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## The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs

**ABSTRACT.** In our legal system, redressing private wrongs has tended to be the business of tort law, itself traditionally a branch of the common law. But do individuals have a “vested interest” in law that redresses wrongs? If so, do state and federal governments have a constitutional duty to provide that law? Since the New Deal era, conventional wisdom has held that individuals do not possess such a right, and consequently, government bears no such duty. In this view, it is a matter of unfettered legislative discretion — “whim” — whether or how to provide a law of redress. This view is wrongheaded. To be clear: I do not argue that individuals have a property-like interest in a particular corpus of tort rules. The law of tort is always capable of improvement, and legislatures have an obligation and the requisite authority to undertake such improvements. Nonetheless, I do argue that tort law, understood as a law for the redress of private wrongs, forms part of the basic structure of our government. And though the Constitution does not confer on any particular individual a right to a specific version of tort rules, all American citizens have a right to a body of law for the redress of private wrongs that generates meaningful and judicially enforceable limits on tort reform legislation.

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## ARTICLE CONTENTS

INTRODUCTION	527
I. ENGLISH PROVENANCE	531
A. Common Law Theory, Courts, and the Dispensing Power	532
1. The Ancient Constitution	532
2. Implications for the Right to a Law of Redress	537
B. Locke on the Inalienability of the Right To Redress Injuries	541
C. Blackstone's Synthesis: Private Wrongs and the English Constitution	545
1. Rights and Wrongs	546
2. The Right to Law for the Redress of Private Wrongs: Blackstone's Constitution	549
II. RECOGNITION OF THE RIGHT TO A LAW OF REDRESS IN AMERICAN CONSTITUTIONAL LAW	559
A. 1776-1875: Reception	560
1. The Founding Era	560
2. Section 1 of the Fourteenth Amendment	564
B. 1875-1920: Due Process as Ceiling and Floor	568
1. Railroads and Ships	568
2. Workers' Compensation: <i>Ives</i> and <i>White</i>	572
C. 1920-1976: Recognition and Retreat	575
1. <i>Truax v. Corrigan</i> and the Arrival of Rational Basis Review	575
2. Rights-Skepticism, Court-Skepticism, and Wrongs-Skepticism	580
III. THE CONSTITUTIONAL STATUS OF TORT LAW AS A LAW FOR THE REDRESS OF PRIVATE WRONGS	583
A. Due Process Revisited	583
1. Skepticism's Skeptics	583
2. Doctrinal Sightings	585
3. Affirmative Rights, Rights to Law, and Structural Due Process	590

B. Tort Law Revisited	596
1. A Law of Wrongs	597
2. A Law of Private Wrongs: Relational Duties and Injuries	599
3. A Law for the Redress of Private Wrongs	601
4. Torts, Rights, and Duties	606
C. Guidelines for Enforcing the Right to a Law of Redress	611
1. Possible Frameworks	611
2. Applying the Guidelines	616
a. Workers' Compensation	616
b. Peaceful Picketing	617
c. Anti-Heartbalm Statutes	618
d. Trespasses and Takings	620
e. Damage Caps	621
D. Implications	622
1. Defendants' Due Process Rights	622
2. Federal Tort Reform	623
3. Structural Due Process	625
4. Constitutional v. Constitutive: Eliminating the Law of Redress of Wrongs	626
<b>CONCLUSION</b>	626

*A person has no property, no vested interest, in any rule of the common law.*<sup>1</sup>

*It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs . . . .*<sup>2</sup>

## INTRODUCTION

Tort reform legislation abounds. Mostly it is issuing from state legislatures, although Congress has also joined in.<sup>3</sup> Typical reforms burden plaintiffs by raising new procedural and evidentiary hurdles, narrowing grounds for liability, and limiting damages.<sup>4</sup> Plaintiffs have raised numerous constitutional challenges to these laws, with mixed results.<sup>5</sup> One article counts 82 decisions issued by courts in 26 states between 1983 and 2001 that have struck down tort reform measures, usually on state constitutional grounds.<sup>6</sup> However, the article also identifies 140 decisions from courts in 45 states and the District of Columbia upholding reforms in this same period.<sup>7</sup> Lower federal courts appear

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1. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).
  2. *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).
  3. See Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005). Arguably, the Supreme Court has engaged in tort reform of its own. See JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 959-1038 (2004) (collecting recent decisions).
  4. Such measures include setting caps on contingent fees; tightening statutes of limitations or adopting statutes of repose; making certification of class actions more difficult; restructuring trials (e.g., requiring bifurcation); narrowing substantive liability standards; providing hard-look judicial review of jury findings; capping compensatory damages; eliminating the collateral-source rule; eliminating or limiting joint and several liability; and eliminating, capping, or “splitting” punitive damages. See Nat’l Ass’n of Mut. Ins. Cos., Tort Reform: An Overview of State Legislative Efforts To Improve the Legal System, <http://www.namic.org/reports/tortReform/overview.asp> (last visited Oct. 1, 2004).
  5. These challenges have asserted violations of state constitutional provisions that, among other things, guarantee open courts, a right to remedy, or a right to a jury trial; prohibit special legislation; mandate separated powers; and guarantee due process and equal protection. They have also asserted violations of the Jury Trial Clause of the Seventh Amendment, and the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.
  6. Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How To Restore the Right Balance*, 32 RUTGERS L.J. 907, 939-51 (2001).
  7. *Id.* at 952-76.

to be largely unreceptive to federal constitutional challenges,<sup>8</sup> and the Supreme Court has not ruled directly on the subject in recent years.<sup>9</sup>

State and federal decisions upholding a Virginia statute capping compensatory damages in malpractice actions illustrate the predominant approach.<sup>10</sup> Under the statute, if a patient were to prove that a doctor's malpractice proximately caused her injuries resulting in lifetime medical expenses of \$10 million (this apart from any pain and suffering), she would recover less than \$2 million.<sup>11</sup> Claimants who stood to receive awards above the cap challenged the statute, but the courts adopted a deferential posture toward the legislature.<sup>12</sup> In particular, each decision reasons that, because the damage cap is a piece of "social or economic" legislation that does not single out a discrete minority or burden a recognized fundamental right, it should be subject only to the rational basis versions of equal protection and due process analysis.<sup>13</sup> To impose any harder-look review would be to ignore the counsel of *Munn v. Illinois* (quoted above) that individuals lack a vested interest in mere

