number of such ordinances has proliferated." (footnotes omitted)); Lester, *supra* note 179, at 696–97 ("Recently, the rise in juvenile crime has forced many politicians to turn to curfews to control crime. As a result, the debate on the effectiveness of juvenile curfews has been rekindled, leading to the same discussion that occurred 100 years ago."); Lichtenbaum, *supra* note 179, at 679 ("Most states enact curfews to protect minors from becoming victims of crimes that occur in the late evening and early morning hours."); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 555 & n.11 (1997) ("[A]pproximately 150 major American cities . . . have adopted juvenile curfews of one sort or another.")

of judicial review of juvenile curfews.[181] Some judges have concluded that such curfews should be subjected to strict scrutiny because they burden a

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[181] *See* Chen, *supra* note 179, at 131–32 ("As quickly as lawmakers have enacted youth curfews, children, their parents, and constitutional rights advocates have challenged the laws on the grounds that they represent an unjustifiable state infringement of individual rights. The case law these challenges have generated, however, has failed to define a clear set of principles for evaluating youth curfews." (footnote omitted)); Freitas, *supra* note 179, at 245 ("It is evident that courts across the country are searching for guidance on the general constitutionality of municipally imposed juvenile curfews."); Horowitz, *supra* note 179, at 383 (observing that "the courts have not reached a consensus on the constitutionality of [juvenile] curfews"); Kizer, *supra* note 179, at 756 ("Although some similarities are evident between traditional juvenile rights issues and juvenile curfew laws, there is no clear framework for analysis. The Supreme Court's reluctance to take an affirmative stance on juvenile curfew laws is likely to create a lack of uniformity and confusion among lower federal and state courts."); Lichtenbaum, *supra* note 179, at 686 ("[B]ecause different courts have analyzed juvenile curfews differently, there have been inconsistent results, where some curfews were upheld while others were invalidated."); Scherr, *supra* note 179, at 176–77 ("[T]here is presently no precedential method for determining minors' rights relative to those of adults in the curfew ordinance context. The Supreme Court's failure to establish a comprehensive framework for analyzing minors' rights has perpetuated the lower courts' apparent difficulty in assessing the constitutional validity of juvenile curfew ordinances. The lower courts' problems in determining the validity of juvenile curfews is characterized by their inconsistent application of various levels of scrutiny to equal protection and substantive due process analyses of the curfew ordinances concerning minors' rights." (footnotes omitted)); *Harvard Note*, *supra* note 179, at 1167–68 ("[A]lthough it is clear that children's rights are not coextensive with the rights of adults, confusion persists as the Court continues to determine the scope of children's rights on a case-by-case basis without constructing a practical, comprehensive framework for analysis.").

An interesting example of the extent of the disagreement among federal judges concerning the appropriate standard to apply in reviewing the constitutionality of juvenile curfews is found in a recent en banc opinion by the D.C. Circuit, *Hutchins v. District of Columbia*, 188 F.3d 531, 534 (D.C. Cir. 1999) (plurality opinion). *Hutchins* involved a challenge to the constitutionality of the District of Columbia's juvenile curfew under the Fifth Amendment. Four judges concluded that no fundamental right was implicated and that the law should be upheld under rational basis review. Eight judges (including the four that thought the court should apply rational basis review) agreed that if some form of heightened scrutiny were applied, the law should be given "intermediate scrutiny" instead of strict scrutiny and that after review it "survive[d] heightened scrutiny." *Id.* at 541. Four judges expressly agreed that at least intermediate scrutiny applied. *See id.* at 562 (Rogers, J., dissenting in part and concurring in part). Two judges concluded that the curfew did not survive intermediate scrutiny. *See id.* at 564 (Rogers, J., concurring in part and dissenting in part) ("Some juvenile curfews may survive intermediate scrutiny, but the present curfew does not."). Finally, one of these two judges indicated that, while the curfew in his opinion did not survive even intermediate scrutiny, the most appropriate level of scrutiny to apply to the curfew would be strict scrutiny. *See id.* at 571 (Tatel, J., dissenting) ("Although I still believe that the curfew should be subject to strict scrutiny . . . I join Judge Rogers's conclusion that this curfew fails to survive even intermediate scrutiny.").

fundamental right.[182] Some have concluded that the curfews should be subjected to merely rational basis review.[183] Finally, based on dicta in certain Supreme Court cases regarding the rights of minors,[184] some judges have

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[182]*See, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997) ("[W]e apply strict scrutiny to our review of the [juvenile curfew] ordinance."); QUTB v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994) (applying strict scrutiny review to juvenile curfew ordinance); Waters v. Barry, 711 F. Supp. 1125, 1138–40 (D.D.C. 1989) (same); Brown v. Ashton, 611 A.2d 599, 609 (Md. App. 1992), *vacated*, 660 A.2d 447 (Md. 1995) (same); Allen v. City of Bordentown, 524 A.2d 478, 486 (N.J. Sup. Ct. Law Div. 1987) (same). *Cf.* S.W. v. State, 431 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983) (deciding that juvenile curfew law must reasonably relate to legitimate state purpose and not unduly limit individual freedoms).

[183]*See, e.g.*, Bykofsky v. Borough of Middleton, 401 F. Supp. 1242, 1265 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976) ("[T]he traditional rational basis test is the proper yardstick to utilize in determining the constitutionality of the [juvenile curfew] ordinance."), *cert. denied*, 429 U.S. 964 (1976); People *ex rel.* J.M., 768 P.2d 219, 223 (Colo. 1989) (applying "rationality" standard of review for juvenile curfew ordinance).

[184]*See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrowest sense, *i.e.*, the right to come and go at will."); Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion) ("[A]lthough children generally are protected by the same constitutional guarantees . . . as are adults, the State is entitled to adjust its legal system to account for children's vulnerability."); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults." (citations omitted)); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) ("The state's authority over children's activities is broader than over like actions of adults."); *see also* Federle, *supra* note 179, at 1351 ("The Supreme Court . . . has applied an 'intermediate-intermediate' level of scrutiny in those cases involving an infringement of a minor's privacy rights and has required the government to show only a 'significant state interest' to justify the restriction."); *Harvard Note*, *supra* note 179, at 1169–70 ("[C]ourts, pointing to the unique developmental traits of children, have afforded minors' rights a level of protection lower than that secured by traditional strict scrutiny. . . . The Court's confusion over the proper formulation of the standard of review results from the tension caused by the recognition that, while children are persons for constitutional purposes, they are simultaneously the subject of special state concern." (footnote omitted)); *id.* at 1169 ("[T]he Court's decisions reflect both a persistent unwillingness to engage in traditional strict scrutiny analysis and a continuing recognition that children's rights deserve considerably more protection than that offered by the rational relation test."). *But cf. In re* Gault, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."); Kizer, *supra* note 179, at 751 ("The United States Supreme Court has consistently held that minors are entitled to the same constitutional rights and protections as adults.").

The Court's discussion of juvenile rights in *Bellotti* has been particularly influential. *See* Federle, *supra* note 179, at 1337 ("The *Bellotti* . . . decision has structured much of the subsequent judicial analysis of juvenile curfew laws. Of the sixteen cases decided after 1979 that address the constitutional validity of juvenile curfew ordinances, twelve have cited to

concluded that the curfews should be subjected to some intermediate form of review.[185] This hybrid intermediate form of scrutiny has been justified on the ground that the fundamental rights of minors are more appropriately subject to greater regulation by the state.[186] Thus, courts are all over the map when it comes to choosing the appropriate framework for analyzing the constitutionality of juvenile curfews. Indeed, because of the confusion, many times it is difficult to categorize the test applied.

Moreover, the level of review applied to juvenile curfews does not seem to be outcome-determinative. Some judges have concluded that juvenile curfews pass constitutional muster even after applying strict scrutiny.[187] Other judges have concluded that juvenile curfews do not survive strict scrutiny.[188] Somewhat less surprising is the fact that judges have differed concerning

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Bellotti. . . ."); Horowitz, *supra* note 179, at 383 ("In post-*Bellotti* decisions, all lower courts deciding the constitutionality of juvenile curfews have adopted and applied . . . [the *Bellotti*] test."). In *Bellotti*, the Court stated that juvenile rights and adult rights were not necessarily the same, relying on three factors inherent in youth: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti*, 443 U.S. at 634.

[185] *See, e.g., Hutchins*, 188 F.3d at 563–64 (Rogers, J., concurring in part and dissenting in part) ("When a minor's fundamental right to movement is at issue, intermediate rather than strict scrutiny is most appropriate."); Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999) ("We . . . believe intermediate scrutiny to be the most appropriate level of review and must determine whether the ordinance is 'substantially related' to 'important' governmental interests.").

[186] As one commentator has observed,

> A particular conception of rights animates the courts' discussion about the constitutional validity of juvenile curfew laws. Although children do have some constitutional rights, their rights and those of adults are not coextensive. The courts attribute the diminished constitutional status of children to their peculiar vulnerability and immaturity as well as the limitations imposed by parental authority. The state, then, may regulate the activities and conduct of minors to a far greater extent than would be permissible in the case of adults. This connection between children's helplessness and immaturity, and their subjugation to parental or state control suggests that rights are tied to the capacities of the rights holder.

Federle, *supra* note 179, at 1339–40; *see also* Lichtenbaum, *supra* note 179, at 696–97 ("Since minors do not always have the same fundamental rights as adults, courts have used different levels of scrutiny to analyze the curfew ordinances. . . . [T]he inconsistent results by different courts regarding the fundamental rights of minors . . . produce inconsistent results regarding juvenile curfew ordinances in the area of substantive due process." (footnote omitted)); *Harvard Note*, *supra* note 179, at 1163 ("Courts have . . . upheld juvenile curfew ordinances on the basis of the often cited but seldom clarified principle that the rights of children are subject to greater restrictions than are the rights of adults." (footnote omitted)).

[187] *See* QUTB v. Strauss, 11 F.3d 488, 494 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994).

[188] *See Nunez*, 114 F.3d at 949; *Waters*, 711 F. Supp. at 1138–40; *Brown*, 611 A.2d at 609; *Allen*, 524 A.2d at 486; *cf. S.W.*, 431 So.2d at 341.

whether juvenile curfews pass constitutional muster under intermediate or heightened scrutiny.[189] However, as might be expected, judges applying only rational basis review generally find that juvenile curfews are not constitutionally flawed.[190] Indeed, the majority of courts seem to recognize the constitutional legitimacy of government regulation of minors' movement under certain conditions.[191] Nonetheless, there is widespread disagreement concerning the form of permissible regulation. Moreover, there is confusion concerning the appropriate method for reconciling the constitutionality of such regulations with the Court's Fourteenth Amendment jurisprudence.

While differences among various curfews might serve to explain differences in outcome given similar levels of scrutiny, these disparate outcomes are still troubling if one believes that there should be some degree of correlation between the level of scrutiny applied to challenged legislation and the likelihood that that legislation will be struck down. If one believes that no such correlation should exist or that any differences in the particular curfews reviewed by various courts explain the discrepancies, then there is no problem. However, the outcomes achieved thus far undoubtedly raise questions concerning the coherence of the law in this area.

Should the Court attempt to apply the Privileges or Immunities Clause in reviewing the constitutionality of juvenile curfews, the analysis might proceed as follows. The Court must first discern whether the curfews implicate a "privilege" or "immunity" of citizens of the United States. While there might be some dispute concerning the nature of the fundamental liberty interest at issue, examination of the history of such curfews should resolve this first issue. The right of locomotion has been recognized in the abstract sense as a fundamental right of citizens.[192] Thus, at a minimum, since juvenile

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[189]*Compare Hutchins*, 188 F.3d at 534–48 (Silberman, J.) (plurality opinion) (upholding curfew under intermediate scrutiny) *and Schleifer*, 159 F.3d at 846, *with Hutchins*, 188 F.3d at 553–70 (Rogers, J., concurring in part and dissenting in part) (arguing curfew ordinance not "adequately tailored" to "important" government interest should not survive intermediate scrutiny).

[190]*See J.M.*, 768 P.2d at 223; City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989).

[191]Federle, *supra* note 179, at 1346–47 ("Although there is no consensus among the courts as to the constitutionality of juvenile curfew laws, most recognize the state's authority to impose some restrictions upon the free movement of minors at night." (footnote omitted)).

[192]*See* 1 WILLIAM BLACKSTONE, COMMENTARIES *134 ("[P]ersonal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct."); *see also Kent*, 357 U.S. at 125–26 ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. . . . Freedom of movement across frontiers . . . and inside frontiers as well, was a part of our heritage."); Williams v. Fears, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is

curfews regulate the right of a certain portion of the citizenry to move about freely, they probably implicate a fundamental privilege or immunity of citizens of the United States, making the Amendment applicable. Note that the fundamental liberty interest at issue here would probably not meet the test announced by the *Slaughter-House* majority since the right of locomotion is a prototypical privilege of *state*, and not *national*, citizenship. It is local in character as long as citizens are not moving among the states, and certainly was not among the privileges and immunities of national citizenship enumerated by Justice Miller in his majority opinion in *Slaughter-House*.[193]

Having identified at least one potential "privilege" or "immunity" of citizenship implicated by the juvenile curfew, the Court would then have to determine whether the curfew represented a legitimate exercise of the state's police power or whether it unconstitutionally abridged the privileges and immunities of United States citizens. Here, again, an examination of the historical record proves useful. As a number of courts examining the issue have concluded, legislatures have issued curfews in emergency and non-emergency situations for hundreds of years.[194] Despite this fact, many courts have felt constrained to strike down juvenile curfews as a result of intervening Supreme Court precedent discussed above. Many courts are faced with the following dilemma. If they conclude, as seems warranted, that the curfews do implicate a fundamental right, they must then apply strict scrutiny in reviewing the curfew under which almost no legislative enactment can survive. Thus, although curfews historically have been enacted without any thought as to their constitutionality, modern courts might be compelled to strike them down as a result of the intricate, and arguably less than coherent, modern structure developed by the Supreme Court to address alleged infringements of fundamental rights.

Alternatively, they might hold against the weight of the evidence that the curfews do not implicate any fundamental right. Here, definition of the

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an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."). *But see Hutchins*, 188 F.3d at 537 (contending that statements by Court concerning a general right of locomotion "are only dicta" and that "the cases involved travel across borders, not mere 'locomotion'"); *Hartch*, *supra* note 2, at 476 ("In terms of original intent, there is no evidence that the Framers regarded the right to travel as a fundamental right.").

[193] *See Slaughter-House*, 83 U.S. (16 Wall.) at 79.

[194] *See, e.g.*, Thistlewood v. Trial Magistrate for Ocean City, 204 A.2d 688, 690–91 (Md. 1964) (discussing history of curfew ordinances dating back to William the Conqueror); Johnson, *supra* note 179, at 330–31 ("These ordinances are not a new phenomenon; some cities have longstanding curfews, and the new movement may merely involve enforcing a law passed decades earlier." (footnote omitted)); Scherr, *supra* note 179, at 164 n.5 (examining widespread history of juvenile curfew ordinances in United States).

implicated liberty interest is key. If the interest is defined as the right of juveniles to wander the streets at any time they wish, then courts can more readily rule that this is not a fundamental liberty interest under the Due Process Clause. If the interest is defined more generally as the right of locomotion, it becomes more difficult for the courts to deny that the liberty interest involved is fundamental. Indeed, many courts seem to have engaged in such semantical machinations as is evidenced by the many divergent results achieved upon review of various curfew ordinances.[195] But we must ask ourselves, do we really want the courts to be engaging in such word games? Do we really want to give courts incentives to forgo recognizing that certain rights are fundamental?

If the analytical structure outlined above is applied, courts might avoid such undesirable outcomes. Under that structure, a reviewing court would examine the historical record. It might conclude that the right to move about is fundamental and therefore the Fourteenth Amendment is applicable. However, it would then review the historical record concerning the nature of the police power as conceived at the time of ratification of the Amendment and might well find that curfews—particularly those applicable to juveniles—were deemed legitimate regulations of citizens' fundamental right to move about. It would then uphold the curfew, consistent with historical practice.

This does not mean, however, that the reviewing court would necessarily uphold every aspect of the curfew under review. For example, a number of courts have considered challenges to juvenile curfews on the ground that they

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[195]*See supra* notes 187–91 and accompanying text.

were unconstitutionally vague,[196] abridged minors' free speech rights,[197] or unconstitutionally interfered with parents' role in childrearing.[198] If there is

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[196]*See Hutchins*,188 F.3d at 547–48; *Nunez*, 114 F.3d at 940; Naprstek v. City of Norwich, 545 F.2d 815, 818 (2d Cir. 1976); *Bykofsky*, 401 F. Supp. at 1248–53; *Ashton*, 660 A.2d at 447. One court has stated the test for vagueness in the curfew context as follows: "To avoid unconstitutional vagueness, an ordinance must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *Nunez*, 114 F.3d at 940–44. The Supreme Court has underscored the fact that vague punitive laws may chill First Amendment freedoms:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432–33 (1963) (citation omitted).

[197]*See, e.g., Hutchins*, 188 F.3d at 546 (discussing First Amendment challenge to juvenile curfew ordinance); City of Maquoketa v. Russell, 484 N.W.2d 179, 183 (Iowa 1992) ("Whenever the First Amendment rights . . . require one to move about, such movement must necessarily be protected under the First Amendment."); *Allen*, 524 A.2d at 483 (discussing constitutional rights and standards as applied to minors).

Many of the challenges to juvenile curfews alleging abridgement of free speech rights include assertions that the laws are overbroad. *See Nunez*, 114 F.3d at 949–51; *Johnson*, 658 F.2d at 1074; *Waters*, 711 F. Supp. at 1132–37; McCollester v. City of Keene, 586 F. Supp. 1381, 1385–86 (D.N.H. 1984). The overbreadth doctrine developed by the Court allows plaintiffs "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Some commentators have claimed that challenges based on overbreadth often are "so closely related to the void for vagueness doctrine that the concepts often merge." Freitas, *supra* note 179, at 233. Other commentators, however, have argued that "the doctrines are not coextensive." Siebert, *supra* note 179, at 1723 n.64.

[198]*See Bellotti*, 443 U.S. at 639 n.18 (noting that Constitution prevents "undue, adverse interference by the State" in childrearing); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("[T]he rights to conceive and raise one's children have been deemed 'essential.'"); *Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking down law that prohibited teaching of subjects in foreign

some aspect of the ordinance under consideration that exceeds the state's police power or which violates some other constitutional directive, then surely it must receive constitutional scrutiny resulting perhaps in part of the curfew being voided. Indeed, much of the litigation concerning juvenile curfews has been aimed at the types of defenses that are built into the law to protect minors' liberty interests.[199] Nonetheless, as for the general question concerning whether legislatures may enact curfews regulating minors' right of locomotion, based on the historical interpretation of courts examining the issue, there seems to be nothing particularly constitutionally problematic about such a regulation. Despite this fact, this seemingly easy constitutional question has resulted in a wealth of confusion and divergent outcomes among the lower federal courts—confusion that is arguably attributable to the Court's own Fourteenth Amendment jurisprudence.

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languages as "arbitrary and without reasonable relation to any end within the competency of the State"); *see also* Federle, *supra* note 179, at 1360 (observing that "[i]n addition to procedural due process challenges, the courts have also considered claims based on violations of parents' First Amendment rights"); *Harvard Note*, *supra* note 179, at 1178–79 ("A long line of cases has established the Court's view that child-rearing is the role of parents, not of impersonal political institutions. . . . The principle of minimal state interference with parental guidance serves not only to preserve family autonomy, but also to legitimate state authority. Juvenile curfews undercut both of these goals by allowing the state to usurp parental authority over children's liberty." (footnote omitted)).

Courts examining the constitutionality of juvenile curfews have entertained claims that curfews can impermissibly erode parental child rearing rights. *See Hutchins*, 188 F.3d at 545 ("Since the curfew generously accommodates parental rights, . . . it does not unconstitutionally infringe on such rights."); *Schleifer*, 159 F.3d at 852–53 ("The limited curtailment of juvenile liberty in the ordinance [does not violate] a parent's rights."); *Nunez*, 114 F.3d at 945; *Johnson*, 658 F.2d at 1073–74 (noting that curfew "inhibits rather than promotes parental role in child-rearing"); *McCollester*, 586 F. Supp. at 1386 ("[T]he ordinance restricts the parent's protected liberty interest in family and child rearing"); *see also* Lichtenbaum, *supra* note 179, at 698 ("Courts have safeguarded parental rights from state interference when concerning the upbringing of their children."). *But see* Lichtenbaum, *supra* note 179, at 701 ("Although the Court has upheld parents' right to direct their childrens' upbringing, this right is not absolute. When dealing with legitimate state concerns, specifically those affecting the welfare of children and the general public, the state may lawfully act to protect those interests." (footnote omitted)).