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8. See, e.g., *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1225 (10th Cir. 1991); *Boyd v. Bulala*, 877 F.2d 1191, 1196-97 (4th Cir. 1989); *Gronne v. Abrams*, 793 F.2d 74, 78-79 (2d Cir. 1986); *Pitts. v. Unarco Indus.*, 712 F.2d 276, 279-80 (7th Cir. 1983).
  9. See *Fein v. Permanente Med. Group*, 474 U.S. 892, 893-95 (1985) (mem.) (White, J., dissenting from dismissal of appeal) (noting as an open question whether due process forbids states from enacting damage caps without providing a quid pro quo to persons whose claims are capped); *infra* text accompanying notes 313-345.
  10. See *Boyd*, 877 F.2d at 1191; *Pulliam v. Coastal Emergency Servs. of Richmond*, 509 S.E.2d 307 (Va. 1999); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525 (Va. 1989).
  11. The cap was originally set at \$750,000, but has increased in annual increments. VA. CODE ANN. § 8.01-581.15 (2000). Virginia's cap probably has mattered and will matter in only a handful of cases per year involving claimants who have suffered very severe injuries. National data from state courts indicate median malpractice verdicts in 2001 of about \$500,000. Robert C. LaFountain & Neal B. Kaudern, *An Empirical Overview of Civil Trial Litigation* 1, 3 (Nat'l Ctr. for State Courts, Caseload Highlights Vol. 11, No. 1, 2005), [http://www.ncsconline.org/D\\_Research/csp/Highlights/Vol11No1.pdf](http://www.ncsconline.org/D_Research/csp/Highlights/Vol11No1.pdf).
  12. They did so not only with respect to the constitutional claims discussed in the text, but also with respect to other claims of right. For example, the *Pulliam* court treated jury trial rights as an entitlement to jury fact-finding only when the legislature defines, or permits courts to define, a cause of action with elements raising factual questions. By capping damages, it reasoned, the legislature had pronounced that there was no need for fact-finding on damages above the amount of the cap. 509 S.E.2d at 313-14.
  13. See *Boyd*, 877 F.2d at 1196-97; *Pulliam*, 509 S.E.2d at 318; *Etheridge*, 376 S.E.2d at 530-31. Even if rational basis review has bite in some settings, it seems necessarily toothless as applied to plaintiff-unfriendly tort reforms. Legislators are surely reasonable to suppose that such reforms provide a rational means of protecting the activity being spared liability, as well as the populace it benefits. *But see Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 460-61 (Wisc. 2005) (applying rational basis "with bite" to strike down, on equal protection grounds, a cap on noneconomic damages for medical malpractice actions).

common law rules. Stricter scrutiny, these judges worry, would resurrect *Lochner* and its much-maligned constitutionalization of the common law.<sup>14</sup>

Contrary to the views expressed by these and other courts, this Article argues for recognition of a right, grounded in the Fourteenth Amendment's Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them. This right, in turn, generates the prima facie duty described in *Missouri Pacific Railway Co. v. Humes* (also quoted above): the duty of each state to provide a law for the redress of private wrongs.<sup>15</sup> Recognition of this right need not entail the federalization of tort law, or even require that tort law remain a part of our legal system. Instead, this right can and should be judicially enforced by establishing meaningful but capacious limits on the ways in which, and the reasons for which, legislatures may undertake plaintiff-unfriendly tort reform.<sup>16</sup>

In Parts I and II, I demonstrate that the right to a law of redress has deep roots in Anglo-American law. The former focuses on influential English sources that articulate the idea of a law for the redress of private wrongs and confer on it fundamental significance. The latter discusses the reception of the right in the Founding era and the antebellum period and offers evidence that the Privileges or Immunities Clause of the Fourteenth Amendment was likely meant to guarantee the right. After discussing late-nineteenth-century U.S. Supreme Court decisions that locate the right in the Due Process Clause, Part II also reviews the emergence of the now-prevalent rational basis paradigm in the late 1920s.

In Part III, I argue for judicial enforcement of the right to a law for the redress of private wrongs via guidelines for decision<sup>17</sup> that are more robust than

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14. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) (arguing that *Lochner's* error was to treat common law entitlements as natural baselines for constitutional analysis). *But see* David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003) (arguing against Sunstein's analysis).
  15. My focus is on state tort reform legislation. The Fifth Amendment probably should be read to guarantee a parallel right against the federal government. See *infra* text accompanying notes 450-453. The right argued for here is a right to a body of law with certain characteristics and a certain role to play. Whether that body of law is judge-made or statutory is of no particular importance.
  16. My analysis concerns the rights of persons who are not tort victims or litigants at the time at which the legislative rule change takes effect. See, e.g., Susan C. Randall, Comment, *Due Process Challenges to Statutes of Repose*, 40 SW. L.J. 997 (1986) (arguing that persons pursuing tort claims at the time of the rule change have vested interests that are entitled to heightened due process protection).
  17. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 61-63 (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

the rational basis test. First, I identify modern Supreme Court decisions that are part of a broader recasting of the New Deal revolution in terms less rights- and court-skeptical than those articulated by first-generation progressive critics of substantive due process. I also deflect doctrinal objections to the idea that individuals enjoy an affirmative right to the provision of a particular body of law. In doing so, I identify a distinct branch of due process analysis that, borrowing from Laurence Tribe, I dub “structural due process.”<sup>18</sup>

Second, I explain why, notwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals such as loss-spreading or efficient precaution-taking, it is still best understood as a law of redress. I also describe how a redress conception of tort differs from corrective-justice and day-in-court conceptions and why a law of redress has a unique and important role to play in our legal system.

Third, I develop and apply a set of guidelines for judicial review that will permit courts to assess more intelligently the constitutionality of particular tort reforms. Under these guidelines, a court should (1) consider the type of interest protected by the tort at issue and the type of wrongdoing that the tort identifies and enjoins; (2) gauge the extent to which the reform in question interferes with the victim’s ability to respond to the wrong; and (3) assess the legislative justification(s) for the reform.

The claims in this Article run against the grain of conventional academic wisdom. As a result, they necessitate a two-front campaign. To a skeptical audience of constitutional scholars, I must make the case for recognition of an affirmative constitutional right (albeit of a special sort), as well as for a holistic conception of the Constitution that treats private law as integrally connected to public law. To a skeptical audience of tort scholars, I must establish that modern tort law is properly understood as a law of wrongs and redress.

The position I advocate here also does not mesh neatly with the views of the camps currently waging war over tort law. If sound, it offers modest support to those eager to ward off plaintiff-unfriendly tort reforms. However, it does not justify routine judicial nullification. It also comes with baggage that many in the pro-plaintiff camp will find intolerable—namely the idea that tort law merits meaningful judicial protection against legislation only insofar as it operates as a law of redress. If tort doctrines are conceived as a means by which government indirectly punishes or deters wrongdoers on behalf of the public

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18. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). Tribe uses this phrase to refer to a requirement that certain controversial issues about governmental power and individual rights be addressed through procedures that “structure” a meaningful dialogue about them. *Id.* at 301. In my usage, the phrase conveys the idea that citizens enjoy rights to certain political institutions and bodies of law.

interest, my argument gains no purchase.<sup>19</sup> For their part, tort reform advocates will be pleased to see that even an unconventionally robust conception of due process leaves legislatures with substantial leeway. But they will be displeased with the rejection of the idea that tort reform is a domain of plenary power. A court applying the guidelines developed here could reasonably strike down a provision such as the Virginia cap, even though many less irresponsible tort reforms will withstand scrutiny.