[199] *See QUTB*, 11 F.3d at 493–94 (concluding that in undertaking strict scrutiny of curfew laws, "the defenses are the most important consideration in determining whether . . . [the] ordinance is narrowly tailored"); Johnson, *supra* note 179, at 341 ("It is clear . . . based on the existing cases, that the constitutionality of a juvenile curfew depends on the number and types of defenses it contains."); *Michigan Note*, *supra* note 179, at 143 ("The greatest difficulty in designing an effective yet constitutionally acceptable curfew ordinance lies in specifying the exceptions that are to be provided. An ordinance that is so general that it prohibits too much innocent behavior might well fail to survive constitutional scrutiny.").

VI. CONCLUSION

While it seems unlikely that the Court will soon engage in a wholesale revision of its Fourteenth Amendment jurisprudence by abandoning the Due Process Clause in favor of the Privileges or Immunities Clause as a source of the substantive guarantee for certain fundamental rights, the possibility suggested by *Saenz* presents intriguing questions for constitutional scholars interested in the original meaning of the Fourteenth Amendment. As this Article has attempted to demonstrate, however, even if the Court does abandon the Due Process Clause in favor of the Privileges or Immunities Clause, the alterations such a switch might entail in the Court's Fourteenth Amendment jurisprudence still remain unclear. This is unfortunate. Displacement of the Due Process Clause with the Privileges or Immunities Clause might go a long way toward clarifying the Court's arguably convoluted Fourteenth Amendment jurisprudence.

Indeed, this was the conclusion of Justice Thomas, who stated in his *Saenz* dissent that the Court might consider whether the Clause could supplant certain portions of the Court's substantive due process and equal protection jurisprudence.[200] Justice Thomas, however, further observed that resorting to the Privileges or Immunities Clause may serve not to clarify existing doctrine, but rather as a touchstone for "inventing new rights" not contemplated by its framers.[201] Thus, while its potential as a source of clarification remains great, resurrection of the Privileges or Immunities Clause should only be undertaken after careful examination of the text and history of the Amendment lest the Court inject further confusion into an already confused domain.

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[200] *See Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).

[201] *See supra* notes 63–64 and accompanying text.

Utah's Medical Malpractice Prelitigation Panel: Exploring State Constitutional Arguments Against a Nonbinding Inadmissible Procedure

I. INTRODUCTION

Beginning in 1976, the Utah Legislature enacted the Utah Health Care Malpractice Act ("the Malpractice Act") and has amended the Act regularly since its initial passage.[1] Like many other states during the 1970s and 1980s, Utah sought to address the "medical malpractice crisis"[2]—a national rise in malpractice insurance premiums that was attributed to medical malpractice damage awards.[3] This crisis consists of two premises: that juries were awarding excessive malpractice damages more frequently than ever before and that these awards caused a rise in malpractice insurance premiums. The existence of the crisis was largely supported by anecdotal evidence.[4] Other likely causes of higher premiums, such as the "cyclical pricing and investment practices of insurance companies" were ignored.[5] Insurance

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[1]*See* UTAH CODE ANN. §§ 78-14-1 to -17 (1996 & Supp. 1999) (codifying Utah Health Care Malpractice Act, ch. 23, 1976 Utah Laws 90).

[2]The Malpractice Act's complete statement of purpose provides:

> The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.
>
> In view of theses recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide . . . reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

UTAH CODE ANN. § 78-14-2 (1996).

[3]*See id.*

[4]*See* Lee v. Gaufin, 867 P.2d 572, 588 (Utah 1993) (finding that "increased costs of health care were not caused by significant increases in malpractice lawsuits or claims in Utah").

[5]*Id.*

companies and practitioners pushed for damage caps and other reform, and state legislatures across the country responded. In more recent years, however, courts and commentators have increasingly questioned the factual existence of any crisis, particularly in Utah.[6] It is thus worth examining the appropriateness and effectiveness of limiting patients' legal rights to fix a tort system that was never broken.

A peculiar irony of the "crisis" in medical malpractice insurance in Utah is that carrying medical malpractice insurance is not required as a condition of obtaining a license to practice medicine.[7] In other words, in Utah you can practice medicine without malpractice insurance, but operating a motor vehicle without insurance is a class B misdemeanor.[8] Rushing to address the crisis and fearing that practitioners would quit their jobs, the legislature attempted to control the cost of a purely optional expense.[9] By curtailing common law tort remedies for the victims of medical malpractice, the legislature sacrificed a real right to security of one's person in favor of a superfluous business subsidy.

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[6]*See, e.g.*, Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365 *passim* (1989) (discussing inability of tort reforms to provide just results for medical malpractice victims); Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 24–29 (1995) (asserting that insurance crisis is creation of large corporations and insurance companies); *Lee*, 867 P.2d at 584–89 (discussing extensive evidence that medical malpractice crisis was simply not true for Utah); James E. Magelby, *The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution*, 21 J. CONTEMP. L. 217, 242–50 (1995) (explaining Justice Durham's skepticism of "insurance crisis"); Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels* (visited Dec. 22, 1999) <http://www.le.state.ut.us/audit/93_07rpt.pdf> (noting Utah Supreme Court's skepticism that an insurance crisis exists).

[7]Nowhere was the author able to find a legal obligation in Utah for physicians and surgeons to carry malpractice insurance. *See, e.g.*, UTAH CODE ANN. § 58-67-401 (1998) (detailing grounds for denial of license); UTAH CODE ANN. § 58-67-302 (Supp. 1999) (same); UTAH ADMIN. CODE R156-67-302a to -302e (2000) (specifying qualifications for licensure). *See also* Jones v. State Bd. of Med., 555 P.2d 399, 408 (Idaho 1976) (upholding maintenance of malpractice insurance as condition of licensure after decision striking malpractice damage cap as unconstitutional); Johnson, *supra* note 6, at 1372–73, 1387 (discussing failure of premiums to deter negligence because most premiums are set according to risk of specialty not according to practitioner's track record and proposing requirement that physicians maintain adequate insurance coverage).

[8]*Compare* UTAH CODE ANN. § 41-12a-302 (1998) (providing that driving without insurance is a class B misdemeanor), *with* UTAH CODE ANN. § 58-67-302 (1998) (providing qualifications for licensure to practice medicine).

[9]*See* UTAH CODE ANN. § 78-14-2 (1996) (describing crisis).

While many of the provisions of the Malpractice Act arguably violate the Utah Constituti on,[10] this Comment specifically focuses on constitutional infirmities in the mandatory prelitigation panel, particularly given the Malpractice Act's limitations on damages. Part II describes the Malpractice Act's mandatory prelitigation panel and limits on damages. Part III presents a sample of constitutional challenges to similar prelitigation panels throughout the United States, including challenges based on state constitutional guarantees of access to the courts, equal protection, separation of powers, and trial by jury. Part IV applies this constitutional analysis to the Utah Medical Malpractice Act and argues that the mandatory prelitigation panel violates the Utah Constitution, buttressed by the constitutional infirmities of the Malpractice Act's limitations on damages. Part V concludes that the prelitigation panel is a useless impediment to resolving medical malpractice claims, and that the best cure for the panel's constitutional defects is the removal of this section.

II. THE EVOLUTION OF UTAH HEALTH CARE MALPRACTICE ACT: RESPONDING TO A QUESTIONABLE CRISIS

Because of alleged increases in rates of medical malpractice insurance and in the amounts of settlements and judgments,[11] the tort system was reformed by statute to limit damages, restrict the statute of limitations for bringing medical malpractice claims, and "expedite early evaluation and settlement of claims."[12] This was accomplished by providing for a $250,000 cap on all noneconomic damages in medical malpractice actions except for punitive damages.[13] In addition, awards must be reduced by any amount paid to the plaintiff from collateral sources,[14] plaintiffs cannot specify a dollar

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[10]For example, section 78-14-4 provides for a brief, two-year statute of limitations for medical malpractice claims. *See* UTAH CODE ANN. § 78-14-4 (1996). The Utah Supreme Court held the statute unconstitutional as applied to minor plaintiffs in *Lee v. Gaufin*, 867 P.2d 572, 589 (Utah 1993). Similarly, section 78-14-8 mandates giving the provider ninety days' notice prior to commencing suit. *See* UTAH CODE ANN. § 78-14-8 (1996). *See* Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 32 (Utah 1981) (same); Yates v. Vernal Family Health Ctr., 617 P.2d 352, 354 (Utah 1980) (same); McGuire v. University Med. Ctr., 603 P.2d 786, 787 (Utah 1979) (upholding constitutionality of notice provision).

[11]*See* Lee v. Gaufin, 867 P.2d 572, 587–88 (Utah 1993) (noting that ratio of insurance costs to physicians' incomes has not changed significantly) (citing Glen O. Robinson, *The Medical Malpractice Crisis of the 1970s: A Retrospective*, 49 L. & CONTEMP. PROBS. 5, 31 (1986)).

[12]UTAH CODE ANN. § 78-14-2 (1996).

[13]*See id.* § 78-14-7.1.

[14]*See id.* § 78-14-4.5.

amount of damages in the complaint,[15] and plaintiff attorney's contingency fees are capped at 33 1/3% of recovery.[16] The Malpractice Act also provides mandatory periodic payment for future damages of amounts exceeding $100,000,[17] and except for future earnings, payment automatically ends with the death of the successful plaintiff.[18]

In 1985, the Utah Legislature added to these restrictions by amending the Malpractice Act to provide for the mandatory, non-binding review of medical malpractice claims by a panel as a compulsory condition precedent to commencing litigation.[19] The panel is convened under the Division of Occupational and Professional Licensing ("DOPL") within 60 days after the plaintiff files the notice of intent to commence an action.[20] The panel itself consists of three members: one lawyer who has indicated a willingness to serve on the panel and has completed DOPL training serves as chair;[21] a practitioner with the same specialty as the defendant-practitioner who is obliged to serve when called by DOPL, much like a juror;[22] and a lay panelist who has completed DOPL training.[23]

Proceedings by the panel need not be recorded,[24] and they are informal and nonbinding.[25] The process is not subject to the Utah Administrative Procedures Act,[26] and judicial or other review of the process is prohibited.[27] Participants may agree to treat the panel proceeding as binding arbitration.[28] If the plaintiff proceeds to trial after the panel's determination, however, panel proceedings are inadmissible, and panelists are immune from civil liability and cannot be compelled to testify at trial.[29] The panel has at least

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[15]*See id.* § 78-14-7.

[16]*See id.* § 78-14-7.5.

[17]*See id.* § 78-14-9.5.

[18]*See id.* § 78-14-9.5(6).

[19]*See* Prelitigation Panel Requirement for Medical Malpractice Claims, ch. 238, 1985 Utah Laws 652, (codified at UTAH CODE ANN. § 78-14-12 to -16 (1996 & Supp. 1999)).

[20]*See* UTAH CODE ANN. § 78-14-12(2) (Supp. 1999).

[21]*See id.* § 78-14-12(4)(a) (1996 & Supp. 1999).

[22]*See id.* § 78-14-12(4)(b). If the defendant is a hospital or employee, this panelist is a person serving in a hospital administration position in the same area of responsibility at issue. *See id. See also* UTAH ADMIN. CODE R156-78A-8(3)(a)(iv) to -(3)(c) (2000) (describing hospital administrator position). Practitioners must serve at the request of the Division unless excused from service. *See* UTAH CODE ANN. § 78-14-12(5) (Supp. 1996 & 1999).

[23]*See* UTAH CODE ANN. § 78-14-12(4)(c) (Supp. 1999).

[24]*See id.* § 78-14-13(1) (1996).

[25]*See id.* § 78-14-12(1)(c) (1996 & Supp. 1999); *id.* § 78-14-13(4) (1996).

[26]*See id.* § 78-14-12(1)(c) (1996 & Supp. 1999).

[27]*See id.* § 78-14-14 (1996).

[28]*See id.* § 78-14-16.

[29]*See id.* § 78-14-15(1), (2).

180 days to complete the proceedings.[30] Further, any evidence collected by the panel is returned to the party providing the evidence at the end of the panel proceeding. Therefore, the panel's existence does nothing to streamline discovery if the parties proceed to trial.[31] The only safeguard against bias or prejudice on the part of panel members is an oath certifying that each panel member has no bias or conflict of interest in the matter.[32] Proceedings are closed to the public, confidential, privileged, and immune from civil process.[33] Finally, because proceedings are informal, parties have no right to cross-examine, rebut, or demand any procedural right permitted at trial.[34]

In 1993, the Utah Legislative Auditor General published a report ("Audit") to examine the effectiveness of Utah prelitigation panels. The Audit specifically focused on whether panels decreased the number of claims filed in court and whether panels are fair and impartial.[35] The Audit found that 31% of claims were dropped after prelitigation, 8% were settled, and 60% were filed in court after the proceedings.[36] Of the cases that were dropped after prelitigation proceedings, the greatest percentage of claims dropped was attributed to inexperienced attorneys who may have used the process to screen cases.[37]

The Audit indicated that regardless of the panel's decision, both plaintiffs and defendants were reluctant to settle until after the case had been filed in court.[38] For cases that the panel found meritorious, a majority were filed in court because defendants demanded more proof to settle the claim.[39] The Audit suggested that defendants delayed settlement to ensure that the plaintiff filed suit within the statute of limitations, to force the

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[30]*See id.* § 78-14-12(3)(b) (Supp. 1999).

[31]*See id.* § 78-14-13(1) (1996).

[32]*See id.* § 78-14-12(6) (1996 & Supp. 1999). *See also* UTAH ADMIN. CODE § R156-78A-8 (2000) (creating no procedure to challenge panelist for bias or conflict); UTAH CODE ANN. § 78-14-14 (1996) (prohibiting judicial or other review). The Administrative Code does provide a time period for filing motions directed toward "the composition of the panel," but does not provide any standard or rule for disqualification of a panel member. UTAH ADMIN. CODE § R156-78A-6(5)(b)(iii) (2000).

[33]*See* UTAH CODE ANN. § 78-14-12(1)(d) (1996 & Supp. 1999); UTAH ADMIN. CODE R156-78A-12 (2000).

[34]*See* UTAH CODE ANN. § 78-14-13(5)(b) (1996).

[35]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) <http://www.le.state.ut.us/audit/93_07rpt.pdf>.

[36]*See id.* at 13.

[37]*See id.* at 21. "Inexperienced attorneys" were those who handled only one or two claims over a five year period. *See id.* at 10.

[38]*See id.* at 14, 24.

[39]*See id.* at 26.

plaintiff to meet the burden of proof, or because the defendant believed that the plaintiff could show little or no damages at trial.[40] Additionally, where both the practitioner and the insurer must agree to settlement, either party may impede settlement by insisting on formal discovery before giving consent.[41] This strategy, is ironic, though, because the prelitigation process was designed to help defendants by keeping claims out of the courts. For cases ruled nonmeritorious, a majority were filed in court, indicating that many plaintiffs did not trust the prelitigation process.[42] In essence, the Audit found that neither side had incentive to settle until formal discovery had been accomplished after filing in court.[43]

The lack of formal discovery, combined with the failure of prelitigation procedures to induce settlements, provides an incentive to plaintiffs to refrain from fully presenting their case before the panel. One plaintiff attorney commented:

> Many of the defendant's attorneys use the prelitigation process in order to obtain factual information from the plaintiff before any of the doctors or medical providers are deposed. Therefore, there are significant disadvantages to 'exposing your hand' at the prelitigation process . . . there is no incentive for me to risk exposing the factual details of my case before the defendant's depositions are taken. Plaintiff attorneys tell us they would be more willing to participate in the process if the defense would show a greater willingness to settle claims that are ruled meritorious.[44]

Statistically, both sides may be justified in doubting the ability of the panel to determine the outcome at trial. For both meritorious and nonmeritorious cases, the panel's opinion is reversed in roughly one third of the cases going to trial.[45] For this reason alone, many parties with nonmeritorious rulings were willing to accept a thirty percent chance of winning at trial.

In addition to being a poor predictor of legal heart, prelitigation costs between $1,300 and $2,000 for a two-hour hearing.[46] Further, the Audit found an inconsistency in panelists' interpretation of their own roles.[47]

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[40]*See id.* at 26.
[41]*See id.* at 28.
[42]*See id.* at 14.
[43]*See id.* at 28.
[44]*See id.* at 26.
[45]*See id.* at 17, fig. V.
[46]*See id.* at 30.
[47]*See id.* at 40.

Some attempt to remain impartial, while others act as an advocate for one side or the other.[48]

Both plaintiff and defense attorneys felt that any attempt to make the panel finding admissible in court would make the prelitigation process worse.[49] In states where panel findings are admissible, it was feared that plaintiffs may refuse to put on any evidence before the panel in order to challenge the panel ruling at trial. Similarly, in states where panel opinions are admissible, the process may be more cumbersome and time-consuming, therefore, increasing the likelihood that the process will be unconstitutional.[50] The Audit ultimately questioned "whether a strategy based on tort reforms alone will ever dramatically reduce the number and cost of medical malpractice claims."[51] These problems with Utah's panel, combined with the constitutional infirmities discussed below,[52] indicate that there is little practical or legal basis to maintain the panel process as a prerequisite to litigation.

III. OVERVIEW OF CHALLENGES TO MEDICAL MALPRACTICE PRELITIGATION PANELS UNDER STATE CONSTITUTIONS

In challenging the constitutionality of mandatory prelitigation review under state constitutions, several provisions may be implicated. These challenges, however, break down into four general classifications: First, Part A discusses mandatory review prior to litigation as a denial of access to the courts. This is sometimes approached under a due process analysis, but the scrutiny applied tends to be stricter where state constitutions contain an Open Courts Clause. As such, this part includes claims of denial of access and abrogation of constitutionally protected remedies. Second, Part B discusses equal protection arguments leveled at the disparate impact experienced uniquely by medical malpractice plaintiffs. Third, Part C addresses prelitigation panels as a violation of the separation of powers inherent in grants of judicial authority in state constitutions. This challenge may arise because jurisdiction is vested in a nonjudicial panel, or because the legislature interferes with the courts' power over procedure. Finally, Part D asks whether prelitigation panels may be challenged as a deprivation of the right to trial by jury. Further, Part D finds that plaintiffs may challenge

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[48] *See id.* at 40.

[49] *See id.* at 36–37.

[50] *See id.* at 37.

[51] *See id.*

[52] *See infra* Part IV (discussing possible challenge to Utah Health Care Malpractice Act under Utah Constitution).

either a prelitigation panel's infringement of the jury's fact-finding role or its impermissible delay of the right to trial by jury.

A. Open Courts: the Denial of Access and Abrogation of Guaranteed Remedies

Many states, including Utah, retain in their constitutions adaptations of the Magna Carta's guarantee of free and open courts, and the preservation of remedies for the redress of injury.[53] States that have an open courts constitutional provision may face challenges to prelitigation panels under either or both clauses. First, a medical prelitigation panel may impermissibly restrict access to the courts. Second, the panel procedure and restrictions on damages may contravene the guaranteed right to a remedy for injury to one's person.[54] States that lack an open courts provision, however, often approach these issues under the rubric of federal due process. Therefore, some courts in states that have an open courts provision may use due process as a starting point.

One important distinction between the Due Process Clause and the Open Courts Clause is that the Due Process Clause originally applied as a limitation on actions of the government against citizens, whereas the open courts provisions guaranteed access to the courts to obtain civil remedies against private parties.[55] This distinction has been muddied, primarily due to the lack of an open courts provision in the federal Constitution.[56] For statutes challenged under state or federal Due Process Clauses, courts generally uphold the statute under a rational basis scrutiny. However, state Open Courts Clauses in state constitutions generally provide "broader constitutional protections than those afforded by the Due Process Clause of

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[53]*See generally* Craftsman Builder's Supply, Inc., v. Butler Mfg. Co., 974 P.2d 1194, 1206–10 (Utah 1999) (Stewart, J., concurring) (examining roots of Utah's Open Courts Clause in Magna Carta). The Magna Carta provided:

> "[A]nd therefore every subject . . . for injury done to him in bonis [i.e., goods] in terris [land] vel persona [person] by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay."