In any event, my argument has implications beyond the extreme case of judicial nullification. For one thing, it identifies a notion of due process that might help capture the content of other rights that do not fit within conventional categories. For another, it suggests that legislatures operate under certain affirmative duties, including a duty to provide bodies of law that are integral to liberal-constitutional government.

#### I. ENGLISH PROVENANCE

One can trace the idea that individuals enjoy a right to a law of redress for private wrongs back to the work of influential seventeenth- and eighteenth-century English jurists, including Coke, Hale, Locke, and Blackstone. This Part briefly explicates their views.

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19. See, e.g., CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* (2001); THOMAS H. KOENIG & MICHAEL L. RUSTAD, *IN DEFENSE OF TORT LAW* (2001). Of course, as a law of redress, tort might at times have the effect of bringing powerful malefactors to heel.



A. *Common Law Theory, Courts, and the Dispensing Power*<sup>20</sup>

Common law political and legal theory was developed in the seventeenth century by lawyers such as Coke, Selden, and Hale in opposition to absolutist theories proposed by the Stuart Kings and their supporters. For present purposes, the significance of common law theory is twofold. First, it provides an early version of structural constitutionalism in Anglo-American thought—the idea that fundamental law establishing (and regulating the operation of) a network of political and social institutions is essential to maintaining a stable, prosperous, and free polity. Second, it treats the availability of redress to victims of wrongs through courts as a vital component of that network. The common lawyers maintained that the King was under an obligation both to establish courts and not to interfere with their operation so that they might, among other things, provide for the redress of wrongs.

1. *The Ancient Constitution*

Common law theory had its roots in medieval thought.<sup>21</sup> It treated the relation of ruler and ruled as one of a set of hierarchies built into the fabric of the world.<sup>22</sup> It also drew on natural law theory, which viewed polities as no less

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20. Others have linked common law theory to rights to law and redress. See, e.g., Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 512-14 (1991); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 357-61 (1997). Like these authors and others, I present common law theory as a composite. See, e.g., Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 157 (2002). For treatments of individual common lawyers' thought, see PAUL CHRISTIANSON, DISCOURSE ON HISTORY, LAW AND GOVERNANCE IN THE PUBLIC CAREER OF JOHN SELDEN, 1610-1635 (1996); ALAN CROMARTIE, SIR MATTHEW HALE (1609-1676): LAW, RELIGION, AND NATURAL PHILOSOPHY (1995); JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1992); and Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994). It is worth stressing that the common lawyers reasoned within a context quite alien to our own. They accepted as natural monarchical government, a very limited franchise, and a patriarchal and profoundly inegalitarian social order that doled out privileges on the basis of status and sanctioned various forms of servitude. Although they addressed recognizably constitutional questions, they did so in the absence of modern notions of separated powers. And, of course, their writings about redress were not animated by concern over tort reform as we know it. For these reasons, inferences from their work must be drawn with caution.
21. 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 491 (3d ed. 1923).
22. See GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642, at 132-38 (1992); J.P. SOMMERVILLE, ROYALISTS

natural extensions of human nature than are plants extensions of seeds.<sup>23</sup> Yet the common lawyers also believed that a thick crust of national and local custom lay atop the natural structure of ruler and ruled.<sup>24</sup> Thus, when they argued against absolutism they did not rely directly on principles of natural law.<sup>25</sup> Rather, their claim was that the English had developed a uniquely sound variation on the natural phenomenon of government.<sup>26</sup> This mode of political organization, which they referred to as “the Ancient Constitution,” was “nature’s law for England.”<sup>27</sup>

The common lawyers’ conception of this constitution approximated H.L.A. Hart’s later notion of a legal system.<sup>28</sup> Through its public-power-conferring rules, the constitution defined the offices and powers of government, including King and Parliament.<sup>29</sup> In addition, through primary rules (e.g., rules defining

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AND PATRIOTS: POLITICS AND IDEOLOGY IN ENGLAND 1603-1640, at 20 (2d ed. 1999); James Daly, *Cosmic Harmony and Political Thinking in Early Stuart England*, 69 *TRANSACTIONS AM. PHIL. SOC’Y* 1, 5-13 (1979); David Harris Sacks, *Parliament, Liberty, and the Commonwealth, in PARLIAMENT AND LIBERTY FROM THE REIGN OF ELIZABETH TO THE ENGLISH CIVIL WAR* 85, 87 (J. H. Hexter ed., 1992) [hereinafter *PARLIAMENT AND LIBERTY*].

23. Calvin’s Case, (1608) 77 Eng. Rep. 377, 392 (K.B.) (Coke, C.J.) (“[T]o command and to obey is of nature, and . . . magistracy is of nature: for whatsoever is necessary and profitable for the preservation of the society of man is due by the law of nature . . . .”). Some natural law theorists traced the authority of specific governments to consent, but they did not argue that authority as such was consent-based. See FRANCIS OAKLEY, *POLITICS AND ETERNITY: STUDIES IN THE HISTORY OF MEDIEVAL AND EARLY-MODERN POLITICAL THOUGHT* 123, 96-137 (1999); see also SOMMERVILLE, *supra* note 22, at 20 (“Little was heard in early seventeenth-century England of the doctrine that government is an artificial and not a natural creation.”); J.P. Sommerville, *John Selden, The Law of Nature, and the Origins of Government*, 27 *HIST. J.* 437 (1984) (criticizing the claim that Selden was a social contract theorist).
24. In this they again tracked medieval political theory. 3 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY: LATE MEDIAEVAL AND RENAISSANCE PHILOSOPHY (PART I)* 141-42, 215-16 (Image Books ed. 1963) (1953); SOMMERVILLE, *supra* note 22, at 13-54, 69, 137.
25. Postema, *supra* note 20, at 178.
26. 2 EDWARD COKE, *THE REPORTS OF SIR EDWARD COKE (1602)*, reprinted in 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE* 37, 40 (Steve Sheppard ed., 2003) [hereinafter *SELECTED WRITINGS*] (praising “the ancient Lawes of this noble Island [that have] excelled all others”); MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 30 (Charles M. Gray ed., Univ. of Chi. Press 1971) (1713); Berman, *supra* note 20, at 1678-79. Supposedly the best evidence of the law’s excellence was that a succession of conquerors had left it alone. See Charles M. Gray, *Parliament, Liberty, and the Law*, in *PARLIAMENT AND LIBERTY*, *supra* note 22 at 1, 155-57.
27. Alan Cromartie, *The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England*, 163 *PAST & PRESENT* 76, 84 (1999).
28. H.L.A. HART, *THE CONCEPT OF LAW* 94-99 (2d ed. 1994).
29. See 12 EDWARD COKE, *THE REPORTS OF SIR EDWARD COKE (1656)*, reprinted in 1 *SELECTED WRITINGS*, *supra* note 26, at 481 (reporting that Coke responded to James I’s attempt to

crimes and civil wrongs), private-power-conferring rules (e.g., rules of the writ system and property law), and public-power-conferring rules (e.g., rules granting jurisdiction to courts), it set the basic terms on which Englishmen interacted. For the common lawyer, personal liberties and obligations, no less than the powers and obligations of the King, were traceable to the Ancient Constitution; it provided a comprehensive and constitutive normative framework. Every activity in England took place within, and was shaped by, the normative terrain it created.<sup>30</sup>

The common lawyers thus credited the Ancient Constitution with delivering the primary advantages thought to be enjoyed by the English. Its structuring of political institutions warded off tyranny; its law of property helped to ensure prosperity;<sup>31</sup> and its reluctance to enforce monopolies was integral to the ability of (some male) citizens to pursue a livelihood.<sup>32</sup> English liberty was a condition achieved through law rather than a pre-legal freedom of action.<sup>33</sup> To be free was to enjoy the benefits and privileges of the law, particularly the protection afforded by the balanced political structure it created.<sup>34</sup>

English law was also linked to tranquility, prosperity, and liberty in a second way: by providing a full menu of remedies for wrongful deprivations of life, liberty, and property. Coke in particular saw in Chapter 29 of Magna Carta an expression of the monarch's constitutional obligation to ensure that each Englishman enjoyed his "best birth-right"—i.e., that "his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong."<sup>35</sup> In principle, each person suffering wrongful injury at the hands of

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intervene in litigation with Bracton's maxim that the King was answerable to no other man, but only to God and the law); see also BURGESS, *supra* note 22, at 161 (stating that common lawyers treated the common law as a master language for English politics); SOMMERVILLE, *supra* note 22, at 147 (noting John Eliot's assertion that the law is *rex omnium*).

30. Cromartie, *supra* note 27, at 88.

31. See, e.g., HALE, *supra* note 26, at 30-31. On the connection between property and liberty in common law thought, see SOMMERVILLE, *supra* note 22, at 135-37.

32. Sacks, *supra* note 22, at 86, 99.

33. *Id.* at 93-95.

34. The common lawyers' conception of liberty echoed Roman republican thought. See Heyman, *supra* note 20, at 531; see also PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 19-41 (1997).

35. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1642), reprinted in 2 SELECTED WRITINGS, *supra* note 26, at 745, 873. Coke's rendition of the text of Chapter 29 is as follows:

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed;

another would “take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.”<sup>36</sup> Similarly, Coke maintained that the law protected individuals from overreaching officials by requiring them to employ fair procedures and by authorizing those unfairly detained, prosecuted, and punished to bring civil actions against officers.<sup>37</sup>

The order created by the Ancient Constitution was also deemed to be an irreducibly yet harmoniously complex structure. At the center of this exquisite scheme stood a complex institution: the King-in-Parliament.<sup>38</sup> Each constituent—King, Lords, and Commons—occupied a rightful place within it.<sup>39</sup> Complexity also characterized each subordinate unit. The monarchy, for example, consisted of numerous sub-offices, including the royal courts. The courts were, in turn, divided by jurisdiction: maritime, equitable, ecclesiastical, and common law. Finally, the common law itself, particularly real property law,<sup>40</sup> was notoriously complex. The common lawyers argued that each of these complexities was vital to the health of the polity, just as the health of each organ in a complex organism ensures its well-being.

A third attribute of the Ancient Constitution was that the source of its authority lay in tradition. The constitution was said to have no origin; it

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nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

*Id.* at 848. Coke regarded Magna Carta as a declaration of basic constitutional principles. See *infra* note 41.

36. COKE, *supra* note 35, at 870. The law often fell short of this ideal. Peers, for example, often trespassed on commoners' land with impunity. DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 131 (1989).
37. COKE, *supra* note 35, at 859-64.
38. See EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (1644), reprinted in 2 SELECTED WRITINGS, *supra* note 26, at 1053, 1062, 1067. Coke described the power of King-in-Parliament as “so transcendent and absolute, [that] it cannot be confined either for causes or persons within any bounds.” *Id.* at 1133. Yet Coke also refused to identify any institution of English government as “sovereign,” for to attribute sovereignty to an institution would have suggested that it stood outside the law. See Edward Coke, Address Before Parliament in Defense of the Petition of Right (May 20, 1628), reprinted in 3 SELECTED WRITINGS, *supra* note 26, at 1285; see also STONER, *supra* note 20, at 27-29.
39. BURGESS, *supra* note 22, at 5; CROMARTIE, *supra* note 20, at 58-73. The relationship of these units was not that of mechanistic counterweights. Gray, *supra* note 26, at 184-85. Rather, they were to function as members of a joint venture. Sacks, *supra* note 22, at 89-93.
40. Gray, *supra* note 26, at 179.

reached back into the mists of time.<sup>41</sup> Although its content had changed,<sup>42</sup> these changes occurred within a unitary tradition that permitted one to speak, as Americans do today, of a singular constitution.<sup>43</sup> It claimed authority by custom<sup>44</sup>—a concept that invoked notions of habituation,<sup>45</sup> wisdom,<sup>46</sup> and consent.<sup>47</sup> The common lawyers were thus hardly political radicals. They endorsed monarchy,<sup>48</sup> and maintained that the monarch was entitled to broad discretion in the formulation of policy.<sup>49</sup> Subjects owed him allegiance,<sup>50</sup> and