Id. at 1206–07 (quoting Blackstone) (emphasis omitted) (changes in original).

[54]*See id.* at 1205–06 (describing right to a remedy in context of right of access).

[55]*See id.* at 1206 n.5.

[56]*But see* Jiron v. Mahlab, 659 P.2d 311, 312 (N.M. 1983) (finding First Amendment right to petition government for redress of grievances to some extent preserved open courts guarantee).

the Fourteenth Amendment."[57] For this reason, courts often apply stricter scrutiny to statutes challenged under a state Open Courts Clause.

In the context of prelitigation panels for medical malpractice, the existence of a panel as a prerequisite may abridge the right of access to the courts. Further, the specific powers of a panel, damage limitations, or statutes of limitations may abridge the corollary right to a remedy under a state's open courts clause. While these claims are related, they raise distinct issues discussed in turn below.

1. Denial of Access to the Courts

Where a state's constitution contains an open courts provision, prelitigation panels are likely to be unconstitutional. In *State* ex rel. *Cardinal Glennon Memorial Hospital for Children v. Gaertner*,[58] the Missouri Supreme Court struck down a mandatory prelitigation board as a violation of the Missouri open courts provision[59] by imposing the procedure "as [a] precondition to access to the courts."[60] Following an earlier Illinois case, *People* ex rel. *Christiansen v. Connell*,[61] the *Cardinal Glennon* court observed:

> It was stated that the objection was not to the length of the delay as such but rather to the fact that the delay was interposed before jurisdiction was obtained, and therefore, a litigant's right to seek immediate redress in the courts was violated. It was said that the enforced waiting period imposed by the statute not only caused a useless and arbitrary delay, but that delay, by abridging the right to file suit and have summons issued promptly, necessarily destroyed the remedies which depended on obtaining personal service on defendants.[62]

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[57]*Craftsman*, 974 P.2d at 1208.

[58]583 S.W.2d 107 (Mo. 1979).

[59]The Missouri open court's provision states that "the courts of justice shall be open to every person, and certain remedy afforded for injury to person, property, or character, and that right and justice shall be administered without sale, denial or delay.'" *Id.* at 110 (quoting MO. CONST. art. I, § 14).

[60]*Cardinal Glennon*, 583 S.W.2d at 110.

[61]118 N.E.2d 262 (Ill. 1954). The Illinois open courts provision read: Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay.

See id. at 265 (quoting ILL. CONST. art. II, § 19 (1954)).

[62]*Cardinal Glennon*, 583 S.W.2d at 110.

The Missouri Supreme Court distinguished *Comiskey v. Arlen*,[63] where the screening panel was convened after the plaintiff filed the action in court, and the panel acted under the court's jurisdiction.[64] Because the Missouri's Constitution explicitly preserves the right of access to the courts,[65] the court held that a mandatory prelitigation panel, operating before the court had accepted jurisdiction, necessarily violated the Missouri open courts provision.[66]

Three aspects in particular vexed the court. First, the panel had powers that the parties could not exercise, such as the power to issue subpoenas.[67] Second, rights of discovery were denied or delayed by the operation of the panel.[68] Third, complications could arise with either statutes of limitations or unknown parties, who could not become known because of limits on prelitigation discovery.[69] The *Cardinal Glennon* court did not address the specific scrutiny required under the Missouri Constitution, nor did the court apply any rational basis test.[70]

Florida courts have allowed plaintiffs access to courts despite a mandatory panel statute based on the state open courts guarantee. In *Aldana v. Holub*,[71] a Florida mediation act was held irreparably unconstitutional because strict jurisdictional periods operated in an arbitrary and capricious manner, and allowing continuances or extensions would constitute a denial of access to the courts.[72] Ten years later, the Florida Supreme Court revisited this issue in *Adventist Health System/Sunbelt, Inc. v. Hegwood*[73] by permitting the plaintiff to file a bill of discovery prior to a mandatory panel determination.[74] The plaintiff intended to depose twenty-six hospital personnel, some of whom were no longer associated with the hospital.[75] For this reason, some of the employees could not be deposed under the Florida prelitigation panel's informal discovery process.[76] Plaintiff filed a pure bill

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[63]390 N.Y.S.2d 122 (N.Y. App. Div. 1976).

[64]*See Cardinal Glennon*, 583 S.W.2d at 110.

[65]"[T]he courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." MO. CONST. art. I, §14.

[66]*See Cardinal Glennon*, 583 S.W.2d at 110.

[67]*See id.* at 112 (Simeone, J., concurring).

[68]*See id.*

[69]*See id.*

[70]*See id.* at 117.

[71]381 So. 2d 231 (Fla. 1980).

[72]*See id.* at 238.

[73]569 So. 2d 1295 (Fla. Dist. Ct. App. 1990).

[74]*See id.* at 1296.

[75]*See id.*

[76]*See id.*

of discovery to gain access to these witnesses but the hospital objected, claiming that the medical malpractice statute eliminated the pure bill of discovery in medical malpractice cases.[77] Using the Florida access to courts constitutional guarantee, the court reasoned that the statute did not abolish the bill of discovery, which is "filed against a possible or putative defendant . . . [t]o ascertain, as a matter of equity, who an injured party may sue and under what theory.'"[78] Because the open courts provision only permits abrogation of common law causes of action if there is a reasonable substitute remedy provided, the court construed the statute as not violating this provision.[79] The court reasoned that to find otherwise would either foreclose the filing of plaintiff's suit or would force "attorneys willing to accept the risk . . . to file ill-conceived and premature malpractice cases in order to preserve their clients' rights." Both of these options, however, would be questionable under the Open Courts Clause.[80]

Where a state lacks an Open Courts Clause, denial of access to the courts is often construed as a violation of due process, and prelitigation panels are likely to pass constitutional muster under a rational basis scrutiny. In *Comiskey v. Arlen*,[81] the court rejected the argument that the prelitigation panel denied access to the courts under a substantive due process approach.[82] Analogizing medical malpractice to the New York no-fault insurance statute for automobiles, the court reasoned that by virtue of the state's police power, the legislature could regulate use of a motor vehicle and could thus abrogate remedies for injuries arising from such use.[83] Under parallel reasoning, a state may regulate the practice of medicine and so may abrogate remedies for injuries arising from medical malpractice under the same police power.[84] Applying rational basis scrutiny analogous to scrutiny under the federal Equal Protection Clause, the court held that "'access to the courts in and of itself is not an independent constitutional

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[77]*See id.*

[78]*Id.* at 1297 (quoting Sunbeam Television Corp. v. Columbia Broadcasting Sys., Inc., 694 F. Supp. 889, 892 (S.D. Fla. 1988)) (emphasis omitted).

[79]The court noted:

> [F]rom a practical point of view, she needed to obtain a medical expert opinion prior to filing a medical malpractice case that reasonable grounds exist to claim negligent injury. Without additional discovery beyond that available under [the panel statute], she could not file a malpractice case against the petitioner hospital in connection with the death of her minor child.

Hegwood, 569 So. 2d at 1297.

[80]*Id.*

[81]390 N.Y.S.2d 122 (N.Y. App. Div. 1976).

[82]*See id.* at 130.

[83]*See id.* at 128–29.

[84]*See id.* at 127–29.

right.'"[85] On the contrary, the court reasoned a right of access is only afforded constitutional protection where the denial of access involves a fundamental right "'recognized in the constitutional sense as carrying a preferred status and so entitled to special protection and then only where there is no alternative forum in which vindication of that constitutionally protected right may be sought.'"[86]

Applying a similar due process analysis in *Suchit v. Baxt*,[87] the New Jersey Superior Court upheld the constitutionality of the state's panel provision.[88] The plaintiff challenged a prelitigation panel's finding, alleging that the panel violated the New Jersey due process right by denying access to the court.[89] Part of the alleged violation was the prohibition on cross-examination of panelists during the panel procedure.[90] Under a due process right of access, the court held that there is indeed a right to cross-examine witnesses.[91] However, the administrative rules governing panel proceedings provided for challenging the bias of panel members before the scheduled hearing, and plaintiff did not avail herself of this process.[92] The court found that even though the parties were not permitted to cross-examine panel members "as to deviation or nondeviation from the acceptable standard of care," this did not rise to the level of a constitutional violation.[93]

In some cases, a prelitigation panel may deny access to the courts under the Due Process Clause. In *Jiron v. Mahlab*,[94] the plaintiff filed suit directly in court to obtain service over the defendant doctor, who was a Canadian citizen leaving on "an extended tour of Southeast Asia with no definite date of return."[95] The New Mexico Supreme Court held that the operation of a prelitigation panel did constitute an unconstitutional denial of access under the Due Process Clause but only if panel review "causes undue delay prejudicing a plaintiff by the loss of witnesses or parties."[96] Such a case, therefore, requires a showing of actual loss.

Like *Cardinal Glennon*, the *Jiron* court looked to the resolution of the issue in the context of procedural interference with access to the courts in

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[85] *Id.* at 129 (quoting Montgomery v. Daniels, 340 N.E.2d 444, 455 (N.Y. 1975)).
[86] *Id.*
[87] 423 A.2d 670 (N.J. Super. Ct. Law Div. 1980).
[88] *See id.* at 680.
[89] *See id.* at 672–73.
[90] *See id.*
[91] *See id.* at 673.
[92] *See id.*
[93] *Id.*
[94] 659 P.2d 311 (N.M. 1983).
[95] *Id.* at 312.
[96] *Id.* at 313.

divorce cases.[97] Where the state Open Courts Clause prohibited denial of access entirely,[98] the federal Due Process Clause does not guarantee access to the courts for all persons in all circumstances.[99] However, a panel statute may be unconstitutional under a due process analysis by causing undue delay that prejudices access to witnesses or parties.[100]

Accepting the standard in *Cardinal Glennon* and *Jiron,* a prelitigation panel statute may be constitutional if it is subject to a court's jurisdiction, like a special master, and where there is no risk of losing access to witnesses or parties. In *Keyes v. Humana Hospital Alaska, Inc.,*[101] the Alaska Supreme Court upheld its state's panel statute under challenges of substantive due process,[102] procedural due process,[103] and right of access to the courts.[104] The court began by stating that a right of access was "not accorded special constitutional protection."[105] Furthermore, where the maximum delay under the statute was eighty days, there was no denial of access.[106] The court then distinguished *Jiron*, arguing that no actual loss of witnesses or parties was sustained, and *Cardinal Glennon*, reasoning that the court accepted jurisdiction before the panel convened.[107] However, in distinguishing these cases, the court implicitly accepted that a panel acting outside of a trial court's jurisdiction, in a manner that could prejudice access to witnesses and parties, would be unconstitutional.

Occasionally, courts will deny the constitutionality of an entire medical malpractice statute under a due process analysis. In *Arneson v. Olson,*[108] the North Dakota Supreme Court held the state's entire medical malpractice statute unconstitutional under both a substantive due process and and equal protection claim.[109] Examining the substantive merits of the alleged crisis in medical malpractice, the court found that no such crisis existed in North Dakota. However, the *Arneson* court applied a standard similar to a rational

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[97]*See id.* at 312 (citing Boddie v. Connecticut, 401 U.S. 371 (1971)).

[98]*See Cardinal Glennon,* 583 S.W.2d at 110 (citing People *ex rel.* Christiansen v. Connell, 118 N.E.2d 262 (1954)).

[99]*See Jiron,* 659 P.2d at 313 (citing Boddie v. Connecticut, 401 U.S. 371, 382 (1971)).

[100]*See id.*

[101]750 P.2d 343 (Alaska 1988).

[102]*See id.* at 352.

[103]*See id.* at 355 (analogizing panel to administrative agency).

[104]*See id.* at 359. Here, the court distinguished *Jiron* because no actual loss of witnesses or parties was sustained and *Cardinal Glennon* because the Alaska court takes jurisdiction prior to convening the panel. *See id.* at 359 n.33.

[105]*Id.* at 359.

[106]*See id.*

[107]*See id.* at 359 n.33.

[108]270 N.W.2d 125, 136 (N.D. 1978) (striking statute in its entirety).

[109]*See id.* at 138.

basis test.[110] While certain panel provisions were not specifically held to violate due process, the court found so many constitutional infirmities in the act that it struck the act in its down entirety.[111]

2. Abrogation of Constitutionally Guaranteed Remedies

In *Fein v. Permanente Medical Group*,[112] the California Supreme Court upheld a statutory cap on all damages in medical malpractice cases under the federal Equal Protection and Due Process Clauses.[113] The case was denied certiori. However, Justice White, in dissent, emphasized that in every state except California and Indiana, such damage limitations had been rejected.[114] Justice White pointed out that by upholding a dollar limitation on liability for nuclear accidents in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,[115] the United States Supreme Court avoided the issue of whether the Due Process Clause required that legislation replacing common-law remedies provide adequate quid pro quo for the right of recovery replaced by statute.[116] If the federal Due Process Clause was held to require this quid pro quo, it would essentially recognize a right to private recovery that is recognized through state Open Courts Clauses. As the law currently stands, due process alone is generally not construed to require a constitutional quid pro quo when the legislature abrogates a right of recovery.[117]

However, courts have found that statutes abrogating common law rights must provide a comparable remedy under state constitutional right of recovery clauses. Courts have seldom reached this issue in the context of medical malpractice panels because it is closely linked to access. If a panel denies access, as in *Cardinal Glennon*, the statute is unconstitutional and the issue of abrogating a remedy is not reached. Conversely, if a court finds no independent right of access to the courts, it is unlikely that any collateral

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[110]*See id.* at 135. The court asked "whether there is a sufficiently close correspondence between statutory classification and legislative goals so as not to violate the equal protection requirements of the state and federal constitutions." *Id.*

[111]*See id.* at 137.

[112]695 P.2d 665 (Cal. 1985), *cert. denied*, 474 U.S. 892 (1985) (White, J., dissenting).

[113]*See id.* at 686.

[114]*See Fein*, 474 U.S. at 893 (White, J., dissenting) (citing Baptist Hosp. of Southeast Texas v. Baber, 672 S.W.2d 296, 298 (Tex. App. 1984); Carson v. Maurer, 424 A.2d 825, 836–38 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903, 906–07 (Ohio 1976)).

[115]438 U.S. 59 (1978).

[116]*See Fein*, 474 U.S. at 894 (White, J., dissenting).

[117]*See id.*

right to a remedy exists. However, the issue of remedy arises where statutes not only impose a panel procedure, but limit the right of recovery.

Where a state retains the right to remedy provision in its Open Courts Clause, limitations on damages generally must be accompanied by some type of quid pro quo for the alteration in remedy to pass constitutional muster. In *Wright v. Central Du Page Hospital Ass'n*,[118] defendants argued that the state's act represented a "societal quid pro quo," asserting that damage limitations benefit society because, presumably, these savings that result are passed on to healthcare consumers.[119] The Illinois Supreme Court rejected this attenuated exchange, following the reasoning in cases upholding the constitutionality of workers' compensation statutes.[120] Under Illinois' Open Courts Clause, the legislature could reduce a remedy in cases where the right of action was created by the legislature.[121] The workers' compensation cases, by contrast, represented the abrogation of a common law remedy.[122] This abrogation was constitutional as a substitute remedy because "the employer assumed a new liability without fault but was relieved of the prospect of large damage judgments, while the employee, whose monetary recovery was limited, was awarded compensation without regard to the employer's negligence."[123] For malpractice limitations, the "societal quid pro quo" was insufficient because the practitioners gave up no rights in exchange for patient's loss of damage recovery.[124] Furthermore, defendants assumed no new liability in exchange for the relief from damage judgments.[125] However, plaintiffs were not relieved from their burden of proving negligence in exchange for the loss of potentially larger damage judgments.[126] The court thus struck down the damage cap as unconstitutionally limiting plaintiffs whose full compensation could exceed the cap.[127]

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[118]347 N.E.2d 736 (Ill. 1976).

[119]*Id.* at 742.

[120]*See id.*

[121]*See id.* at 741. As the court explained, "'Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation . . . .'" *Id.* at 741 (quoting ILL. CONST. art. II, § 19 (1870)).

[122]*See id.* at 742.

[123]*Id.*

[124]*Wright*, 347 N.E.2d at 742.

[125]*See id.*

[126]*See id.*

[127]*See id.* at 743. The court held that the cap violated the constitutional prohibition on special laws in the 1970 Illinois Constitution, but applied the same quid pro quo requirement of earlier cases decided under the guaranteed remedy provision of the Open Courts Clause in the 1870 Illinois Constitution. *See id.* at 741–43.

In *Stewart v. Price*,[128] the court upheld the constitutionality of a statute that denied recovery for noneconomic damages where adult, nondependent children were suing for the malpractice related wrongful death of a parent.[129] Addressing the constitutionality of the statute under both an equal protection argument and the state open courts provision, the court held that there was no constitutional violation where no prior right of action existed.[130] In other words, prior to enactment, adult, non-dependent children had no standing to sue for the wrongful death of a parent.[131] In this case the legislature was free to grant a limited right of recovery where no prior right existed.[132] By tying the right of recovery to historical rights at common law, the court accepted the standard that damage limitations could be unconstitutional if a common law right of recovery was limited by statute.[133]

As with the right of access to the courts, the right to a remedy enjoys less protection under federal due process. In *Comiskey v. Allen*,[134] the plaintiff challenged the constitutionality of a New York law that provided, in part, that if all three members of a medical malpractice prelitigation panel concurred, this determination would be admissible in evidence at trial.[135] The plaintiff claimed that the statute deprived him of due process under both federal and state constitutions by abrogating common law rights of action.[136]

For the federal due process claim, the court held that a "'person has no property, no vested interest, in any rule of the common law.'"[137] The court reached a similar conclusion construing New York's Due Process Clause. Relying on *Montgomery v. Daniels*,[138] the court held that the legislature could partially abolish a common law right of action without violating that clause.[139] However, reliance on *Montgomery* may have been misguided because the opinion did not reach the remedy issue in construing a no-fault insurance statute. The *Montgomery* court reasoned that, if there was a legislative obligation to provide "an adequate substitute remedy for any cause of action properly abrogated by it," the statute in fact provided for any

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[128]718 So.2d 205 (Fla. Dist. Ct. App. 1998).
[129]*See id.* at 209–10.
[130]*See id.* at 210.
[131]*See id.*
[132]*See id.*
[133]*See id.* at 109.
[134]390 N.Y.S.2d 122 (N.Y. App. Div. 1976).
[135]*See id.* at 124–30.
[136]*See id.* at 125.
[137]*Id.* (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).
[138]340 N.E.2d 444 (N.Y. 1975).
[139]See *Comiskey*, 390 N.Y.2d at 125–26.

cause of action eliminated by the no-fault insurance statute.[140] In *Comiskey*, the court reasoned that the panel statute was less intrusive on the existing cause of action than the no-fault insurance statute had been.[141] Therefore, if the state guaranteed a right to a remedy the panel statute would pass constitutional muster.

Claims of abrogating a common law remedy may also arise when the legislature shortens the statute of limitations, which is common in medical malpractice legislation. In *Nahmias v. Trustees of Indiana University*,[142] the court found no right to a remedy under state or federal Due Process Clauses.[143] In Indiana, the legislature has the power to modify or abolish the common law entirely; so plaintiff has no vested right to a longer statute of limitations.[144] However, in states preserving an open courts provision, this legislative power is necessarily restrained to some degree by the express constitutional preservation of a right of remedy.

Another possible abrogation of a right to remedy is the right to cross-examine witnesses. In *Suchit v. Baxt*,[145] the New Jersey Superior Court found no violation of due process where panel findings were admissible because plaintiffs were permitted to call and cross-examine panel members as witnesses at trial.[146] *Linder v. Smith*[147] raised a similar issue dealing with the constitutionality of the Montana Medical Malpractice Panel Act.[148] Applying rational basis scrutiny under substantive due process, the court determined that the panel did not deny access to the courts,[149] except for a portion of the act that provided that no "statement made by any person during a hearing before the panel may be used as impeaching evidence in court."[150] This portion was severed from the act as violating due process because "[i]t is fundamental to our adversarial system that litigants retain the right to impeach the sworn testimony of witness testifying against them."[151] The court also distinguished access where the right underlying the substantive claim is one expressly preserved in the constitution, implying

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[140]*Id.* at 126.