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41. Coke and other common lawyers treated foundational documents such as Magna Carta as declaratory rather than constitutive. STONER, *supra* note 20, at 21; Corinne C. Weston, *England: Ancient Constitution and Common Law*, in THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, at 374, 379 (J.H. Burns & Mark Goldie eds., 1991).
  42. Coke was perhaps most prone to claim that the content of the constitution had remained constant. Postema, *supra* note 20, at 169; J.P. Sommerville, *The Ancient Constitution Reassessed: The Common Law, the Court and the Languages of Politics in Early Modern England*, in THE STUART COURT AND EUROPE 39, 47 & n.22 (R. Malcolm Smuts ed., 1996). Yet even he acknowledged alterations. BURGESS, *supra* note 22, at 22; SOMMERVILLE, *supra* note 22, at 85.
  43. Postema, *supra* note 20, at 169, 173 (treating this view as likely dominant among common lawyers); *see also* CHRISTIANSON, *supra* note 20, at 61-62 (discussing Selden's views); CROMARTIE, *supra* note 20, at 36 (discussing Hale's views). Hale invoked the example of the Argonauts' ship, which, despite having been overhauled during its long voyage, was still recognizable as the Argo when it returned. Postema, *supra* note 20, at 173; *see also* HALE, *supra* note 26, at 40.
  44. SOMMERVILLE, *supra* note 22, at 84-87.
  45. The longevity of the scheme suggested that significant innovation would meet resistance and failure or cause substantial disruption of expectations and ought to be presumed against. BURGESS, *supra* note 22, at 26.
  46. Coke argued that the constitution contained the nearly unfathomable wisdom of the ages. Postema, *supra* note 20, at 169-72. The idea here is Burkean—the fact that existing institutions had survived the test of time suggested that they were better adapted to serve the public good than any *de novo* scheme. *See* SOMMERVILLE, *supra* note 22, at 84-85, 87; *see also* CHRISTIANSON, *supra* note 20, at 17; CROMARTIE, *supra* note 20, at 110.
  47. Hale viewed the constitution as a continuous but regularly revised covenant between the English King and his subjects, the existence of which was evidenced by the populace's acceptance of traditional law. CROMARTIE, *supra* note 20, at 49-50; Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1, 23-25 (2003); *see also* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 21-27 (1986).
  48. SOMMERVILLE, *supra* note 22, at 102, 220; Cromartie, *supra* note 27, at 103.
  49. CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 10-11 (1981).
  50. Calvin's Case, (1608) 77 Eng. Rep. 377, 382 (K.B.) (Coke, C.J.) (“[L]igeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign.”); *see* David Martin Jones, *Sir Edward Coke and the*

in return he was to protect them from foreign enemies and each other.<sup>51</sup> Yet in describing the constitution as rooted in tradition, the common lawyers did not treat it as a matter of mindless ritual. Rather, its content was forged by the interplay of custom and reason through the exercise of “artificial reason.”<sup>52</sup> In contrast to natural reason—reasoning logically from first principles—artificial reason was practical, cumulative over time, intersubjective, and coherentist in its conception of validity.<sup>53</sup> Although it was identified with the application of an existing body of principles and rules, it was not equated with the modern notion of *stare decisis*.<sup>54</sup> Instead, it referred to a process whereby lawyers read precedents and statutes with an eye toward rendering them coherent with one another and with the basic precepts of justice built into the law.<sup>55</sup> By interpreting the law in this synthetic manner, lawyers sought continually to revise, reconstruct, and maintain the constitution.<sup>56</sup>

## 2. *Implications for the Right to a Law of Redress*

The common lawyers constructed their account of the Ancient Constitution in response to particular royal acts and policies<sup>57</sup> and to the theories by which royalists defended them.<sup>58</sup> A brief examination of the type of act and claim to

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*Interpretation of Lawful Allegiance in Seventeenth-Century England*, 7 HIST. POL. THOUGHT 321, 325-31 (1986).

51. SOMMERVILLE, *supra* note 22, at 9-10 (noting that domestic and international religious disputes posed significant threats to social stability); Sacks, *supra* note 22, at 85 (describing the King’s responsibilities).
52. STONER, *supra* note 20, at 23. On artificial reason, see Postema, *supra* note 47, at 1-11.
53. Postema, *supra* note 20, at 178. Fortunately for us, Hale rejected Coke’s view that the common law’s wisdom could not be systematized. CROMARTIE, *supra* note 20, at 21, 45-46.
54. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 660 (1999); Postema, *supra* note 47, at 12-13.
55. Gray, *supra* note 26, at 160 (“Legal expertise in the highest sense . . . [was regarded by the common lawyers as] knowing how to recognize distant relationships and subtle coherences in the law’s fabric.”). The labyrinthine property law was the paradigm of a subject that could only be mastered by artificial reason. *Id.* at 179. The relevant precepts of justice were contained in familiar maxims, such as one ought not judge one’s own cause; one ought not be imprisoned without cause; and one ought not use property to the damage of another.
56. SOMMERVILLE, *supra* note 22, at 88-89; STONER, *supra* note 20, at 26.
57. These included James I’s unilateral taxation of imported goods, Charles I’s dissolution of Parliament and his refusal to resummon it, and Charles’s imposition of the Forced Loan and his imprisonment of dozens who refused to pay it. ANN LYON, CONSTITUTIONAL HISTORY OF THE UNITED KINGDOM 200-16 (2003).
58. This is not to say that the common lawyers were always at odds with the Stuarts. Many served as royal officials, and alignments and ideologies shifted. See HERZOG, *supra* note 36,

which they responded will fill out our understanding of common law theory. More importantly, it will demonstrate that the common lawyers were concerned with, and indeed denied the legality of, monarchical attempts to interfere with the ordinary operation of law for the redress of wrongs.

Royalists maintained that the King's recognized prerogative included the power to circumvent ordinary legal and political constraints when he deemed such action necessary for the public good.<sup>59</sup> The common lawyers argued that this asserted need for elbow room was part of a plot to replace the harmonious complexity of the constitution with a tyrannical regime,<sup>60</sup> and that it hubristically claimed superiority for the monarch's individual reason over the collective wisdom of generations of lawyers. Political decisions, they argued, are always legal decisions,<sup>61</sup> and, as such, they demanded the application of artificial reason.<sup>62</sup> Hence the King, his ministers, and MPs would always do best to heed the advice of their lawyers.<sup>63</sup>

In addition to impugning the motives and assumptions underlying the royalist position, the common lawyers argued vigorously for the autonomy of other political institutions from the monarchy. They conceded to the King the power to call or dissolve Parliament. But they also maintained that he could not adjourn ongoing proceedings,<sup>64</sup> meddle with election results,<sup>65</sup> or regulate

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at 115 (noting that positions polarized in reaction to particular events and personalities); Richard Cust & Ann Hughes, *Introduction: After Revisionism, in CONFLICT IN EARLY STUART ENGLAND: STUDIES IN RELIGION AND POLITICS 1603-1642*, at 1, 17-18, 27-40 (Richard Cust & Ann Hughes eds., 1989) (canvassing explanations for the hardening of views).

59. SOMERVILLE, *supra* note 22, at 159, 162-63; Clive Holmes, *Parliament, Liberty, Taxation, and Property, in PARLIAMENT AND LIBERTY, supra* note 22, at 122, 124-37.
60. See, e.g., SOMMERSVILLE, *supra* note 22, at 147, 159-60 (the power to make forced loans would entail the power "to annihilate acts of parliament, and parliaments themselves." (quoting Sir John Eliot)).
61. Gray, *supra* note 26, at 181-82. The common lawyers' application of a unitary conception of artificial reason to all governmental decisionmaking (whether political or judicial) in part reflected the absence of separated powers. See Derek M. Hirst, *Freedom, Revolution, and Beyond, in PARLIAMENT AND LIBERTY, supra* note 22, at 252, 258 (noting the intermingling of government functions).
62. POSTEMA, *supra* note 47, at 9; see also CROMARTIE, *supra* note 20, at 55 (noting that lawyers were "ideal politicians, the spokesmen of reason itself"); Gray, *supra* note 26, at 184 (stating that each political actor was well-advised to proceed by "accept[ing] the justice and sufficiency of the ancestral law and concentrat[ing] on understanding it deeply to the end of applying it correctly in the present").
63. This claim of lawyerly competence was not an argument for supreme judicial competence. True, the application of artificial reason was central to the task of adjudication. But it was equally central to the work of the lawyer serving as royal counselor or as MP.
64. SOMMERSVILLE, *supra* note 22, at 65.

parliamentary speech.<sup>66</sup> That all appropriations had to commence in the House of Commons likewise served as a critical counterweight to the King's power to call and dissolve Parliament.<sup>67</sup> In a similar fashion, they insisted that the King was obliged to respect his courts. True, they did not argue for an independent, coequal judicial branch: The King was the font of justice and individual judges worked for him. Yet they maintained that his delegation of authority to the courts was irrevocable—that he was “immanent if not dissolved” within them,<sup>68</sup> and he would step out of his proper place if he were to assume the power to adjudicate individual cases.<sup>69</sup> To interfere with the course of justice would upset the structure of government, and entail a substitution of the King's natural reason for lawyers' artificial reason. Similarly, they argued that it was not within the King's authority to grant executive courts (e.g., Star Chamber) jurisdiction that properly belonged to common law courts.<sup>70</sup>

The common lawyers not only argued for the autonomy of the courts, but also for limits on the “dispensing power”—the King's prerogative to exempt particular persons from legal rules and penalties.<sup>71</sup> For example, if Parliament

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65. According to the common lawyers, the House of Commons retained the exclusive right to determine qualifications of its members, rendering void attempts by the King to render disfavored persons ineligible for service (e.g., by appointing them to some other office). *Id.* at 63-64, 73.
66. *Id.* at 70-71, 74-76; see also J.H. Hexter, *Parliament, Liberty and Freedom of Elections*, in *PARLIAMENT AND LIBERTY*, *supra* note 22, at 21, 25-51 (describing the “Humble Answer” and “Apology” drafted by members of the House of Commons to James I as early assertions of parliamentary privileges). I do not mean to cast these MPs as modern-day civil libertarians—they frequently took it upon themselves to punish members who defended royalist positions.
67. SOMMERVILLE, *supra* note 22, at 66-67. The common lawyers were against not the impositions per se, but rather the King's assertion of unilateral power to impose them. *Id.* at 145 & n.24.
68. Cromartie, *supra* note 27, at 112.
69. COKE, *supra* note 38, at 1169 (“[T]he King hath wholly left matters of judicature according to his lawes to his Judges.”). Hobbes took this argument to be of sufficient import to warrant a rebuttal. THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 89 (Joseph Cropsey ed., Univ. of Chi. Press 1971) (1681).
70. STONER, *supra* note 20, at 30.
71. The dispensing and pardoning powers were distinct. The latter spared a wrongdoer from punishment for having done wrong. 12 EDWARD COKE, *THE REPORTS OF SIR EDWARD COKE* (1656), reprinted in 1 *SELECTED WRITINGS*, *supra* note 26, at 439. The former relieved the beneficiary of any obligation to comply with the law. Because pardons did not purport to annul the wrong, they could be granted in situations when dispensations could not. See WESTON & GREENBERG, *supra* note 49, at 22-34; Paul Birdsall, “*Non Obstante*”: *A Study of the Dispensing Power of English Kings*, in *ESSAYS IN HISTORY AND POLITICAL THEORY* 37, 60 (Carl



enacted a law setting a one-year term of office for sheriffs, the King could dispense with the law as it applied to a particular sheriff.<sup>72</sup> According to common law theory, the dispensing power, like every royal power, was subject to significant legal restraints. For example, it could not be used to suspend the application of laws applicable to whole classes of persons, nor could it be invoked to exempt individuals from common law obligations (as opposed to statutory directives). It also could not license an act *malum in se*: The King could not grant a man dispensation to commit murder, although he could pardon him from being punished for it.<sup>73</sup>

Most saliently, “the king [could] never exercise his prerogative of dispensation in such a way as to prejudice the more specific rights of his subjects, those of property or of personal security.”<sup>74</sup> Thus, he had no power to dispense “if in doing so he allowed one subject to dispossess another, do another injury, or deprive another of recourse to a private suit or action.”<sup>75</sup> The King could not grant an individual immunity from liability for an action to recover a debt.<sup>76</sup> To do so would be to tread on “[o]ne of the subject’s most fundamental rights,” namely, the right to have “his cause tried by the known rules of the common law in the common law courts.”<sup>77</sup> Nor could the King immunize a subject from being enjoined to eliminate a nuisance. By definition, a nuisance interferes with the property rights of another citizen whose interest in the matter the King had no power to waive.<sup>78</sup> The pardon power was similarly limited. The King could pardon a felon, but that pardon only concerned the royal interest in punishment. If the felony also constituted an

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Wittke ed., 1967); Carolyn A. Edie, *Tactics and Strategies: Parliament’s Attack upon the Royal Dispensing Power 1597-1689*, 29 AM. J. LEGAL HIST. 197 (1985).

72. Likewise, the King could grant an exemption to laws limiting trade in certain goods. WESTON & GREENBERG, *supra* note 49, at 25-26; Birdsall, *supra* note 71, at 46-47. This was so even if such a law contained a clause purporting to block the King from dispensing with it. Birdsall, *supra* note 71, at 46-47.
73. Birdsall, *supra* note 71, at 55-56; Edie, *supra* note 71, at 199.
74. Birdsall, *supra* note 71, at 56.
75. Edie, *supra* note 71, at 199.
76. Birdsall, *supra* note 71, at 57.
77. SOMMERVILLE, *supra* note 22, at 169; *see also* Birdsall, *supra* note 71, at 60.
78. *See* WESTON & GREENBERG, *supra* note 49, at 11, 24 (discussing this limitation in connection with the King’s pardon power); Cromartie, *supra* note 27, at 110 (noting Glanville’s assertion that the dispensing power cannot be used to “take from . . . subjects that birthright and inheritance which they have in their liberties by virtue of the common law and of . . . statutes [incorporated into it]”).

injury to another, the King could not annul the victim's right to prosecute an appeal of felony against the defendant as redress for the wrong done to him.<sup>79</sup>

*B. Locke on the Inalienability of the Right To Redress Injuries*

As described in the previous Section, one finds within common law theory the idea that the King's responsibilities, as defined by the Ancient Constitution, include an obligation to establish courts and not to interfere with their operation so that they might, among other things, provide for the redress of wrongs. John Locke took a similar position as a matter of normative social contract theory in his *Second Treatise on Government*.<sup>80</sup> In it, Locke maintained that an individual's delegation of governing power to the state does not include a renunciation of his right to obtain redress from one who has wrongfully injured him. Instead, the individual consents only to channel the exercise of that right through the law, and, in return, the government is placed under an obligation to provide such law. Locke, like the common lawyers, thus insisted that the sovereign has no authority to extinguish a victim's claim to recourse against an injurer.