[141]*See id.*

[142]444 N.E.2d 1204 (Ind. Ct. App. 1983).

[143]*See id.* at 1207 (holding plaintiff's claim was time barred regardless of applicable construction of statute of limitations).

[144]*See id.* at 1210 (citing Dague v. Piper Aircraft Corp., 418 N.E.2d 207, 212–13 (Ind. 1981)).

[145]423 A.2d 670 (N.J. Super. Ct. Law. Div. 1980).

[146]*See id.* at 673.

[147]629 P.2d 1187 (Mont. 1981).

[148]*See id.* at 1189.

[149]*See id.* at 1191–92.

[150]*Id.* at 1192 (quotation omitted).

[151]*Id.*

that strict scrutiny would be applied in such a case.[152] This also suggests that in states preserving an Open Courts Clause, strict scrutiny could apply under the constitutionally guaranteed remedy clause.[153]

B. Equal Protection: Disparity in Remedies Afforded Medical Malpractice Plaintiffs

Where a violation of equal protection is alleged, the most common claim is that by instituting some form of mandatory prelitigation review, medical malpractice plaintiffs are discriminated against in favor of other tort plaintiffs. While this approach enjoyed some success in challenges to medical malpractice damage caps,[154] most prelitigation panels have been upheld under rational basis scrutiny.

In *Linder v. Smith*,[155] for example, the plaintiff claimed a prelitigation panel violated a constitutional prohibition on special laws.[156] The court treated the argument as a violation of equal protection and ultimately rejected the challenge.[157] Applying rational basis scrutiny, the court appointed a special master, who found that there was indeed a medical malpractice insurance crisis in Montana.[158] The panel decision at issue was nonbinding and inadmissible at trial.[159] In addition, the court emphasized that unlike many state medical malpractice statutes, Montana's statute contained no cap on damages.[160] Where all medical malpractice plaintiffs could seek full recovery, the imposition of a panel review treated all members of that class of plaintiffs equally.[161]

In *Suchit v. Baxt*,[162] the plaintiff also raised the issue of denying equal protection to medical malpractice plaintiffs as a class, including the economic hardship imposed by the mandatory panel review.[163] Applying the

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[152]*See id.* at 1191 (distinguishing Madison v. Yunker, 589 P.2d 126, 126 (Mont. 1978) (striking mandatory request for retraction prior to commencing libel action because Montana Constitution expressly preserved freedom of press and right to open courts).

[153]*See supra* Part III.A.2 (discussing right to remedy).

[154]*See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743–44 (Ill. 1976) (holding damage caps unconstitutional as a special law).

[155]629 P.2d 1187 (Mont. 1981).

[156]*See id.* at 1192–93.

[157]*See id.*

[158]*See id.* at 1190.

[159]*See id.* at 1192.

[160]*See id.* at 1193.

[161]*See id.*

[162]423 A.2d 670 (N.J. Super. Ct. Law. Div. 1980).

[163]*See id.* at 673, 676–78.

Supreme Court's rational basis test in *Dandridge v. Williams*[164] for state and federal constitutional claims, the court upheld the panel as a reasonable means "to expedite disposition of medical malpractice cases and to encourage settlement of those which are meritorious."[165] Addressing the argument that the Panel Act disproportionately denied access to the courts and violated equal protection for those parties of limited financial resources, the court held that it had no constitutional obligation "to completely neutralize the economic disparities which inevitably make resort to the courts different for some plaintiffs than others."[166]

Courts often apply the federal approach to state equal protection claims, and where rational basis review is applied, statutes are invariably upheld.[167] The denial of equal protection through panel proceedings has only been stricken in situations where unconstitutional portions were not severable from the remainder of the act.[168] The primary weakness in these cases is framing the denial of equal protection to medical malpractice claimants in general versus other tort plaintiffs. Where the issue can be framed as denying equal protection to one class within the larger class of medical malpractice plaintiffs, the statute is less likely to survive equal protection review.[169] Other possibilities remain largely unexplored, such as denial of equal protection to medical malpractice claimants who are severely injured as compared to protection afforded claimants who die.[170] The plaintiff in *Suchit* discerned the possibility that costs from prelitigation panels could result in disparate impact, but failed to explore the manner in which additional costs of litigation, combined with limits on damages, disproportionately burden plaintiffs who are female, elderly, or disabled.[171] If a disparate impact on some classes of medical malpractice plaintiffs can be shown, panel statutes are less likely to pass constitutional muster.

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[164]397 U.S. 471 (1970).

[165]*Suchit*, 423 A.2d at 677 (citing *Report of the Supreme Court's Committee on Relations with the Medical Profession*, 101 N.J.L.J. 45 (1978)).

[166]*Id.* at 678 (citation omitted).

[167]*See, e.g.*, Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 357–58 (Alaska 1988) (upholding Alaska statute); Lacy v. Green, 428 A.2d 1171, 1170, 1178 (Del. Super. Ct. 1981) (upholding Delaware's Healthcare Malpractice Act).

[168]*See, e.g.*, Arneson v. Olson, 270 N.W.2d 125, 137 (N.D. 1978) (holding entire act unconstitutional, although panel provision not specifically challenged).

[169]*See, e.g.*, Lee v. Gaufin, 867 P.2d 572, 588 (Utah 1993) (finding denial of uniform operation of laws to minor as opposed to adult plaintiffs).

[170]*See generally* Magelby, *supra* note 6, at 256, 257 (suggesting this argument might succeed in Utah).

[171]*See Suchit*, 423 A.2d at 673; *infra* Part IV.C (discussing disparate impact under Utah Constitution).

C. Separation of Powers: Panel Infringement on the Judicial Power

Another constitutional challenge brought against prelitigation panel statutes is that the panel's authority is an impermissible delegation of judicial power and that the statutes violate the separation of powers between the legislature and the judiciary. In *Wright v. Central Du. Page Hospital Ass'n*,[172] the court found that the Illinois Panel Act impermissibly delegated judicial power to lay persons.[173] Although the panel's decision was nonbinding, it could be entered in judgment if the parties agreed to be bound by the decision.[174] However, if the parties proceeded to trial, the decision would be inadmissible.[175] Despite the presence of a judge on the three member panel, the court found that the attorney and physician members could overrule the judge on matters of law and could, therefore, essentially exercise judicial power.[176] Because of this potential power of nonjudicial persons to apply substantive law, the court held the statute unconstitutionally delegated judicial functions to lay persons.

Several courts have distinguished their statutes from *Wright* when panel statutes make it impossible for litigants to be bound by a judgment entered outside of the judicial power vested in the courts. In *Comiskey*, the New York act provided for panel review to be admissible only when the panel's decision was unanimous.[177] Unlike *Wright,* the determination "can never be the sole basis for the entry of judgment," so the panel opinion was subject to judicial review and factual determination by the jury.[178] Because the panel determination could never bind litigants without judicial involvement, the act did not contravene the judicial power.[179]

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[172]347 N.E.2d 736, 739–40 (Ill. 1976).

[173]*See id.* at 740.

[174]*See id.* at 738.

[175]*See id.* at 738–39.

[176]*See id.* at 739–40. "'The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts' and that the circuit court shall have original jurisdiction of all justiciable matters . . . [and] shall have such power to review administrative action as provided by law'" (quoting ILL. CONST. art. VI, §§ 1, 9) (brackets in original). Note that the express possibility that administrative agencies were permissible and subject to judicial review did not save the panel's constitutionality.

[177]Comiskey v. Arlen, 390 N.Y.S.2d 122, 122–24 (N.Y. App. Div. 1976).

[178]*Id.* at 127.

[179]*See id. See also* Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 355–57 (Alaska 1988) (distinguishing Alaska panel statutes from those in *Wright* because panel could not serve as basis for judgment); Firelock Inc. v. District Court, 776 P.2d 1090, 1094 (Colo. 1989) (upholding statute where panel opinion could not result in entry of final judgment, even if parties agreed); Linder v. Smith, 629 P.2d 1187, 1194 (Mont. 1981) (upholding statute because panel's decision not enforceable or admissible at trial).

When a panel statute provides for full judicial review of a panel decision, the decision may be treated like an administrative decision and so may not violate the judicial power. In *Vincent v. Romagosa,*[180] the state constitutional right of access vested in the district "original jurisdiction of all civil and criminal matters, except as otherwise authorized by the Constitution."[181] However, the court upheld the constitutionality of panel review under the general rule that plaintiffs must exhaust administrative remedies before seeking judicial review.[182] Under the Louisiana Administrative Procedure Act, administrative review boards are permissible so long as there is a right to judicial review of the board's findings.[183] Unlike the *Wright* court, the *Vincent* court found the panel requirement analogous to the duty to exhaust administrative remedies where the statute provided judicial review.[184]

Other courts have addressed challenges to prelitigation panel statutes in the context of separation of judicial and legislative powers. In *Suchit v. Baxt,*[185] the New Jersey Superior Court upheld a prelitigation panel against a separation of powers challenge.[186] In New Jersey, as opposed to other states, the panel was adopted by court rule rather than by statute.[187] The court upheld the rule because the "essence of judicial power, in the constitutional sense, is the final authority to render and enforce a judgment."[188] The rule also differed from the statute in *Wright* because there was no possibility that an enforceable judgment could be entered on the findings of the panel alone.[189]

Addressing the possibility that the supreme court's rule violated the legislative function, the *Suchit* court held that the prelitigation panel rule was primarily procedural, and therefore, within the power of the court to enact.[190] By finding that a prelitigation panel was within the supreme court's constitutional role of creating procedural rules, *Suchit* raises separation of powers issues in states where the legislature enacts prelitigation panels and the power to enact procedural rules is vested in the courts.

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[180]390 So. 2d 270 (La. Ct. App. 1980).
[181]*Id.* at 271 (citation omitted).
[182]*See id.* at 273.
[183]*See id.* at 272.
[184]*See id.*
[185]423 A.2d 670 (N.J. Super. Ct. Law. Div. 1980).
[186]*See id.* at 673.
[187]*See id.* at 679.
[188]*Id.* (citing Eastin v. Broomfield, 570 P.2d 744 (Ariz. 1977)).
[189]*See id.* at 679–80.
[190]*See id.* at 680.

Another possible violation of separation of powers may arise where a member of the judiciary must participate in a panel without exercising a judicial function. In *Cardinal Glennon*,[191] after the Missouri Supreme Court held the Panel Act unconstitutional on other grounds, Justice Simone concurred and suggested that the mandatory membership on the panel of a judge could violate state separation of powers by imposing "nonjudicial functions upon judicial officers outside the realm of judicial matters."[192] This demonstrates how problematic the structure of a panel can be. If the panel has no judicial control, it may vest the judicial power in lay persons. On the other hand, conscripting a judge to serve on a panel may violate separation of powers by imposing nonjudicial duties.

If a panel decision is admissible only after careful judicial scrutiny, however, the statute may pass constitutional muster. In *Lacy v. Green*,[193] for example, the Delaware Superior Court upheld the constitutionality of a Delaware panel because the supreme court could, prior to admitting the panel opinion into evidence, review the decision and strike any portion that reflected either an error of law or that was not supported by substantial evidence.[194]

After *Wright*, few courts have invalidated prelitigation panels as infringing on judicial power.[195] At the same time, courts have also accepted *Wright*'s basic standard: a panel may be constitutionally infirm if parties have the option of agreeing to the binding judgment of the panel. This problem is compounded by limitations on damages because the remedy is not subject to review by the judge nor subject to final fact-finding of the jury.[196] If it is within the judicial power to reduce excessive jury verdicts, then any limitation on damages constitutes an unconstitutional "legislative remittitur" of damages.[197]

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[191]*See* State *ex rel.* Cardinal Glennon v. Mem. Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979).

[192]*Id.* at 111 (Simeone, J., concurring).

[193]428 A.2d 1171 (Del. Super. Ct. 1981).

[194]*See id.* at 1174.

[195]*See, e.g.*, *Keyes*, 750 P.2d at 355–57 (distinguishable from *Wright* because panel findings only come in as expert testimony); *Firelock*, 776 P.2d at 1094 (distinguishable from *Wright* because nonjudicial members of panel not allowed to overrule judicial members of panel); *Vincent*, 390 So. 2d at 272 (upholding panel because panel subject to administrative procedures); *Linder*, 629 P.2d at 1196 (finding panel statute constitutional because panel findings are not admissible in court); *Suchit*, 423 A.2d at 675, 680 (distinguishing *Wright* and upholding panel statute); *Comiskey*, 390 N.Y.S.2d at 127–28 (distinguishing *Wright* because panel findings not sole basis for judgment).

[196]*See infra* Part III.D (addressing right to jury trial).

[197]*See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1080 (Ill. 1997) (holding $500,000 cap on non-economic damages usurped judicial power of remittitur).

D. Prelitigation Panels' Interference with the Right to Trial by Jury

Just as a prelitigation panel may deny access to the courts or infringe the judicial power, a panel may operate to impermissibly restrict the right to trial by jury. This argument is raised in two basic ways: First, the panel may infringe on the jury's fact-finding role. Second, the panel may burden the plaintiff's right by delaying access to the jury trial.

The issue of the jury's role in fact finding was raised in *Wright*.[198] The *Wright* court held that because parties could agree to be bound by the panel decision, judicial functions were unconstitutionally vested in nonjudicial personnel.[199] Further, this constitutional infirmity led the court to conclude that "the procedure prescribed therein as the prerequisite to jury trial is an impermissible restriction on the right of trial by jury."[200] The Illinois Constitution had been recently amended, and the state's Constitutional Convention Committee on the Bill of Rights had entertained a proposal to limit the right to jury trial "in suits between private persons for damages for death or injury to persons or property."[201] The committee ultimately rejected this proposal, however, finding that reforms of fact-finding could be accomplished without diluting the right to jury trial.[202] The provision was approved by voters as maintaining the same right to trial by jury as the 1870 constitution, "'except that it deletes an out-dated reference to the office of justice of the peace.'"[203] For this reason, the court construed the right to trial by jury as preserved "'as it existed at common law . . . [namely] the right to have the facts in controversy determined, under the direction and superintendence of a judge, by the unanimous verdict of twelve impartial jurors who possess the qualifications and are selected in the manner prescribed by law.'"[204] Just as the statute impermissibly interfered with the judicial function, it also denied the plaintiff's right to have facts tried by a jury.[205]

More commonly, courts have upheld the constitutionality of panel statutes challenged under the right to jury trial.[206] In *Comiskey v. Arlen*,[207]

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[198]*See* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 736, 741 (Ill. 1976).

[199]*See id.* at 740–41.

[200]*Id.* at 741.

[201]*Id.* at 740.

[202]*See id.*

[203]*Id.*

[204]*Id.* (quoting People v. Lobb, 161 N.E.2d 325, 331–32 (Ill. 1959)).

[205]*See id.* at 741.

[206]*See, e.g.*, Woods v. Holy Cross Hosp., 591 F.2d 1164, 1179 (5th Cir. 1979) (upholding statute in face of right to jury trial challenge); Eastin v. Broomfield 570 P.2d 744,748 (Ariz. 1977) (same); McCarthy v. Mensch, 412 So. 2d 343, 345 (Fla. 1982); Prendergast v. Nelson, 256 N.W.2d 657, 666–67 (Neb. 1977) (same); Beatty v. Akron City

the court found no impermissible influence on the jury's fact-finding at trial.[208] Because only a unanimous panel opinion was admissible, the jury remained free to accept or reject the panel opinion, which was analogous to any other expert testimony.[209] The legislature had "amended the rules of evidence, which is within its power to do," so the court found no problem with separation of powers.[210] The court also distinguished *Wright* because, under the New York law, the determination of the panel could "never be the sole basis for the entry of a judgment."[211] The constitutional infirmity in Illinois, reasoned the court, consisted of two difficulties. First, a judgment rendered by nonjudicial personnel could serve as the sole basis for judgment.[212] Second, the panel's recommendation could never be subject to scrutiny by a jury; it was either the sole basis for judgment, or inadmissible.[213]

Although the panel statute in New York passed constitutional muster, the *Comiskey* court accepted the standard outlined in *Wright* for jury scrutiny.[214] Because the New York panel decision was admissible if unanimous and could never be the sole basis for judgment, the right to jury fact-finding was not infringed.[215] Under the *Comiskey* standard, the admissibility of the panel opinion weighed in favor of the plaintiff's right to have facts determined by a jury.[216]

For this reason, under statutes where the jury may scrutinize panel findings at trial, the right to trial by jury is generally not infringed. In *Suchit v. Baxt*,[217] for example, the court rejected a jury challenge to the panel statute because the jury remained the "ultimate trier of the fact."[218] The challenge was based only on the inference that no jury would deviate from the panel recommendation once introduced into evidence.[219] The *Suchit* court found that while the findings served as prima facie evidence of facts,

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Hosp., 424 N.E.2d 586, 589–90 (Ohio 1981) (same).

[207] 390 N.Y.S.2d 122 (N.Y. App. Div. 1976).

[208] *See id.* at 128.

[209] *See id.* at 127–28.

[210] *Id.* at 126.

[211] *Id.* at 127.

[212] *See id.*

[213] *See* Comiskey, 390 N.Y.S.2d at 127.

[214] *See id.* at 127–28.

[215] *See id.*

[216] *See id.*

[217] 423 A.2d 670 (N.J. Super. Law. Div. 1980).

[218] *Id.* at 674.

[219] *See id.*

they were rebuttable, and the jury remained capable of determining the merits of the claim.[220]

The second constitutional challenge to prelitigation panels under the right to trial by jury is that the panels unconstitutionally hinder this right. When a statute has been in operation long enough to demonstrate factually burdensome delays caused by the prelitigation panel, the panel may impermissibly postpone the right to trial by jury. In *Mattos v. Thompson*,[221] for example, the court reluctantly held the statute unconstitutional for burdening the right to trial by jury based on factually demonstrated delay.[222] The average length of time to convene a panel varied from 5.3 to 7.57 months in cases where panels had been selected.[223] Beyond this average, the court examined cases where no action had been taken in the four years between enactment and the *Mattos* case.[224] The panel had not resolved 9 of 48 four-year-old cases, 190 of 422 three-year-old cases, 855 of 1166 two-year-old cases, and 1173 of 1273 one-year-old cases.[225] The court also emphasized that in many of these cases, the amount in controversy was less than $10,000.[226] These factual delays burdened the right of trial by jury to the extent to "'make the right practically unavailable.'"[227] In addition, this delay also contravened the legislative intent to streamline medical malpractice cases.[228] Thus, the statute was not "'reasonably designed to effectuate the desired objective' of affording 'the plaintiff a swifter adjudication of his claim, at a minimal cost.'"[229] The court still expressed confidence that, in general, "'arbitration [is] a viable, expeditious, alternative method of dispute-resolution.'"[230] However, where the forced arbitration of medical malpractice claims factually fell short of its goal of expedient resolution, the court refused to permit the process to burden the right to trial by jury.[231]

Occasionally, a court may find no denial of the right to trial by jury where the panel is nonbinding and inadmissible at trial. In *Linder v.*

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[220]*See id.* at 675.

[221]421 A.2d 190 (Pa. 1980).

[222]*See id.* at 196.

[223]*See id.* at 194.

[224]*See id.* at 195.

[225]*See id.*

[226]*See id.*

[227]*Mattos*, 427 A.2d at 195 (quoting Parker v. Children's Hosp. of Philadelphia, 394 A.2d 932, 939 (Pa. 1978) (refusing to determine question of right to trial by jury because law was too new to determine its effectiveness)).

[228]*See id.*

[229]*Id.* (quoting

[230]*Id.* at 196 (quoting Parker v. Children's Hosp. of Philadelphia, 394 A.2d 932, 939–40 (Pa. 1978)).

[231]*See id.*

Smith,[232] for example, the court construed the Montana right to trial by jury as equivalent to the Seventh Amendment right to jury trial under the federal constitution.[233] Because "changes that affect the form, but not the substance, of the right may pass constitutional muster," the panel was "merely a permissible delay in the path to the ultimate jury verdict."[234] Under the statute at issue, the panel decision was nonbinding and inadmissible.[235] This bolstered the statute's constitutionality because there was no question of interference with the fact-finding role of the jury.[236]

Following similar reasoning, the Alaska Supreme Court, in *Keyes v. Humana Hospital Alaska Inc.*,[237] upheld the Alaska panel statute against the argument that it abrogated the right to jury trial.[238] Panel review was nonbinding and functioned similar to an expert opinion; therefore, it did not infringe upon the fact-finding role.[239] The court then addressed the possibility that the panel could infringe on the right to trial by jury if the panel caused excessive delay.[240] Because the Alaska panel was subject to maximum time restraints, no factual delay could imperil the right to jury trial.[241] The dissent, however, took issue with the court's finding that a state-sanctioned panel carried only the weight of an expert witness.[242] On the contrary, it argued, "the jury trial guarantee . . . is as much the right of an individual to keep the court out of the fact-finding process as it is to bring jurors into it."[243] The dissent specifically objected to injecting "influential, court-sponsored evidence into jury trials as a matter of course, where the only real purpose in doing so is to influence the jury's verdict one way or the other."[244]

These varied opinions on the right to trial by jury demonstrate the inherent tension in the structure of a prelitigation panel statute. If a panel finding is inadmissible, it probably causes less delay in access to the jury, but it may infringe on the right of the plaintiff to jury fact-finding. If a panel

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[232]629 P.2d 1187 (Mont. 1981).
[233]*See id.* at 1189.
[234]*Id.* at 1189 (quoting defendant's argument).
[235]*See id.* at 1189–90.
[236]*See id.* at 1190 (distinguishing *Comiskey*).
[237]750 P.2d 343 (Alaska 1988).
[238]*See id.* at 349.
[239]*See id.* at 346–48.
[240]*See id.* at 349.
[241]*See id.* at 349–51 (explaining that statute allows maximum delay of 80 days).
[242]*See id.* at 360 (Burke, J., dissenting).
[243]*Id.* (Burke, J., dissenting) (emphasis omitted).
[244]Keyes, 750 P.2d at 360.

finding is admissible, the jury is free to scrutinize it during fact-finding, but it is more likely to delay access to the jury trial.

IV. POSSIBILITY OF CHALLENGES UNDER THE UTAH CONSTITUTION

As discussed in the preceding Section, the most common state constitutional challenges brought against medical malpractice panel statutes are claims that the statute denies access to the courts, violates equal protection of the laws, impermissibly delegates judicial power, and abrogates right to trial by jury. Panel statutes have been struck down as unconstitutional under each of these challenges; however, these determinations turn on the specific mandates of the statutes, the applicable standard of review, and the nuances of state constitutional law. The discussion below examines each of these arguments as they apply to the Utah Health Care Malpractice Act, exploring the possibilities that the Malpractice Act violates the Utah Constitution under these arguments.

A. Denial of Access and Remedies Under the Open Courts Clause

The Utah Constitution preserves both access and remedy provisions in its Open Courts Clause ("Section 11"):

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.[245]

Preserving the historic guarantee of the Magna Carta,[246] this provision serves to protect those who are most marginalized in society and who lack the political power to change legislation.[247] The Utah Supreme Court has

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[245]UTAH CONST. art. I, § 11.

[246]According to Sir William Blackstone, the Magna Carta provided:

> [A]nd therefore every subject . . . for injury done to him in bonis [i.e., goods] in terris [land] vel persona [person] by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.

Craftsman Builder's Supply, Inc. v. Butler Mfg. Co., 974 P.2d 1194, 1207 (Utah 1999) (brackets in original).

[247]*See* Condemarin v. University Hosp., 775 P.2d 348, 357 (Utah 1989) (Durham, J.) (quoting Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985)).

outlined the standard for construing statutes that implicate a right protected by the Open Courts Clause.[248] Similar to other courts' analysis of state Open Courts Clauses, the Utah Supreme Court has recognized that the open courts analysis goes beyond the Due Process Clause, requiring "something more than 'rational basis' deference."[249]

The Malpractice Act may be challenged in two ways under the Open Courts Clause: First, the panel itself may be an unconstitutional denial of access to the courts if it potentially, or in fact, causes needless delay or prejudice. Second, the damage provisions may be unconstitutional under the remedy clause.

1. Denial of Access to the Courts

The Utah Supreme Court has found a few statutes unconstitutional for denying access to the courts. Denial of access may be premised on expensive procedures required to obtain judicial review or on the outright denial of judicial review. In *Jensen v. State Tax Commission,*[250] the court examined the portion of a statute that requires putative delinquent taxpayers to deposit the full amount of the overdue taxes as a mandatory condition for judicial review.[251] While cautioning that the statute was not unconstitutional in all cases, the court found that the statute violated Utah Constitution's Section 11 guarantee of access to the courts as applied to these taxpayers.[252] In this particular case, the assessment totaled $344,419 in taxes, penalties, and interest.[253] Because of the burden of depositing this amount prior to obtaining judicial review, the court found that the statute was "an effective bar to judicial review" of the Tax Commission's assessment.[254]

In *Zamora v. Draper,*[255] the Utah Supreme Court addressed the constitutionality of a mandatory bond required to sue police officers.[256] While it was unclear to the court if the bond requirement was applicable in this case—applicability depended on whether the defendants' actions were

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[248]*See, e.g.,* Lee v. Gaufin, 867 P.2d 572, 580–81 (Utah 1993) (applying heightened scrutiny under uniform operation of laws provision if harm involves denial of access to courts). For more discussion of uniform operation of laws, see infra, Part IV.D.

[249]*Condemarin,* 775 P.2d at 360 (Durham, J.).

[250]835 P.2d 965 (Utah 1992).

[251]*See id.* at 969.

[252]*See id.*

[253]*See id.* at 968.

[254]*Id.* at 969.

[255]635 P.2d 78 (Utah 1981).

[256]*See id.* at 79.

related to their duties as police officers[257]—the court determined that if in fact the statute applied, a bond could be unconstitutional if applied to impecunious plaintiffs.[258] To preserve the constitutionality of the bond requirement, the supreme court directed that courts should set the amount of the bond according to "the plaintiff's circumstances."[259] Thus, a statute may be unconstitutional if expenses required for access are beyond the plaintiff's means.

While expenses that are prerequisites to access play some role in these cases, the supreme court has also stricken provisions that deny judicial review. In *Celebrity Club Inc. v. Utah Liquor Control Commission,*[260] the court found that statutory provisions precluding judicial review of the liquor commission's revocation of a liquor store lease denied access.[261] Although the statute provided for review within sixty days of most commission orders,[262] the statute explicitly precluded any judicial review in cases involving the revocation of a liquor store lease.[263] The court severed this portion of the statute, finding that "[i]t is perfectly obvious that [the statute] cannot constitutionally preclude *all* judicial review of the defendant Commission's actions in terminating the plaintiff's state liquor store lease."[264] The commission attempted to defend the statute, claiming there was no protected property interest in a continued lease.[265] The court found instead that "'property' denotes a broad range of interests,"[266] and that the plaintiff's potentially severe financial loss was a sufficient property interest.[267] For this reason, the denial of review offended both the Due Process clause and the Open Courts Clause of the Utah Constitution.[268]

In *Lyman v. National Mortgage Bond Corp.*,[269] the court addressed the constitutionality of an adverse possession statute.[270] The statute forbid raising any claim or defense in disputes over ownership of real property "unless the claimant was seized, possessed or occupied such property within

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[257]*See id.* at 82.
[258]*See id.* at 81.
[259]*Id.*
[260]657 P.2d 1293 (Utah 1982).
[261]*See id.* at 1296.
[262]*See id.* at 1295 n.3.
[263]*See id.*
[264]*Id.* at 1299.
[265]*See id.* at 1296.
[266]*Celebrity Club* 657 P.2d at 1297 (quoting Board of Regents v. Roth, 408 U.S. 564, 571 (1972)).
[267]*See id.* at 1297 (citing City of Kenosha v. Bruno, 412 U.S. 507 (1973)).
[268]*See id.* at 1298–99.
[269]320 P.2d 322 (Utah 1958).
[270]*See id.* at 324.

seven years."[271] In the plaintiffs' suit to quiet title, it was undisputed that they had possessed the land for the statutory period, and that defendants had not.[272] The defendants sought to raise the plaintiffs' failure to pay all taxes on the land as a defense[273] but were precluded from doing so because of their lack of possession under the statute.[274] This effectively allowed plaintiffs to prevail on their action without satisfying all the elements of their claim.[275] The court held that the defendants were entitled to raise their defense despite the statute.[276] To construe the statute otherwise "would be in effect to deny them access to the courts."[277] Although the denial of access was not explicit in the statute, its operation worked to preclude access by prohibiting a defense in court.

Under the standards in these cases, the requirement that prelitigation panels renew malpractice claims could be challenged as a denial of access to the courts based on either expense or the denial of judicial review. In the 1993 Legislative Audit ("Audit"),[278] the Legislative Auditor General estimated that the costs of participating in the prelitigation panel generally ran from $1,300 to $2,000.[279] Plaintiffs without financial resources are likely to hire a lawyer on a contingency fee basis, where fees are limited to one third of damages recovered.[280] This means that for a lawyer to accept the plaintiff's case, estimated damages must be $3,900 to $6,000 more than they would be absent the panel. Granted, this cost is nowhere near the $344,419 that was unconstitutional in *Jensen*.[281] However, there is no statutory provision to alter or shift these costs based on the injured patient's impecuniosity or based on damages sought, as mandated in *Zamora*.[282] In the abstract, these costs may seem unlikely to deny a plaintiff access to the courts, but these costs are significant where many claims fall below $10,000 in damages.[283] In fact, the most recent data available suggests that in the vast

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[271] *Id.*

[272] *See id.* at 324–25.

[273] *See id.* at 323.

[274] *See id.* at 325.

[275] *See Lyman*, 320 P.2d at 325.

[276] *See id.*

[277] *Id.*

[278] *See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) at 30.

[279] *See id.*

[280] *See* UTAH CODE ANN. § 78-14-7.5 (1996).

[281] *See Jensen*, 835 P.2d at 968.

[282] *See Zamora*, 635 P.2d at 81.

[283] At the height of the medical malpractice crisis, only 237 malpractice claims were filed in Utah over a three year period, only four payments exceeded $100,000, and payments averaged "$21,589 per paid claim or an average of $7,652 per claim made, whether or not

majority of cases, only a small percentage result in an award or settlement of over $100,000.[284] Because all evidence gathered is returned to the parties at the end of inadmissible proceedings,[285] the statute imposes the costs of discovery twice. Under the standard in *Jensen*, the cost of prelitigation panels may be an unconstitutional denial of access where this cost approaches the amount in controversy. Further, the panel cost may deny access where there is no allowance for the plaintiff's financial circumstances in gaining access to the court.[286]

It could be argued that the panel is like any administrative proceeding, so the costs of panel proceedings deny access no more than the requirement of exhausting administrative remedies.[287] However, the panel does little, if anything, to further the resolution of the controversy. The panel need not follow administrative procedure, and the administrative proceeding is nonbinding.[288] In practical terms, the majority of cases before the panel are filed in court regardless of the panel's opinion.[289] Further, the lack of formal discovery makes parties on either side reluctant to settle.[290] The panel's determination of whether or not a claim is "meritorious" is reversed in one-third of all cases proceeding to trial.[291] This shows that it may be unwise for parties to rely on the panel's determination alone for settlement. Finally, analogizing a panel proceeding to an administrative proceeding is only appropriate where procedural safeguards to judicial review of proceedings

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paid [by the malpractice insurer]." Lee v. Gaufin, 867 P.2d 572, 587 (Utah 1993) (citing National Ass'n of Comm'rs, *Malpractice Claims, Final Compilation: Medical Malpractice Closed Claims, 1975-1978* (Sept. 1980)). While these figures are thirty years old, the Utah scheme limiting non-economic damages and adopting the collateral source rule for plaintiffs severely curtails damages available to some classes of plaintiffs. *See infra* Part IV.B (discussing disparate impact on female, elderly, and disabled plaintiffs). *See also* Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1368–70 (1989) (discussing unpredictable nature and lack of uniformity in loss compensation cases).

[284]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) at 18, Fig. VI (showing awards or settlements exceeded only $100,000 in 18.6% of cases deemed "meritorious" by the panel and 7.5% of cases deemed "nonmeritorious").

[285]*See* UTAH CODE ANN. § 78-14-13(1) (1996).

[286]*See Zamora*, 635 P.2d at 81.

[287]*See* Vincent v. Ramogosa, 390 So. 2d 270, 272 (finding panel did not violate judicial power where it operated under state administrative procedures and was subject to judicial review).

[288]*See* UTAH CODE ANN. § 78-14-12(1)(c) (Supp. 1999).

[289]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) at 14.

[290]*See id.*

[291]*See id.* at 16–17.

exist.[292] Under Utah's statute, there is little incentive for fully exploring the facts where no judicial review of proceedings is available.[293]

In addition to the economic burdens that panel proceedings place on access to the courts, the denial of judicial review of panel proceedings impermissibly denies access.[294] In *Celebrity Club*, the Utah Supreme Court had little trouble deciding that the blanket denial of any judicial review denied access to the courts.[295] However, *Celebrity Club* also dealt with a decision that could deprive the plaintiff of property rights.[296] Therefore, it is unclear whether the court would have found a denial of access to the courts absent the finding of lost property rights in violation of due process. Because the panel cannot bind parties without their consent,[297] the *Celebrity Club* holding could be limited to cases where the plaintiff can show a due process violation. The *Celebrity Club* court did find that both Due Process and Open Courts Clauses were violated.[298] The court has also reaffirmed that the Utah Open Courts Clause protects rights beyond those protected by the Due Process Clause.[299] Thus the right of access should never depend on proving a due process violation.

The primary infirmity in the Malpractice Act's prelitigation panel, similar to the statute in *Cardinal Glennon,* is its mandatory prerequisite to the court's assumption of jurisdiction.[300] Where some delay may be acceptable, delay prior to the court assuming jurisdiction necessarily harms remedies that depend on discovery. This includes the power to issue subpoenas and serve defendants, including serving unknown defendants who could not be ascertained without discovery. While the potential harm to plaintiffs' rights could violate access to the courts, violation is more likely where the plaintiff can show actual prejudice by virtue of delay, as was demonstrated in *Jiron.*[301] This standard is problematic, though, because the plaintiff may not be able to demonstrate actual prejudice until a putative defendant leaves the jurisdiction. By the same token, the delay may cause

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[292] *See Vincent*, 390 So. 2d at 272 (upholding panel subject to administrative procedures and judicial review).

[293] *See* UTAH CODE ANN. § 78-14-14 (1996).

[294] *See id.*

[295] *See Celebrity Club*, 657 P.2d at 1299.

[296] *See id.* at 1296.

[297] *See infra* Part IV.C.1 (addressing problems with Malpractice Act's binding arbitration option in context of judicial power).

[298] *See Celebrity Club*, 657 P.2d at 1296–97.

[299] Condemarin v. University Hosp., 775 P.2d 348, 360 (Utah 1989).

[300] *See supra* notes 58 to 70 and accompanying text (discussing reasoning in *Cardinal Glennon*).

[301] *See supra* notes 94 to 107 and accompanying text (discussing *Jiron*).

the statute of limitations to run for defendants that are unknown without formal discovery. *Cardinal Glennon* thus adopts a better standard by recognizing that any delay in the court's exercise of jurisdiction could result in the plaintiff's loss of a remedy. This standard recognizes that once the plaintiff loses rights, relief under the Open Courts Clause is too late.

Courts upholding the constitutionality of their state panel statutes do so under two basic rationales: First, a court may uphold a panel as constitutional under the state Due Process Clause because no fundamental right is involved.[302] Second, a court may uphold a statute under the state Open Courts Clause by distinguishing *Cardinal Glennon* and *Jiron*: under this reasoning statutes are sustained if a prelitigation panel convenes after the court has assumed jurisdiction and there is no resulting risk of losing witnesses or parties.[303]

Utah's Malpractice Act cannot be justified under either of these arguments. To begin, Section 11 preserves access to the courts as a fundamental constitutional right and so extends protection beyond the typical due process rights.[304] A court cannot assume jurisdiction prior to the completion of panel proceedings[305] or until time limits on the panel determination have expired.[306] The 180-day time limitation on the panel is long enough to jeopardize access to witnesses or parties without the benefit of traditional discovery.

The inadmissibility of panel proceedings at trial could preclude introducing evidence of claims or defenses arising from the panel proceedings. Like the statute in *Lyman*,[307] the Malpractice Act violates the Open Courts Clause by precluding claims or defenses without fully exploring their substantive validity.[308] In the same manner, evidence and testimony of witnesses in panel proceedings may provide impeaching material at trial, but parties are precluded from introducing any portion of the panel proceedings in evidence.[309] This arbitrarily excludes as evidence material that would

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[302]*See, e.g.*, Comiskey v. Arlen, 390 N.Y.2d 122, 130 (N.Y. App. Div. 1976) (upholding panel as constitutional and not in violation of right to access and equal protection); Linder v. Smith, 629 P.2d 1187, 1192 (Mont. 1981) (applying rational basis test to Medical Panel Act); Suchit v. Baxt, 423 A.2d 670, 676 (N.J. 1980) (upholding Medical Malpractice claims statute under rational basis test); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 359 (Alaska 1988) (finding access to courts not independent right and generally does not receive special protection).

[303]*See, e.g., Keyes*, 750 P.2d at 359 n.33 (discussing *Cardinal Glennon* and *Jiron*).

[304]*See Condemarin*, 775 P.2d at 360.

[305]*See* UTAH CODE ANN. § 78-14-12(1)(c) (1996 & Supp. 1999).

[306]*See id.* § 78-14-12 (3)(b).

[307]*See Lyman*, 320 P.2d at 325.

[308]*See id.*

[309]*See* UTAH CODE ANN. § 78-14-15(1) (1996).

otherwise be subject to the rules of evidence and court discretion to determine admissibility.[310] By denying the court's consideration of claims arising from prelitigation, the Malpractice Act violates Section 11.

The crux of the access to courts problem is that jurisdiction is conditioned on a process that is neither judicial nor administrative. Like the divorce cases that guided *Cardinal Glennon*[311] and *Jiron*,[312] the panel is an arbitrary hoop imposed on plaintiffs who are claiming to have been physically or emotionally damaged by the defendant. While innovation in resolving disputes is a laudable goal, a procedure that attempted to force reconciliation of divorcing couples impermissibly denied access to the courts under the Missouri Open Courts Clause.[313] It is equally odious to require plaintiffs to sit down and informally try to sort things out with a defendant who may have violated the doctor-patient trust.[314] This is particularly true where the alleged malpractice has resulted in the death, imminent death, mutilation, disfigurement, or mental impairment of the patient. In the same way, legislative attempts to remedy the growing divorce rate through mandatory attempts at reconciliation may unduly burden a suffering individual, the medical malpractice prelitigation panel is likely to burden an injured individual in an attempt to curb the rate of malpractice. Both approaches implicitly blame the individual victim for the larger societal trend. Limiting individual rights does not cure flawed relationships. It is thus foolhardy to try to repair doctor-patient relationships by imposing statutory restraints on the patient.[315]

By requiring prelitigation panel proceedings as a mandatory condition on the court's accepting jurisdiction, the Malpractice Act denies access to

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[310]*See Linder*, 629 P.2d at 1192 (striking prohibition on using statements before panel as impeaching evidence in court as violation of due process). *See also infra* Part IV.C.2 (discussing rules of evidence as appurtenant to judicial power).

[311]*See supra* notes 58 to 70 and accompanying text (discussing reasoning in *Cardinal Glennon*).

[312]*See supra* notes 94 to 107 and accompanying text (discussing *Jiron*).

[313]*See supra* notes 58 to 70 and accompanying text (discussing reasoning in *Cardinal Glennon*).

[314]The legislature has continued to favor the idea of imposing less formal resolution of medical malpractice claims. In 1999, it amended the Malpractice Act to provide for mandatory binding arbitration if the provider succeeds in obtaining the patient's consent. *See* UTAH CODE ANN. § 78-14-17 (Supp. 1999). It is too early to tell what effect, if any, this will have on patients' rights.