The opening pages of the *Second Treatise* reveal a political theory based on modern rather than medieval premises.<sup>81</sup> Expressly rejecting the idea that the relationship of ruler and ruled is one of natural subordination, the *Second Treatise* famously posits that political power is unnatural and therefore in need of justification.<sup>82</sup> This, in turn, requires an account of how a government constructed by persons who stand in a natural relation of equality can claim the

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79. See WESTON & GREENBERG, *supra* note 49, at 23. An appeal of felony was a private prosecution brought at the behest of the victim of a felony, or surviving kin, in lieu of an action for damages. See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 61-68 (1996). Even Hobbes thought it would be inequitable—though of course not unlawful—for the sovereign to relieve wrongdoers of the obligation to make reparations to victims. HOBBS, *supra* note 69, at 76.

80. For recent analyses of the significance of Locke's thought for the idea of redress, see Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 696-97 (2004); and Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 637-40 (Jules Coleman & Scott Shapiro eds., 2002).

81. See HERZOG, *supra* note 36, at 19, 39-71 (arguing that modern consent theories of political legitimacy emerged in conjunction with the emergence of new nonhierarchical forms of interaction in Stuart England).

82. JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 265, 267-68 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

right to coerce and even kill.<sup>83</sup> To develop this account, Locke employed the now-familiar concepts of the state of nature and the social contract.

In Locke's view, the state of nature is governed by the law of nature.<sup>84</sup> Under it, persons are equal and free to pursue any course of conduct, so long as they do not harm another's life, health, liberty, or possessions. They also bear obligations, including duties not to transgress against one another, that come with preemptive and after-the-fact enforcement mechanisms. First, each person has a right and a duty of self-preservation,<sup>85</sup> which include a right to defend oneself against transgressions by others.<sup>86</sup> Second, breaches of the obligation not to wrong others are punishable.<sup>87</sup> The authority to judge and to punish resides equally in each individual.<sup>88</sup> Judgment and punishment are thus sought not for the benefit of the victim, but in the name of mankind. True, the wrongdoer deserves his punishment: His transgression renders him eligible for it. But the fact that punishment can be inflicted by anyone is evidence that Locke did not conceive of it as revenge or retribution. Moreover, the degree of punishment to be visited on the wrongdoer is only that which will suffice to "make . . . [the wrongdoer] repent" for his violation of the law and to set an effective example by which to deter others.<sup>89</sup>

Although Locke's conception of punishment centered on the vindication of public interests, he also recognized that victims of wrongdoing stand in a special relationship to wrongdoers:

Besides the Crime, which consists in violating the Law, . . . there is commonly *injury* done to some Person or other, and some other Man receives damage by his Transgression, in which Case he who hath received any damage, has besides the right of punishment common to him with other Men, a particular Right to seek *Reparation* from him that has done it.<sup>90</sup>

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83. *Id.* at 268.

84. *Id.* at 271.

85. *Id.*

86. *Id.* at 271, 280.

87. *Id.* at 271-74.

88. *Id.* at 271-72.

89. *Id.* at 272.

90. *Id.* at 273.

In other words, wrongs tend to have a public aspect and a private aspect. They are a trespass<sup>91</sup> against the whole species (crimes) and a trespass against particular victims (injuries).<sup>92</sup> As crimes, wrongs are punishable by anyone in furtherance of the law and public safety. As injuries, they warrant redress or satisfaction for the victim.<sup>93</sup>

With the transition from the state of nature to civil society, individuals delegate to government the task of defining wrongs and of responding to them.<sup>94</sup> Locke, of course, argued that this delegation is revocable upon conduct by governors evidencing a breach of the trust placed in them.<sup>95</sup> He also argued that it is incomplete. Individuals do hand over completely their right to act as judge and executioner; but they do not give up their right of self-preservation or their related right to redress wrongs.

The latter point is most apparent in cases of self-defense: When one man sets upon another with an evident intent to rob him, Locke supposed that the intended victim may kill the other.<sup>96</sup> Yet the right is also in play in situations in which the wrong committed—such as a theft that involves no risk of personal injury—does not justify an immediate response from the victim. In civil society, this sort of victim must look to the law for reparations.<sup>97</sup> But, in return, the government must provide such law. True, by entering civil society each individual wholly gives over to government his right to punish, and it follows that government enjoys the power to decline to punish when, in its judgment, punishment will not serve to vindicate the law or deter.<sup>98</sup> But with respect to the private aspect of wrongs, Locke reasoned, the government enjoys no such power:

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91. *Id.* at 272. “Trespass” in this usage roughly corresponds to our notion of “tort”—i.e., a wrong involving a transgression against another. GOLDBERG ET AL., *supra* note 3, at 3; *see also id.* app. B (briefly describing the old trespass concept).

92. “Injury” refers not to the bad outcome for the victim, but to the fact of having been wronged by another. Hence the import of the legal aphorism *damnum absque injuria*, which identifies instances in which an actor causes harm to another yet cannot be said to have acted wrongfully toward that other. WILLIAM BLACKSTONE, 1 COMMENTARIES \*118 (equating “private wrongs” with “civil injuries”).

93. Others could assist the victim in obtaining reparations, but only the victim is entitled to them. LOCKE, *supra* note 82, at 272.

94. *Id.* at 353.

95. *Id.* at 367, 406-28.

96. *Id.* at 280-81, 390.

97. *Id.* at 280-81, 324-25.

98. *Id.* at 273-74.