[315]A plaintiff's decision to sue is often triggered by the doctor's dishonesty or failure to disclose a mistake. *See, e.g.*, Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, 85 A.B.A. J. 64, 65 (Dec. 1999) (finding that around 30% of medical malpractice plaintiffs say they would not have sued if practitioner had apologized); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1011 (1999) (same).

the court as guaranteed by Section 11. As a prerequisite to jurisdiction, the informal panel endangers the plaintiff's remedies that are dependent on access to witnesses or parties through formal discovery. Because of this risk, an otherwise successful claim could be extinguished by the fact of the panel alone. The Utah Supreme Court could wait for a plaintiff to show the actual loss that occurred in *Jiron* to find the panel procedure unconstitutional. Under the more rational standard of *Cardinal Glennon*, the risk of losing a remedy because of the panel should be sufficient to find the statute unconstitutional under Section 11.

2. Denial of Constitutionally Protected Remedy

Not only does the Malpractice Act deny access to the court by virtue of the panel's operation, the Malpractice Act's limitations on damages abrogate the common law right to receive a full remedy for medical malpractice. For constitutional challenges under the remedy clause of Section 11, the Utah Supreme Court has subjected statutes to heightened scrutiny,[316] consisting of a two-part test.[317] First, a law may be constitutional under Section 11 if the law provides a reasonable quid pro quo for the loss of remedy or "'an effective and reasonable alternative remedy . . . for vindication of his constitutional interest.'"[318] An example of this is the constitutionality of workers' compensation statutes, where remedies are diminished in one way but broadened in others.[319] In this case, access may actually be increased, and remedies may fairly be described as different, rather than simply decreased.

The second part of the test is applied when the remedy or cause of action is abrogated without a substitute or alternative remedy.[320] In this case, the statute will only pass constitutional muster under heightened scrutiny, which will be found "'only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.'"[321] In *Condemarin*, which questioned the applicability of governmental immunity damage caps to state-owned hospitals, the alleged evil to be eliminated was again the

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[316]Condemarin v. University Hosp., 775 P.2d 348, 360 (Utah 1989).

[317]*See id.* at 360.

[318]*Id.* (quoting Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985)).

[319]*See id. See also supra* notes 118 to 127 and accompanying text (discussing *Wright*).

[320]*See Condemarin*, 775 P.2d at 360.

[321]*Id.* at 358 (quoting *Berry*, 717 P.2d at 680).

"medical malpractice crisis."[322] The court not only doubted the existence of the evil to be eliminated, it rejected the limitation on individual rights in this context as an arbitrary and unreasonable means to achieve this end.[323] In Justice Stewart's concurrence, he emphasized that "remedy [in Section 11] means the full, fair, and complete remedy provided by the common law."[324] Applying this heightened scrutiny, Justice Zimmerman has suggested that the court shift the "presumption that the limiting statute is constitutional to a presumption that the statute is unconstitutional, placing the burden . . . upon those seeking to uphold the challenged statute."[325] In any case, there is little dispute that the second part of the remedy clause test requires "'a real and thoughtful examination of legislative purpose and the relationship between the legislation and that purpose.'"[326]

Under the first part of the remedy clause test, it is difficult to argue that the Malpractice Act provides the proper quid pro quo for changing a common law remedy. To pass constitutional muster under this test, the "'benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different.'"[327] For example, the Utah Workers' Compensation Act limits remedies but eliminates the plaintiff's burden of showing fault to recover.[328] The Malpractic Act's limitations on damages only abrogate remedies without enhancing plaintiffs' access or lowering plaintiffs' burden of proof.[329] In addition, defendants assume no additional liability, and the collateral source rule applies only to plaintiffs.[330]

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[322]*See id.* at 362. "'A crisis,' as political scientist Paul Starr has noted, 'can be a truly marvelous mechanism for the withdrawal or suspension of established rights, and the acquisition and legitimation of new privileges.'" *Id.* (quoting Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 SO. CAL. L. REV. 829, 935 n.623 (1979)).

[323]*See Condemarin*, 775 P.2d at 363. The court criticized this argument as containing two unsupported premises: first, that a crisis exists with malpractice plaintiffs as a cause, and second, that limiting malpractice plaintiffs' rights would alleviate the crisis. *See id.* at 362 n.10.

[324]*Id.* at 372 (citations omitted). Justice Stewart would have decided the case under the Uniform Operation of Laws provision, UTAH CONST. art. I, § 24, but would have applied heightened scrutiny where Section 11 right to remedy was abrogated. *See id.* at 372–73.

[325]Lee v. Gaufin, 867 P.2d 572, 591 (Utah 1993) (Zimmerman, J., concurring).

[326]*Id.* at 582 (quoting *Condemarin*, 775 P.2d at 356).

[327]*Condemarin*, 775 P.2d at 357–58 (quoting *Berry*, 717 P.2d at 680).

[328]*See* UTAH CODE ANN. § 34A-2-207 (1997).

[329]*See Condemarin*, 775 P.2d at 361. *See also supra* notes 118 to 127 and accompanying text (discussing *Wright*).

[330]*See* UTAH CODE ANN. § 78-14-4.5 (1996) (providing that evidence of insurance, public benefits, etc., only admissible as to plaintiffs' collateral sources).

Mandatory periodic payment of future damages exceeding $100,000 gives defendants the benefit of the present value of unpaid damages.[331] The cessation of periodic payments on the death of the plaintiff likewise gives defendants a windfall if the plaintiff dies.[332] Assuming *arguendo* that some societal benefit was achieved by these limitations, this "legislation is simply an arbitrary and impermissible shifting of collective burdens to individual citizens"[333] and does not satisfy the first part of the remedy test.

Because the Malpractice Act's limitation on remedies does not offer an adequate substitute, the second part of the remedy clause test requires the court to apply heightened scrutiny. Under this test, the statute will be constitutional "'only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.'"[334] Addressing the presence of a societal evil, the court in *Lee* seriously questioned the existence of a medical malpractice crisis in Utah.[335] Referring to a Utah State Medical Association document, the *Lee* court examined the proportional causes of increased health care costs in Utah.[336] According to the document, only 22% of increases from 1974 through 1982 were collectively attributed to "[o]ther factors including modern medical care financing, the effect of governmental health programs, an increasing aging population, new technology, and the legal climate."[337] In addition, the court found that the insurance costs for physicians have remained proportionate to physicians' incomes.[338] The *Lee* opinion thus elaborated on the court's earlier criticism of the "crisis" in *Condemarin*.[339]

Looking to the reasonableness of addressing the alleged malpractice crisis by capping plaintiff damages, the *Condemarin* court was concerned with the discrepancy among classifications within the larger class of medical malpractice plaintiffs. The court reasoned that

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[331]*See id.* § 78-14-9.5(2).

[332]*See id.* § 78-14-9.5(6). The only exception to this is damages for lost future earnings. *See id.*

[333]*Condemarin*, 775 P.2d at 358 (discussing applicability of governmental immunity cap to state owned hospital).

[334]*Id.* (quoting *Berry*, 717 P.2d at 680).

[335]*See Lee*, 867 P.2d at 584–89.

[336]*See id.* at 587.

[337]*Id.* at 587. Other causes were inflation (59%), medical care inflation (11%), and an increasing population (8%). *See id.*

[338]*See id.* (citing Glen O. Robinson, *The Medical Malpractice Crisis of the 1970s: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 31 (1986)).

[339]*Condemarin*, 775 P.2d at 360–62 (discussing "crisis" in context of applicability of governmental immunity damage cap to state-owned hospital).

> [t]hose whose injuries are minor may seek and recover all of economic damages and some measure of noneconomic damages up to the recovery cap ($100,000 at the time of these injuries). Those whose economic losses approach or equal the statutory limit may recover only those losses and will receive no compensation for noneconomic losses. Finally, those whose economic losses exceed the statutory limit are precluded from even recovering out-of-pocket costs resulting from their injuries.[340]

The statute unreasonably shifted the burden of the malpractice crisis onto a few of those most seriously injured plaintiffs.[341] The court determined that the statutory cap was an arbitrary means to a legislative end absent a showing that patients' legal actions are a significant cause of the crisis and that limiting patient remedies would alleviate the crisis.[342] The court found that the cap was unconstitutional by making a few, isolated individuals bear the costs of a general benefit to the state.[343]

If anything, the purpose behind the Malpractice Act's damage limitations is even more arbitrary than the governmental cap in *Condemarin*. The governmental immunity cap purported to protect the public treasury,[344] whereas the Malpractice Act limitations purport to protect private practitioners and their insurers. Further, the Malpractice Act's limitations have a disparate impact on those with high non-economic damages: primarily women, elderly, and disabled persons.[345] For this reason, the Malpractice Act's limitation on damages ignores the goal of deterring practitioner negligence[346] and may even create an incentive to assign substandard practitioners to those patients with low economic damages. Because the Malpractice Act's abrogation of the common-law remedy does not offer a substitute remedy, the limitations do not pass constitutional muster under

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[340] *Id.* at 353.

[341] *See id.* at 361.

[342] *See id.* at 363.

[343] *See id.*

[344] *See id.* at 361.

[345] *See infra* Part IV.B (discussing impact of limiting noneconomic damages only).

[346] Addressing the need to fully compensate plaintiffs to deter negligent conduct, the court in *Condemarin* stated:

> As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses. Were they forced to pay more (punitive damages), some economical accidents might also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be deterred. It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss. But that the damages are paid to the *plaintiff* is, from an economic standpoint, a detail.

Condemarin, 775 P.2d at 364 (quoting Richard Posner, ECONOMIC ANALYSIS OF LAW, § 6.12, at 143 (1972)).

the first part of the remedy clause test. Under the second part of the remedy clause test, the existence of an "evil to be eliminated" has been repeatedly questioned by the Utah Supreme Court. Where the Malpractice Act's supporters have had a difficult time demonstrating a crisis in fact. The damage limitations on the individual's right to a remedy are likely to be an arbitrary and unreasonable means to alleviate the putative crisis.

B. Uniform Operation of Laws

The equal protection question in Utah constitutional law is most closely related to the Uniform Operation of Laws clause of the Utah Constitution. Article 1, Section 24 ("Section 24") provides that "[a]ll laws of a general nature shall have uniform operation."[347] The analysis under Section 24 consists of two parts: "First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute."[348] Given this analysis of equal protection, it is easy to see why this argument has failed in so many state courts. The typical equal protection argument challenges the remedies available to malpractice plaintiffs as opposed to other tort plaintiffs.[349] Courts merely define the class as all medical malpractice plaintiffs. Then, all medical malpractice plaintiffs are treated equally, and the classification furthers the legislative purpose of restricting remedies.[350]

In Utah, the supreme court has cautioned that Section 24 is not identical to federal equal protection.[351] For a law to be constitutional,

> it is not enough that it be uniform on its face. What is critical is that the *operation* of the law be uniform. A law does not operate uniformly if "persons similarly situated" are not "treated similarly" or if "persons in different circumstances" are "treated as if their circumstances were the same.[352]

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[347]UTAH CONST. art. I, § 24.

[348]Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984).

[349]*See* Condemarin v. University Hosp., 775 P.2d 348, 353 (Utah 1989).

[350]*See supra* Part III.B (discussing challenges based on distinction between medical malpractice and other tort plaintiffs).

[351]*See* Lee v. Gaufin, 867 P.2d 572, 577 (Utah 1993).

[352]*Id.* (citing *Malan*, 693 P.2d at 669) (emphasis added). The court also points out that all laws discriminate in some sense, and "'[f]or that reason, to be unconstitutional[] the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary . . . provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act.'" *Id.* at 577 n.6 (quoting State v. Mason, 78 P.2d 920, 923 (1938)).

For this reason, it is imperative to show that the statute denies equal protection to a class within the class of malpractice plaintiffs. The Malpractice Act violates uniform operation if similarly situated medical malpractice plaintiffs are treated differently. By the same token the Malpractice Act is unconstitutional if differently situated plaintiffs are treated the same.

In *Lee*, for example, the court struck down the medical malpractice statute of limitations because it operated to the detriment of minors as opposed to adults.[353] The statute would have extinguished a minor's cause of action in the same period of limitation that applied to adults.[354] In doing so, the Malpractice Act failed to recognize that a minor cannot sue until she reaches majority.[355] Thus, the statute impermissibly treated minors as equivalent to adults, failing to account for the "fundamental differences between minors and adults with respect to their status in the law."[356] The *Lee* court also found a denial of uniform operation between minors injured in general and minors injured by medical malpractice.[357] The general statute recognized the minor's incapacity, but the Malpractice Act in *Lee* would have abrogated the minor's remedy before a cause of action could accrue.[358]

The court applied a heightened standard of scrutiny, "stricter than rational-basis,"[359] because the claimed discrimination implicated the right of access to the court and the right to remedy protected under Article 1, Section 11.[360] In applying this standard, the court moved beyond the rational basis test. The court examined whether the Malpractice Act's statute of limitations for minors "actually furthers the legislative purposes and objectives . . . [and] is reasonably necessary to achieve those ends."[361] The court first extensively explored the causes of increasing malpractice insurance premiums.[362] The court concluded that increased malpractice premiums and increased costs of health care simply "were not caused by significant increases in malpractice lawsuits or claims in Utah, by either adults or minors, or by significant increases in the size of jury verdicts."[363] The court found it unnecessary to declare the entire purpose of the

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[353]*See id.* at 577–78.
[354]*See id.*
[355]*See id.* at 578.
[356]*Id.* at 579.
[357]*See Lee*, 867 P.2d at 579.
[358]*See id.*
[359]*Id.* at 581.
[360]*See id.*
[361]*Id.* at 583.
[362]*See id.* at 583–88.
[363]*Lee*, 867 P.2d at 588.

Malpractice Act illegitimate. Even if the court accepted a causal relationship between increased health-care costs and malpractice claims, "that would not justify shifting the costs of malpractice injuries from health-care providers to injured children and their caretakers."[364]

The Utah Supreme Court has already demonstrated that the Malpractice Act is a questionable means to further the legislative purpose.[365] If a plaintiff can show the Malpractice Act has a nonuniform application, the court is not likely to uphold the Malpractice Act as a reasonably necessary means to achieve those ends. For this reason, a challenge to the constitutionality of the Malpractice Act's panel provision would need to demonstrate that the mandatory prelitigation panel operates to treat similarly situated plaintiffs differently or differently situated plaintiffs in the same manner. One obvious discrepancy is the economic burden imposed by good-faith participation in the panel.[366] This burden falls disproportionately on poorer plaintiffs—and their attorneys who are limited to one third of their recovery—who must essentially pay for discovery twice if they choose to go to trial.[367] Some courts have been reticent, however, to find an obligation to affirmatively level the playing field by finding violations when plaintiffs have different available economic resources.[368]

An argument could be raised, however, challenging the disparate impact that the prelitigation panel and damage limitations have on plaintiffs based on gender, age, or disability.[369] To begin, the "'male-dominated character of western medicine'"[370] has resulted in "'documented gender disparities in treatment.'"[371] The American Medical Association Counsel on Ethical and Judicial Affairs has admitted that while some inferior medical

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[364]*Id.*

[365]*See* UTAH CODE ANN. § 78-14-2 (1996).

[366]*See* UTAH CODE ANN. § 78-14-13(3) (1996) (providing that requesting party pay for expenses related to subpoenas, including witness fees and mileage). These costs are imposed primarily on plaintiffs, who need to access defendant practitioners, even though practitioners are in a better position to have records and testimony regarding the events leading to the claim.

[367]*See id.* § 78-14-13(1) (providing that all evidence, documents, and exhibits be returned to party providing evidence at end of proceedings).

[368]*See, e.g.*, Suchit v. Baxt, 423 A.2d 670, 678 (N.J. 1980) (applying Equal Protection Clause); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 357–58 (Alaska 1988) (same).

[369]*See generally* Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995) (discussing findings of disparate impact of medical malpractice reforms on women and elderly).

[370]*Id.* at 58 n.243 (quoting KATHRYN STROTHER RATCLIFF, *Health Technologies for Women: Whose Health? Whose Technology?, in* HEALING TECHNOLOGIES: FEMINIST PERSPECTIVES 173, 174 (Kathryn Strother Ratcliff et. al. eds., 1989)).

[371]*Id.* at 59–60 (quoting American Medical Association Counsel on Ethical and Judicial Affairs, *Gender Disparities in Clinical Decision-Making* (1990)).

care may be attributed to biological factors, "'the studies indicate that there may be non-biological and non-clinical factors which affect clinical decision-making.'"[372] This raises questions as to women's greater likelihood to suffer medical malpractice. The precise impact is difficult to ascertain from claims brought into the justice system because estimates generally concur that "'at most 1 in 10 incidents of malpractice'" result in a claim.[373] Because of limitations on damages and the expense of bringing a claim, one of the greatest problems in medical malpractice is "'the need for the injured party to obtain a lawyer to gain access to the system.'"[374]

The economic burden of the panel,[375] along with limitations on non-economic damages, undeniably have a disparate impact on women. Compensatory damages traditionally include economic damages such as lost wages, medical, and rehabilitation costs,[376] whereas non-economic damages include pain and suffering or lost enjoyment of activities.[377] The combination of economic and non-economic damages represent the cost of making the plaintiff "whole." On the other hand, punitive damages are only available to punish the tortfeasor for gross negligence or intentional misconduct[378] and, as a practical matter, are extremely rare.[379] Traditionally, where women continue to earn only 71% of the average male salary,[380] non-economic damages have been a method whereby juries could assess damages for a female plaintiff's injury in parity with awards granted to

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[372]*Id.*

[373]Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1368 (1989) (quoting PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 25 (1985)).

[374]Johnson, *supra* note 283, at 1368 (quoting U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: A FRAMEWORK FOR ACTION 30 (1987)).

[375]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) at 30.

[376]Koenig & Rustad, *supra* note 369, at 77.

[377]*See id.* at 78.

[378]*See id.* at 77.

[379]*See id.* at 56 n.230 (describing American Bar Foundation Study finding that out of 1,917 jury verdicts, only 18 awarded punitive damages).

[380]*See id.* at 78 n.325 (citing Alan Otten, *Gender Pay Gap Eased Over Last Decade*, WALL ST. J., April 15, 1994, at B1). In 1998, the median weekly earning for women was 76% of men's earnings. *See* BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SUMMARY NO.99-5, WHAT WOMEN EARNED IN 1998 (May 1999). The gap ranges from 68% for women approaching retirement to 91% for women under 25 and also varies widely by race. *See* Koenig & Rustad, *supra* note 369, at 78 n.325.

men.[381] One commentator criticized a bill seeking to limit non-economic damages based on the disparate impact it would have on women:

> Two people suffer exactly the same injury. Both find themselves unable to perform life's normal activities. One is a man and one is a woman. The man is a plumber. He receives economic damages that are not effected [sic] by this bill. The woman is a homemaker and has suffered little "economic loss," and so the compensation she receives for an injury which has shattered her life could be severely limited by this bill. No one could argue that is fair.[382]

In Koenig and Rustad's study, women's non-compensatory damage awards averaged twice the non-compensatory damages awarded to men.[383] Part of this is attributable to the overwhelmingly feminine nature of some classes of malpractice injuries, such as sexual abuse by a practitioner, reproductive injuries during childbirth, and malpractice during cosmetic surgery.[384] These actions may constitute incredible violation of the plaintiff's person, but yield little in measurable economic damages. The combination of the malpractice on predominantly female patients with the lower earnings of women shows how non-economic damages are essential to the full compensation of female patients.

By adding age to gender, the gap becomes even wider between those who can be fully compensated through the medical malpractice limitations and those who are hard pressed to find a lawyer. More elderly women than men suffer abuse in nursing homes simply because of women's higher longevity.[385] However, for all retired persons, potential damages exceeding the cost of litigation are essential to gain access to the court. The typical

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[381]Even economic damages may reflect gender bias. *See generally* Thomas R. Ireland & Anne E. Winkler, *Projecting the Lost Future Economic Contribution of a Female Child: Refining Income Data to Reflect True Losses*, 4 J. LEGAL ECON. 19–37 (1994) (arguing that future lost income for disabled female children should be based only on earning stream of never married, childless women to accurately include economic losses from household production and child rearing).

[382]Koenig & Rustad, *supra* note 369, at 79 (quoting *Hearing on H.R. 1910, the Fairness in Products Liability Act, Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. 1 (1994) (testimony of Robert Creamer, representing Citizen Action and Illinois Public Action)).

[383]*See id.* at 85.

[384]*See id.* at 85.

[385]*See id.* at 76. Women live roughly seven years longer than men. *See id.* at n.313 (citing U.S. DEPT. OF HEALTH AND HUM. SERVS., *Health United States* 1988 53 tbl. 13 (1989)).

nursing home plaintiff has no economic damages, no medical bills,[386] and the plaintiff may die or lose coherence before completing the malpractice suit.[387] The same is true of plaintiffs disabled prior to malpractice, who have a lower life expectancy, lower economic damages, or who may have economic damages reduced because their income comes from public assistance.[388]

For these plaintiffs, there is a true crisis in medical malpractice: because of the disproportionate impact of non-economic damage limitations on women,[389] the elderly, and the disabled, their cases are worth so little money that they have difficulty even obtaining counsel. The costs of Utah's prelitigation panel may be relatively small for plaintiffs with high economic damages, but for plaintiffs whose lives are valued in non-economic damages, these costs could determine whether or not an attorney will represent the plaintiff in a borderline case. A plaintiff who seeks access to the court is not even permitted to bargain with her attorney to receive a higher contingency fee where the lack of economic damages would dissuade a sensible attorney from taking her case.[390] The damage cap on non-economic damages[391] and imposition of the collateral source rule[392] result in a unreasonable and arbitrary application of the law by disproportionately limiting relief according to gender, age, and disability.[393] In the same way, the mandatory periodic payment of plaintiff's share of damages exceeding $100,000 prejudices the class of plaintiffs with predominantly non-economic injuries because all periodic payments except for future earnings "cease upon the death of the judgment creditor."[394] This operates to reward those committing serious malpractice leading to the imminent death of the

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[386]*See id.* at 75–77.

[387]*See id.* at 75–77.

[388]UTAH CODE ANN. § 78-14-4.5(4) (1996) provides:

> Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that such programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider such evidence in determining the amount of damages awarded to a plaintiff for future expenses.

[389]*See* Koenig & Rustad, *supra* note 369, at 87.

[390]*See* UTAH CODE ANN. § 78-14-7.5 (1996).

[391]*See id.* § 78-14-7.1.

[392]*See id.* § 78-14-4.5. *See also* American Legion Post Number 57 v. Leahey, 681 So. 2d 1337, 1342 (Ala. 1996) (holding statutory adoption of collateral source rule unconstitutional), *but see* Reid v. Williams, 964 P.2d 453, 460 (Alaska 1998) (upholding statute adopting collateral source rule as not violating substantive due process).

[393]*See American Legion*, 681 So. 2d at 1342 (collateral source rule violated special laws provision).

[394]UTAH CODE ANN. §78-14-9.5(6) (1996).

patient by granting an economic benefit to the physician whose patient dies as a result of the malpractice. In contrast, malpractice with lesser damage is more likely to result in full compensation to the plaintiff.

Under the standard applied by the court in *Lee* and *Malan*, a law may appear uniform on its face but may violate Section 24 if in operation it is unreasonably or arbitrarily exclusive.[395] Where disparate impact on female, elderly, and disabled persons is statistically probable, the disproportionate impact must bear a reasonable relation to the purposes of the Malpractice Act. Recently, the Illinois Supreme Court found a cap on noneconomic damages to be unconstitutional.[396] "Even assuming that a systemwide savings in costs were achieved by the cap, the prohibition against special legislation does not permit the entire burden of the anticipated cost savings to rest on one class of injured plaintiffs."[397] In Utah, under the Section 24 mandate of uniform operation of the laws, this reasoning is even more persuasive where "one class of injured plaintiffs" consists disproportionately of women, the elderly, and the disabled. For this reason, the combination of the prelitigation panel and limits on recoverable damages under the Malpractice Act should be unconstitutional as violating of Section 24 of the Utah Constitution.

C. Unconstitutional Usurpation of Judicial Power

Under Article VIII of the Utah Constitution, the judicial power is vested exclusively in the Utah Supreme Court and other courts established by statute.[398] Further, the supreme court has the power to establish rules of procedure and evidence, which may only be amended by a two-thirds vote of the legislature.[399] Finally, the court has exclusive power to govern the practice of law, including regulating the conduct and discipline of lawyers.[400] These three aspects of power vested in the supreme court—the general judicial power, power to establish rules of procedure and evidence, and the power to regulate the practice of law—present three different

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[395]*See Lee*, 867 P.2d at 577; *Malan*, 693 P.2d at 669.

[396]*See* Best v. Taylor Machine Works, 689 N.E.2d 1057, 1076–77 (Ill. 1997) (finding statutory cap on noneconomic damages compensatory damages violated special legislation provision of Illinois Constitution).

[397]*Id.* at 1077.

[398]*See* UTAH CONST. art. VIII, § 1.

[399]*See id.* § 4.

[400]*See id.*

constitutional difficulties in the Malpractice Act, which are discussed in turn below.

Part 1 discusses how the panel itself contravenes the general judicial power in Article VIII, Section 1. Part 2 examines how the Malpractice Act's procedural and evidentiary mandates conflict with rules of procedure and evidence established by the Utah Supreme Court. Part 3 explores the limitation on attorneys' fees as a violation of the supreme court's authority to govern the practice of law.

1. The Panel Exercises Core Judicial Functions Reserved Exclusively to the Judiciary

Various provisions in the Malpractice Act could be unconstitutional under Article VIII of the Utah Constitution. The general judicial power is vested in the supreme court and other courts created by statute under Article VIII, Section 1, which provides:

> The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district, court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.[401]

Under the reasoning in *Wright v. Central Du Page Hosp. Assoc.*,[402] because the panel decision could serve as a binding judgment, the Malpractice Act contravenes the judicial power.[403] Like the Illinois panel in *Wright,* Utah's panel consists of three members, can be binding on agreement of the parties, and is otherwise inadmissible at trial.[404] However, the Illinois legislature had given a nod to the judicial power by providing that a judge sit on the panel along with an attorney and a physician.[405] Utah, on the other hand, has no judicial presence whatsoever.[406] The Illinois statute was held to be unconstitutional despite the presence of one judge because the lawyer and physician could effectively overrule the judge. The panel could enter a final judgment based on the findings of people who lacked the authority to do so. Utah's statute is even more egregious: instead of a judge, a layperson may

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[401] *See id.* § 1.
[402] 347 N.E.2d 736 (Ill. 1976).
[403] *See id.* at 739–40.
[404] *See* UTAH CODE ANN. § 78-14-12(4) (1996 & Supp. 1999).
[405] *See Wright*, 347 N.E.2d at 738.
[406] *See* UTAH CODE ANN. § 78-14-12(4) (1996 & Supp. 1999).

serve.[407] Thus, under Utah's scheme, parties may enter into a binding judgment after arbitration and without the presence of judicial personnel or a certified arbitrator. This delegates judicial powers in violation of Article VIII, Section 1 of the Utah Constitution.

The Utah Supreme Court, in *Salt Lake City v. Ohms*,[408] found that a statute establishing court commissioners and empowering them to have judicial authority to enter final judgements violated Article VIII.[409] Examining whether court commissioners exercised core judicial functions, the court defined the judicial power as "'the power to hear and determine controversies between adverse parties and questions in litigation.'"[410] Core judicial functions also include the "'*authority* to hear and determine justiciable controversies . . . the authority to enforce any valid judgment, decree, or order . . . [and all powers] necessary to protect the fundamental integrity of the judicial branch.'"[411] In *Ohms*, the defendant consented to having his case tried by a court commissioner and consented to the commissioner's entry of final judgment.[412] However, the defendant's consent was to no avail where "article VIII's explicit vesting of jurisdiction in the various courts of the state is an implicit prohibition against any attempt to vest such jurisdiction elsewhere."[413]

The court did discuss the applicability of its holding to courts of record only.[414] It discarded, though the possibility that the court commissioner could be given these judicial powers under the "courts not of record" provision.[415] This provision did not apply because the legislature had not created a new court but instead simply created a new officer within the jurisdiction of a court of record who was not subject to the provisions governing article VIII judges.[416]

The *Ohms* court also found it disturbing that court commissioners were not subject to constitutional checks and balances for those who exercise the

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[407]*See* UTAH CODE ANN. § 78-14-12(4)(c) (Supp. 1999).

[408]881 P.2d 844 (Utah 1994).

[409]*See id.* at 851–52. Commissioners are "quasi-judicial officers *of courts of record* and have judicial authority as provided by this section and rules of the Judicial Council." *Id.* at 848 (citing UTAH CODE ANN. § 78-3-31(1)(a) (1996)).

[410]*Id.* at 849 (quoting Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy Dist., 690 P.2d 562, 569 (Utah 1984)).

[411]*Id.* (quoting Galloway v. Truesdell, 422 P.2d 237, 242 (Nev. 1967); *In re* Criminal Investigation, 7th Dist. Court No. CS-1, 754 P.2d 633, 642 (Utah 1988)).

[412]*See Ohms*, 881 P.2d at 846–47.

[413]*Id.* at 849.

[414]*See id.*

[415]*See id.*

[416]*See id.* at 850.

judicial power in courts of record.[417] Because court commissioners were not subject to the constitutional process to select persons exercising the judicial power, their existence was unconstitutional.[418] This necessarily would infringe on other constitutional rights:

> [the right of the judicial nominating commission] to select and submit judicial nominees to the governor, it would deprive the governor of the constitutional right to choose judges of courts of record, and it would deprive the people of the state of Utah of their constitutional right to vote on judges of courts of record in retention elections.[419]

The court also distinguished earlier statutory schemes for court commissioners because earlier statutes provided for commissioners to act under the jurisdiction of, and are subject to the final review of, an article VIII judge.[420]

The panel provided for by the Malpractice Act is even more constitutionally suspect than the statute at issue in *Ohms*. To begin, the Utah statute does not create a new court, nor does it operate as an administrative agency.[421] Although parties may litigate after the panel has reached a decision,[422] original jurisdiction is essentially exercised by the panel. By making the panel procedure a mandatory prerequisite to the district court's jurisdiction, the statute delegates judicial authority to exercise initial jurisdiction elsewhere.

If the parties consent, the panel may be treated as binding arbitration, but the statute is unclear as to the degree of judicial control maintained by the judge in a panel proceeding "considered a binding arbitration hearing."[423] For example, the binding arbitration procedures[424] provide that, on motion of a party, the judge has discretion to appoint arbitrators "whom the court shall find qualified to arbitrate the issues stated in the motion."[425] However, the Malpractice Act purports to control the selection of arbitrators but ignores that many panel members are simply not qualified arbitrators.[426]

This conflict arises from the attempt to simply substitute the panel for qualified arbitrators and proceed under the Utah Arbitration Act ("Arbitra-

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[417]*See id.*

[418]*See Ohms*, 881 P.2d at 880.

[419]*Id.* at 850.

[420]*See id.* at 851–52 n.17.

[421]*See* UTAH CODE ANN. § 78-14-12(1)(c) (1996 & Supp. 1999) (specifying that panel is not subject to Administrative Procedures Act).

[422]*See id.* § 78-14-15(1).

[423]*Id.* § 78-14-16.

[424]*See id.* § 78-31a-1 *et seq.*

[425]*Id.* § 78-31a-5(4).

[426]*See id.* §§ 78-14-12(4) to -16.

tion Act").[427] The attorney chair and lay panel members are required to complete some training with DOPL,[428] but need not be certified as arbitrators under the Alternative Dispute Resolution Providers Certification Act ("ADR Act").[429] Certification required under the ADR Act applies to arbitrators in Utah, proceeding under the Arbitration Act.[430] If panelists stand in the shoes of arbitrators as required by the Malpractice Act, they are not only acting in violation of the ADR Act, but lack the training required for the more formal arbitration proceeding.[431] Assuming that certified arbitrators do not contravene the judicial power, panelists under the Malpractice Act are not in the same position as arbitrators because they are not subject to licensing requirements. This lack of checks on power exercised by people performing judicial functions is precisely the problem that concerned the *Ohms* court[432] because malpractice panelists are not certified arbitrators. Granted, arbitrators are subject to the jurisdiction of a court, and final judgment must be entered by an article VIII judge. *Ohms* left unanswered, though, whether exercising any judicial function without being subject to checks on this authority would be cured by a judge entering the final judgment. Like the commissioner in *Ohms,* panel members acting as arbitrators without certification contravene the judicial authority of Article VIII, Section 1.

This conflict between the ADR Act's licensing requirements for arbitrators and the lack of restraint on panelists is compounded by other contradictions that arise from attempting to comply with both the Malpractice Act and the Arbitration Act. For example, the Malpractice Act provides that panel proceedings are "confidential, privileged, and immune from civil process,"[433] but no such requirement exists in the Arbitration Act. Binding arbitration is subject to judicial review,[434] but no judicial review or appeal

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[427]*See id.* § 78-14-16.

[428]*See id.* § 78-14-12(4)(a), (c).

[429]*See id.* § 58-39a-1 *et seq.*

[430]*See id.* § 58-39a-2.

[431]*See, e.g.*, § 78-31a-7(2) (preserving right to be heard, to present evidence, and to cross-examine witnesses); § 78-31a-8 (allowing arbitrators to administer oaths, issue subpoenas, and comply with discovery requests under Utah Rules of Civil Procedure).

[432]*See Ohms*, 881 P.2d at 850.

[433]UTAH CODE ANN. § 78-14-12(1)(d) (1996 & Supp. 1999). *See also id.* §78-14-13(5)(a) (making proceedings confidential and closed to public).

[434]*See id.* § 78-31a-14 (providing for vacation of award by court); § 78-31a-15 (providing for modification of award by court); § 78-31a-16 (permitting court to award costs, including attorney's fee); § 78-31a-19 (providing for appeals from any court order related to arbitration, including entering judgment confirming arbitrators' award).

may be taken from the panel's decision under the Malpractice Act.[435] If the plaintiff has a medical malpractice as well as another claim against the defendant, under the Malpractice Act, the plaintiff cannot commence litigation until the panel decision is final.[436] Under the Arbitration Act, though, "only the issue subject to arbitration is stayed."[437] Finally, the Malpractice Act provides that "[n]o party has the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed."[438] In an arbitration proceeding, though, each person is entitled "to be heard, to present evidence material to the controversy, and to cross-examine witnesses."[439]

There are two possible approaches to harmonizing these contradictory provisions: First, the Malpractice Act's requirement, which states that if parties agree, they "proceed under [the Arbitration Act], except for the selection of the panel, which is done as set forth in Subsection 78-14-12(4),"[440] could be interpreted as making other provisions of the Malpractice Act inapplicable, and so the panelists would act under the procedure set forth in the Arbitration Act. Second, the Malpractice Act's statement that "the proceeding may be considered a binding arbitration hearing"[441] could be interpreted to require the panel to follow procedures set forth in the Malpractice Act and simply treat the panel's opinion as substituting for a final award by arbitrators.[442] The opinion would be treated as a final judgment once confirmed, modified, or corrected by the court.[443] Both approaches are problematic: if the panelists follow the ADR Act procedures, they act as arbitrators without being certified under the ADR Act. If the panelists follow the Malpractice Act procedures, the power of the court to confirm, modify, or correct the panel opinion is stifled by the lack of record of the proceedings,[444] panelists' immunity from civil process,[445] and the prohibition on judicial or other review of the panel opinion.[446] In this case, if the court cannot meaningfully review the panel's opinion, the court's

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[435]*See id.* § 78-14-14 (prohibiting judicial or other review of determination); § 78-14-16 (allowing decision to be considered binding arbitration if agreed to by parties).

[436]*See id.* § 78-14-12(1)(c), (3)(c)(ii).

[437]*Id.* § 78-31a-4(3).

[438]*Id.* § 78-14-13(5)(b).

[439]*Id.* § 78-31a-7(2).

[440]*Id.* § 78-14-16.

[441]*Id.*

[442]*See id.* § 78-31a-7(4).

[443]*See id.* § 78-31a-16 (treating arbitration award as final judgment).

[444]*See id.* § 78-14-13(1).

[445]*See id.* § 78-14-12(1)(d).

[446]*See id.* § 78-14-14.

jurisdiction over the panel is a sham, and the core judicial functions of "'the power to hear and determine controversies between adverse parties and questions in litigation'"[447] is effectively delegated to uncertified, non-judicial personnel. Regardless of the procedure panelists follow, by permitting proceedings to be treated as binding arbitration, the Malpractice Act forces panelists to act either illegally as uncertified arbitrators or unconstitutionally by assuming responsibility for core judicial functions.

2. Adoption or Amendment of Rules of Procedure and Evidence

Beyond the general judicial power exercised by article VIII judges, the Utah Supreme Court has the power to enact rules of procedure and evidence:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.[448]

This power was granted to the Utah Supreme Court when the Utah Constitution was amended in 1985.[449] Shortly after this section was added, the supreme court adopted all existing statutory rules of procedure and evidence "not inconsistent with or superceded by rules of procedure and evidence heretofore adopted by this court."[450] Thus, statutory rules enacted up to 1985 were only adopted to the extent they were not inconsistent with rules of procedure and evidence adopted by the court. However, some of the procedural and evidentiary provisions of the Malpractice Act were added after 1985. For these provisions, the distinction between whether a rule is adopted or amended by the legislature is critical. Under Article VIII, Section 4, the legislature may amend an existing rule by a two-thirds majority but cannot adopt new rules of evidence.[451] Some of these post-1985 changes

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[447] *Ohms*, 881 P.2d at 849 (quoting *Timpanogos*, 690 P.2d at 569).

[448] UTAH CONST. art. VIII, § 4.

[449] Enacted by S.J.R. 1 (2d S.S.) 1984, approved by voters in November 6, 1984; and effective July 1, 1985.

[450] In Re Rules of Procedure and Evidence to be used in the courts of this state, 1985 Utah LEXIS 889 at *1 (Utah Sept. 10, 1985) (per curiam).

[451] *See* UTAH CONST. art. VII, § 4.

inadvertently passed with a two-thirds majority, although the legislature did not seem mindful of this requirement.[452]

The Malpractice Act could infringe on the judicial power over procedure and evidence in one of several ways. First, the provisions enacted through 1985 could be construed as inconsistent with the Utah Supreme Court's rules of procedure and evidence, and therefore, not included in the supreme court's 1985 acceptance of prior statutory procedures. This includes several provisions: not admitting the panel's report;[453] prohibiting judicial review;[454] applying the collateral source rule;[455] and prohibiting dollar amounts in the complaint.[456] Second, the mandatory periodic payments provision[457] and the cap on noneconomic damages[458] were enacted after 1985 with less than two-thirds of the vote. As such, these provisions fail to constitutionally amend rules within the supreme court's power.

The prelitigation panel provisions were enacted with a two-thirds majority, but it is not clear that they qualify as "amending" rules of procedure and evidence. To begin, the prelitigation panel itself, as a mandatory requirement to the court's exercise of jurisdiction,[459] is a procedural impediment that has not been adopted by rule. Further, this

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[452]*See, e.g.*, ch. 238, 1985 Utah Laws 652 (codified as enacting UTAH CODE ANN. § 78-14-12 to -16 (Supp. 1985)) (creating prelitigation panel, giving panel authority, prohibiting judicial review of panel decision, declaring evidence of panel proceedings inadmissible, and providing that panel proceedings may be considered binding arbitration). This Act passed with a two-thirds majority, although the constitutional requirement was not addressed on passage. HOUSE J., 45th Legis., Gen. Sess., 894–95 (Utah 1985); SENATE J., 45th Legis. Gen. Sess., 489 (Utah 1985). However, where these provisions passed the same year as the constitutional amendment, the court would likely find no Article VIII, Section 4 violation. *See, e.g.*, State v. Larsen, 850 P.2d 1264, 1265–66 (Utah 1993) (upholding Act passed in same year as constitutional amendment permitting enactment).

[453]*See* UTAH CODE ANN. § 78-14-15(1) (1996).

[454]*See id.* § 78-14-4.5.

[455]*See id.* § 78-14-4.5.

[456]*See id.* § 78-14-7.

[457]*See id.* § 78-14-9.5. Because these provisions also apply to actions for wrongful death from medical malpractice, it also likely violates Article XVI, Section 5 of the Utah Constitution, which provides: "the right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law." UTAH CONST. art. XVI, § 5. The right is fundamentally abrogated if the limitation makes it more difficult for the plaintiff to obtain a full remedy, as in cases where the decedent was elderly, collects public benefits, and had no measurable future income. *See also* James E. Magleby, *The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution*, 21 J. CONTEMP. L. 217, 254–57 (1995) (discussing constitutional standard applicable to wrongful death actions).

[458]*See* UTAH CODE ANN. § 78-14-7.1 (1996).

[459]*See* UTAH CODE ANN. §§ 78-14-12 to -13 (1996 & Supp. 1999).

requirement is not subject to judicial review.[460] Where evidentiary rules are concerned, the Malpractice Act declares panel findings inadmissible and prohibits compelling a panelist to testify.[461] The prohibition on stating monetary damages in the complaint[462] and the mandatory periodic payment of damages[463] also impose new rules of procedure specifically for malpractice actions. These portions of the Malpractice Act were enacted prior to 1985 and thus are not subject to the two-thirds majority.[464] Even so, the court's adoption of statutory rules of procedure existing in 1985 extends only to those rules not in conflict with previously adopted rules.[465] Under the supreme court's power, any of these provisions could be challenged as unconstitutional where they deviate from the standard rules of evidence and procedure.[466]

For those provisions passed after 1985, those passing with a two-thirds majority may be suspect because none of this legislation addressed the rules impacted:

> It would appear that article VIII, Section 4 requires any legislation which amends a court rule to comply with the same legislative joint rules and practice governing amendments to statutes, that is, to refer to the rule specifically by number and indicate how it is to be amended.[467]

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[460]*See id.* § 78-14-14.

[461]*See id.* § 78-14-15(1), (2).

[462]*See id.* § 78-14-7.

[463]*See id.* § 78-14-9.5.

[464]*See* State v. Carter, 888 P.2d 629, 648 (Utah 1994) (holding Article VIII, Section 4, along with court's 1985 adoption of statutory rules of procedure and evidence, to have only prospective application, mooting argument that pre-1985 statute required two-thirds majority of legislature).

[465]In Re Rules of Procedure and Evidence to be used in the courts of this state, 1985 Utah LEXIS 889 at *1 (Utah Sept. 10, 1985) (per curiam).

[466]*See, e.g.*, UTAH R. CIV. P. 7(b)(2) (providing order to pay money enforceable as a judgment); UTAH R. CIV. P. 8(a)(2) (requiring claim for relief to include demand for judgment); UTAH R. CIV. P. 9(g) (requiring special damages to be specifically claimed); UTAH R. CIV. P. 16(a) (allowing pretrial conferences to encourage settlement or discourage wasteful pretrial activities); UTAH R. CIV. P. 23 (providing for class actions); UTAH R. CIV. P. 43 (providing all evidence admissible under Utah Rules of Evidence or rules adopted by supreme court); UTAH R. CIV. P. 45 (establishing court power to issue subpoenas); UTAH R. CIV. P. 58A (establishing power to enter judgments); UTAH R. CIV. P. 69 (providing for execution of judgment, including cases where judgment creditor is deceased); UTAH R. EVID. 401-402 (providing that relevant evidence is admissible). Some of these rules incorporate statutory exceptions, which may still conflict with the constitutional requirement of a two-thirds vote to amend the rules.

[467]*Larsen*, 850 P.2d at 1267 (upholding constitutionality of statute governing standards for bail pending appeal where constitution was amended to provide for legislative enactment of standards, so court did not reach Article VIII, Section 4 issue) (citing House and Senate

In other words, since the amendment to the Utah Constitution, the legislature needs to acknowledge that it no longer governs procedure and evidence by statute. Among the Malpractice Act's post-1985 provisions, two provisions do not pass constitutional muster because they did not pass with a two-thirds majority. First, the limitation on noneconomic damages to $250,000 was not passed by a two thirds majority.[468] Second, the mandate of periodic payment of damages did not attain the two-thirds majority.[469] Other courts have found similar restrictions on non-economic damages as an unconstitutional "legislative remittitur."[470] There is some difference of opinion on the comparative role of judge and jury in determining damages.[471] However, when the legislature imposes a preexisting limit on non-economic damages it on the power of the judge to impose remittitur on an excessive jury verdict.

3. Limitations on Attorney's Fees

Finally, the limitation on attorney's contingency fees in medical malpractice commandeers the supreme court's power to "govern the practice of law," including the conduct and discipline of attorneys. Utah's Constitution states: "[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."[472]

Where governing the practice of law is concerned, there is no explicit constitutional allowance for legislative amendment; this power belongs exclusively to the Utah Supreme Court.[473] The limitation on attorney

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Joint Rule 4.11).

[468]*See* Sub. S.B. 111, enacting UTAH CODE ANN. §78-14-7.1 (1986); HOUSE J., 46th Legis., Gen. Sess., 619-20 (Utah, 1986) (49 yeas, 16 nays, 10 absent or not voting); Sen. J., 46th Legis. Gen. Sess. 337 (Utah 1986) (19 yeas, 8 nays, 2 absent or not voting).

[469]*See* S.B. 155, enacting UTAH CODE ANN. §78-14-9.5 (1996); HOUSE J., 46th Legis., Gen. Sess., 995 (Utah 1986) (43 yea, 18 nay, 14 absent or not voting); SENATE J., 46th Legis. Gen. Sess., 770 (Utah 1986) (17 yea, 7 nay, 5 absent or not voting).

[470]Best v. Taylor Machine Works, 689 N.E.2d 1057, 1080 (Ill. 1997) (infringing on judicial power to impose remittitur for non-economic damages). *See also* Sofie v. Fibreboard Corp., 771 P.2d 711, 720 (Wash. 1989) (finding right to jury trial on non-economic damages).

[471]*See Best*, 689 N.E.2d at 1080; *Sofie*, 771 P.2d at 720.

[472]UTAH CONST. art. VIII, § 4.

[473]*See* Barnard v. Utah State Bar, 804 P.2d 526, 530 (Utah 1991) (holding Utah Bar not state agency for purposes of Records Act and Writings Act). In *Barnard*, the court refused to consider "whether [the Article VIII, Section 4 grant of authority] ousts the Legislature from all control over the Bar or whether the Records Act and Writings Act would be unconstitutional if applied to the Bar." *Id.*

contingency fees to one third of recovery infringes on this power because the only manner of enforcement is through the supreme court. The general rule for fees is that "a lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee."[474] Where contingency fees are concerned, their appropriateness is linked to the amount of risk involved that a plaintiff will recover. For example, a fee may be excessive where there is "little or no risk" that a plaintiff will not recover.[475] Presumably the contingency fee is more appropriate where more risk is involved, and a higher fee is appropriate where there is a higher risk that plaintiff will recover little in damages.

One article presenting a fault-based administrative system for resolving medical malpractice claims, endorsed by the American Medical Association, advocates providing appointed attorneys to medical malpractice plaintiffs.[476] For plaintiffs who choose to reject their appointed attorney and hire other counsel, suggested reasonable contingency fees are "40% of the first $50,000 recovered, 33 1/3% of the next $50,000 recovered, 25% of the next $100,000 recovered, and 10% of any amount over $200,000 recovered."[477] Even among the medical profession, it is recognized that smaller judgments are less likely to cover actual costs. For a case worth $10,000 that settles after prelitigation and initial discovery, a Utah lawyer is fortunate to recover the cost of the proceedings. In fact, claims for lower amounts of damages will not be brought before the panel because few lawyers would be willing to accept such a case.[478] In such a case, a contingency fee higher than 33 1/3 % may be warranted.

In attorney discipline cases, the Utah Supreme Court has interpreted Article VIII, Section 4 as preserving the court's power to independently determine the appropriateness of sanctions.[479] By limiting attorneys' fees, the legislature has not provided for any sanction other than that imposed by the supreme court. Apparently, the legislature intends the statute to do just that: set the standard of reasonableness for the supreme court. Thus, the mandate that fees be limited to 33 1/3% of recovery infringes on the judicial power to govern the practice of law. The court could independently adopt

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[474]UTAH R. PROF. CONDUCT 1.5(a).

[475]*See In re* Discipline of Jean Robert Babilis, 951 P.2d 207, 211 (Utah 1997).

[476]*See* Kirk B. Johnson et al., *A Fault-Based Administrative Alternative for Resolving Medical Malpractice Claims*, 42 VAND. L. REV. 1365, 1381 (1989).

[477]*Id.* at 1381 n.90.

[478]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999), at 34.

[479]*See In re* Discipline of Paul R. Ince, 957 P.2d 1233, 1236 (Utah 1998) ("[O]ur constitutional responsibility requires us to make an independent determination as to its correctness.") (citing *Babilis*, 951 P.2d at 211).

the same standard, but it has no constitutional obligation to accept this legislative mandate.

D. Denial of Right to Trial by Jury

Two basic contentions have been raised when addressing the potential infringement of medical malpractice prelitigation panels on the constitutional right to trial by jury: First, the panel may infringe on the jury's role, particularly where the panel operates outside of the court's jurisdiction. Second, the delay caused by panel proceedings may impermissibly burden access to trial by jury. The Utah Constitution preserves the right to trial by jury in civil cases:

> In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.[480]

In *International Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*,[481] the Utah Supreme Court addressed whether the right to trial by jury was constitutionally guaranteed in civil cases.[482] The court rejected the argument that the application of "inviolate" only to the jury right in capital cases made civil juries constitutionally permissive, but not mandatory.[483] On the contrary, the court found that by fixing the number of jurors in civil trials, section 10 "presupposes the existence of the basic right itself."[484] More recently, the court has reaffirmed this right for civil actions existing at common law when the Utah Constitution was adopted.[485]

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[480]UTAH CONST. art. I, § 10.

[481]626 P.2d 418 (Utah 1981).

[482]*See id.* at 419.

[483]*See id.* at 419–20.

[484]*Id.* at 420.

[485]*See, e.g.*, Hyatt v. Hill, 714 P.2d 299, 301 (Utah 1986) (holding no right to jury in paternity action where action did not exist at common law). Note that Justice Howe, concurring, would have held that the right to jury trial in civil cases was prospectively preserved for actions involving real or personal property, contract, or injury, despite the absence of a specific cause of action at the time the constitution was adopted. *See id.* at 302. He concurred in denial of jury for paternity because at common law domestic actions were equitable and so were not tried by juries. *See id.*

In states where prelitigation panels produce an admissible report, panels are often challenged for usurping the jury's fact-finding role.[486] While Utah's Malpractice Act does not create an admissible report, the possibility of judgment without trial may restrict the right to trial by jury.[487] In *Wright v. Central Du Page Hosp. Assoc.*,[488] the court first struck the panel statute as impermissibly delegating judicial power to non-judicial persons.[489] Because the panel's decision could be the sole basis for judgment, the statute not only infringed the judicial power, but it also denied the right to have a jury as the ultimate trier of fact.[490] The court held that the panel procedure was an "impermissible restriction on the right of trial by jury" under the Illinois Constitution.[491] Similar to the Utah Supreme Court, the Illinois Supreme Court interpreted the civil jury guarantee as maintaining the same right to a jury as existed at the adoption of the constitution.[492] Under this reasoning, the panel as a mandatory prerequisite may unconstitutionally burden the right to trial by jury.

Another argument under Utah's Malpractice Act is that the panel imposes unconstitutional delays on the right to trial by jury. While the Utah Constitution provides for the voluntary waiver of the right to trial by jury,[493] the prelitigation panel procedure, as a mandatory prerequisite to trial, imposes an involuntary temporary waiver of six months.[494] According to the Legislative Audit, in a sample from 1992, panel proceedings caused an average delay of three months, while some cases took from five to over eight months to complete.[495] In *Mattos v. Thompson*,[496] the court found factual delays from several months up to four years to be an unconstitutional burden on the right to trial by jury.[497] Utah's delays are restricted to six months, but it is unclear how much delay is permissible when the court is

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[486]*See* Comiskey v. Arlen, 390 N.Y.2d 122, 127 (N.Y. App. Div. 1976).

[487]*See supra* Part IV.C.1 (discussing unconstitutional grant of judicial power to non-judicial personnel if panel is treated as binding arbitration).

[488]347 N.E.2d 736 (Ill. 1976).

[489]*See id.* at 739–40.

[490]*See id.* at 741.

[491]*Id.*

[492]*See id.*

[493]*See International Harvester*, 626 P.2d at 420; UTAH CONST. art. I, § 10.

[494]*See* UTAH CODE ANN. § 78-14-12 (3)(b) (Supp. 1999) (finding that if panel does not have decision within 180 days of filing, plaintiff may proceed to trial and prelitigation hearing requirement is satisfied). However, parties may agree in writing to a longer review. *See id.* § 78-14-12(3)(b)(i).

[495]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) at 30.

[496]421 A.2d 190 (Pa. 1980).

[497]*See id.* at 196.

denied jurisdiction. The statute does permit extensions if the parties agree in writing.[498] However, because the panel is subject to a statutory maximum, the Utah statute is likely to be constitutional.[499]

Although the panel itself may not violate the right to trial by jury, limitations on damages in the Malpractice Act may violate this right. The *International Harvester* court took a strong stance on the right to jury trial for civil cases: "[t]oday we squarely hold that the right of jury trial in civil cases is guaranteed by Article I, § 10 of the Utah Constitution."[500] In *Condemarin,* Justice Durham would have stricken the damage cap based on the right to trial by jury.[501] Noting that the fact-finding role of a jury has traditionally extended to the determination of civil damages, Justice Durham found that "the Utah state constitutional right to jury trial on the question of civil damages is absolute."[502] Just as the limitation on non-economic damages may constitute a legislative remittitur,[503] it may also infringe on the right to have a jury determine damages.[504] This is particularly difficult where non-economic damages may be necessary to fully compensate the plaintiff.[505] The statutory cap abrogates the jury's fact-finding role by removing the jury's power to find that a plaintiff's non-economic damages exceed the cap.

V. CONCLUSION

The Utah Health Care Malpractice Act is on shaky ground under the Utah Constitution. To begin, the Utah Open Courts Clause preserves an historic guarantee of access to the courts and remedy for harm to one's person. The Malpractice Act violates both these provisions. The panel proceeding, as a prerequisite to the court's exercise of jurisdiction, delays and may deny access altogether. Where parties proceed to trial, the panel necessarily impairs remedies available only through formal discovery. The Malpractice Act's damage restrictions abrogate damages that were available

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[498] *See* UTAH CODE ANN. § 78-14-12(3)(b)(i) (Supp. 1999).

[499] *See, e.g.,* Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 349–51 (Alaska 1988) (upholding statute creating mandatory pretrial review of medical malpractice claims by expert panel).

[500] *International Harvester,* 626 P.2d at 421.

[501] *See* Condemarin v. University Hosp., 775 P.2d 348, 366 (Utah 1989).

[502] *Id.*

[503] *See* Best v. Taylor Machine Works, 689 N.E.2d 1057, 1080 (Ill. 1997) (holding $500,000 cap on non-economic damages violated judicial power of remittitur).

[504] *See* Sofie v. Fibreboard Corp., 771 P.2d 711, 721 (Wash. 1989) (holding cap on non-economic damages violated right to trial by jury).

[505] *See supra* Part IV.B (discussing disparate impact of damage cap).

at common law for medical malpractice without providing a quid pro quo for the loss of remedy. The questionable legislative purpose and tenuous relationship between the evil to be remedied and the limitations of damages, combined with the Malpractice Act's overall ineffectiveness, make it unlikely that the damage limitations would pass constitutional muster.

The argument against constitutionality of damage limitations is bolstered if an individual plaintiff can demonstrate that higher non-economic damages are necessary to make her whole. In this case, the Malpractice Act's restrictions on remedies violate the constitutional promise of uniform operation of the laws by limiting damages. Non-economic damages are an important portion of compensatory damages that represent the true cost of harm suffered by the plaintiff. By limiting non-economic damages, the Malpractice Act has a disparate impact on those whose damages are not accurately reflected by a paycheck. The Malpractice Act caps the portion that may be a substantial part of compensatory damages for female, elderly, and disabled plaintiffs. As such, it violates the uniform operation of the laws guaranteed by the Utah Constitution.

The requirement of panel proceedings prior to the court's assumption of jurisdiction infringes on the judicial power of the Utah Constitution. If the panel is treated as binding arbitration, judgment may be entered on the panel opinion without meaningful judicial review, or no judicial review, if the court submits to the statutory directive. Further, the Malpractice Act's procedural, evidentiary, and attorney fees provisions infringe on the supreme court's power to govern these affairs.

While delay cause by prelitigation may not unconstitutionally burden the right to jury trial, damage limitations may unconstitutionally impair the plaintiff's right to jury determination of damages. Some have questioned the appropriateness of the jury's capacity to apply law to facts, but the Utah Supreme Court has insisted that "we are not among them."[506] If jury damages are truly excessive, it is the role of the courts, not the legislature, to impose remittitur. In any case, the legislative cap usurps the role of judge, jury, or both.

Further tort reform by the legislature has been opposed by attorneys for both plaintiffs and defendants,[507] and giving the panel more power over controversies can only augment arguments against the constitutionality of the statute. The legislature may have sensed this difficulty in its most recent amendment, which permits patients and providers to execute binding

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[506]International Harvester Credit Corp. v. Pioneer Tractor and Implement, Inc., 626 P.2d 418, 420 (Utah 1981).

[507]*See* Utah Legislative Auditor General, *1993 Audit: A Performance Audit of Medical Malpractice Prelitigation Panels*, 10 (visited Dec. 22, 1999) at 34–37.

arbitration agreements, presumably avoiding prelitigation proceedings.[508] Given the constitutional infirmities of the Malpractice Act's panel provisions and the failure of prelitigation panels to deter filings in court, the repeal of these provisions would simplify and improve the process for both plaintiffs and defendants. The constitutional violations of the Malpractice Act's damage provisions are unlikely to be remedied, unless the legislature abandons the attempt to control jury findings of damages and the judicial power to reduce excessive judgments.

Conceptually, the Malpractice Act's prelitigation panel is between a rock and a hard place. The non-binding panel produces an inadmissible opinion, which weighs in favor of constitutionality where the right to trial by jury and separation of powers are concerned, but creates a scheme that is all the more arbitrary and capricious under the open courts or uniform operation of laws analysis. In sum, the non-binding and inadmissible character of the panel decision is either benign or completely unnecessary and unrelated to the legislative purpose of the Malpractice Act, depending on which constitutional provision is violated. These constitutional infirmities are compounded by damage limitations, which fully compensate some victims of medical malpractice and deny other victims full recovery.

For the Malpractice Act, the cure is clearly worse than the disease. The legislature acted to alleviate a crisis that never existed in Utah. Even under the assumed crisis, lawmakers never considered that more malpractice lawsuits could be the result of more malpractice. Nothing in the Malpractice Act attempts to restrain the few practitioners that habitually provide substandard care. Part of the putative evil of the crisis was "defensive medicine"—that doctors would order more tests and procedures to be certain of a diagnosis and avoid a lawsuit. This ignores the obvious implication that avoiding any risk of error may simply be good medical practice. If a practitioner worries that each patient is a potential million dollar lawsuit, perhaps that practitioner will treat each patient with the highest standard of care.

As the current Utah system stands, some patients are branded as worth little, while others are worth nothing. The added time and expense of prelitigation compounds this problem so that some patients cannot obtain counsel to bring a claim in court. This is the real crisis in medical malpractice. Imagine being told that your doctor did not bother with some test or treatment because you are are an aging homemaker, a downs-syndrome child, terminally ill, on public assistance, or on medicare. Our system simply does not deter negligence for these patients because their lives are

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[508] *See* UTAH CODE ANN. § 78-14-17 (Supp. 1999).

not worth enough to sue over. While this may not be a problem for a majority of patients in Utah, for the few that do suffer, the constitution should provide protection. After twenty-five years of medical malpractice reform, it is time to invoke the constitution to address the true crisis in medical malpractice.

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