[T]he Magistrate, who by being Magistrate, hath the common right of punishing put into his hands, can often, where the publick good demands not the execution of the Law, *remit* the punishment of Criminal Offences by his own Authority, but yet cannot *remit* the satisfaction due to any private Man, for the damage he has received. That, he who has suffered the damage has a Right to demand in his own name, and he alone can *remit*: The damnified Person has this Power of appropriating to himself, the Goods or Services of the Offender, by *Right of Self-Preservation* . . . .<sup>99</sup>

In other words, even in civil society, the natural right of self-preservation includes not only the right to defend oneself against forcible attacks when subsequent appeal to law would be useless, but also the right to remedial self-help—the right of “appropriating to himself, the Goods or Service of the Offender.”<sup>100</sup> This right is defeasible: If the law provides an effective avenue by which redress can be secured, the victim must forego private remedial self-help and proceed by the mechanisms provided by the law. But the law cannot extinguish the right to obtain reparations from one’s wrongdoer by refusing to provide such mechanisms. In that event, the individual is once again entitled to help himself.

In sum, Locke’s social contract theory claims that victims of wrongs possess a natural right to reparations from wrongdoers, and that government, as custodian of individuals’ rights, owes it to them to provide a law of reparations.<sup>101</sup> In noting this feature of his thought, I do not mean to suggest that Locke had views on tort reform. Still, Locke does provide a political theory with modern premises that posits a basic governmental obligation to provide a law of redress for private wrongs. Moreover, he extends the scope of this duty by invoking it not only against the specter of arbitrary monarchy but, more broadly, against the specter of arbitrary government.

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99. *Id.* Locke’s reasoning echoes and expands upon one of the recognized limits on the King’s dispensing power. See *supra* text accompanying notes 71-79.

100. LOCKE, *supra* note 82, at 274. Note Locke’s striking argument that enslavement of the wrongdoer can be an appropriate remedy for a private wrong. *Id.* at 284.

101. Locke cited as one ground for the dissolution of a commonwealth the failure of the executive power within it to administer justice. *Id.* at 410-11.

C. *Blackstone's Synthesis: Private Wrongs and the English Constitution*

Although hardly bedfellows in the seventeenth century, common law and social contract theories would join forces by the end of the eighteenth.<sup>102</sup> The chief architect of this merger was William Blackstone.<sup>103</sup> In Blackstone's work we see a more fully formed rendition of the common lawyers' and Locke's notion that Englishmen enjoy a right to a body of law that enables them to redress "injuries" or private wrongs. This rendition, in turn, would prove influential among early American elites, as I will discuss in Part II.

In this Section, I first offer a hurried overview of the *Commentaries* that aims to defend them against stock charges of incoherence.<sup>104</sup> I then show that they offer a constructivist conception of rights that treats laws granting

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102. Hobbes, the father of social contract theory, was a vicious critic of common law theory, ridiculing as nonsensical and pernicious the ideas of law that binds the sovereign, artificial reason, and virtuous complexity. See THOMAS HOBBS, *LEVIATHAN* 199, 201, 240-44 (Michael Oakeshott ed., Collier Books 1962) (1651). Locke seems to have been unmoved by appeals to custom, artificial reason, and the common law as a font of justice. See Peter Laslett, *Introduction to LOCKE*, *supra* note 82, at 77-79.

103. STONER, *supra* note 20, at 162-75; Heyman, *supra* note 20, at 517.

104. See, e.g., DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* 4-6 (Univ. of Chi. Press 1996) (1941) (arguing that the *Commentaries* form an incoherent and self-serving apology for the mid-eighteenth-century status quo); EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 85 (1955) (reprinting articles from 1928-1929) (describing Blackstone's work as "the very exemplar and model of legalistic and judicial obscurantism"). The standard view owes much to Bentham's overwrought early critiques. See J. H. Burns & H.L.A. Hart, *Introduction to JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT*, at xix-xxix (J. H. Burns & H.L.A. Hart eds., 1977) (describing Bentham's critiques of Blackstone); W. S. Holdsworth, *Blackstone*, 17 N.C. L. REV. 233, 238-40 (1939) (briefly describing the bases for Bentham's hostility toward Blackstone's work). In this country, it also traces back to Blackstone's rejection of popular sovereignty and of the idea that American colonists enjoyed the rights of Englishmen. 1 BLACKSTONE, *supra* note 92, at \*105, \*157; see 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 14-20 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (criticizing Blackstone for rejecting the doctrine of popular sovereignty); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 748-49 (1976) (noting that Jefferson came to associate Blackstone with forces of reaction).

For more charitable modern readings of Blackstone, see DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 29-68 (1989); S.F.C. MILSOM, *The Nature of Blackstone's Achievement*, in *STUDIES IN THE HISTORY OF THE COMMON LAW* 197, 197-208 (1985); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996); J.M. Finnis, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163 (1967); W. S. Holdsworth, *Some Aspects of Blackstone and His Commentaries*, 4 CAMBRIDGE L.J. 261 (1932); Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569 (1976).

individuals the power to redress wrongful invasions of those rights as a vital structural feature of the English Constitution. I conclude by rebutting the objection that the *Commentaries* cannot be treated as a source for a fundamental right to a law of redress because they treat all rights as mere positive rights that are subject to legislative revision.

### 1. *Rights and Wrongs*

The *Commentaries* consist of brief prefatory and introductory remarks followed by a mass of materials organized under the headings of Rights and Wrongs.<sup>105</sup> Each of these headings is in turn bisected into two books, creating the following scheme: I—Rights of Persons; II—Rights of Things; III—Private Wrongs; and IV—Public Wrongs.<sup>106</sup> Although long a source of criticism,<sup>107</sup> this organization is coherent. Its intelligibility hinges on Blackstone's broad (and loose) use of the term "rights." By it he referred to all laws that declare and confer on natural or artificial persons rights, statuses, privileges, or powers.<sup>108</sup> This is why Book I places under the same heading a discussion of Magna Carta, the respective legal powers of King and Parliament, and the rules of family and corporate law. Laws such as Magna Carta—themselves reflective and generative of English practices and beliefs—construct the individual as a rights-bearer by declaring him to be such a being and by directing persons to respect his rights.<sup>109</sup> Governmental institutions, the Anglican church, and

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105. Blackstone's scheme builds on one devised earlier by Hale. WILLIAM BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND, at vii-viii (photo. reprint 1996) (3d ed. 1758). Blackstone's introduction treats social contract theory much like the common lawyers treated natural law, i.e., as setting the basic parameters in which national ("municipal") law operates. In this view, social contract theory captures the fundamental but abstract idea that individuals are holders of basic rights to life, liberty, and the ownership of property, which leaves to particular systems of municipal law almost all of the work of defining and enforcing these rights. 1 BLACKSTONE, *supra* note 92, at \*38, \*43-44, \*47, \*125, \*130.

106. Using modern categories, one can assign the following topics to each book: Book I—constitutional law, administrative law, family law, and corporations; Book II—property, trusts and estates, and contracts; Book III—torts and civil procedure; Book IV—criminal law and procedure.

107. See GARETH JONES, THE SOVEREIGNTY OF THE LAW: SELECTIONS FROM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND, at xxvi (1973); MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE 1760-1850, at 12, 27-41 (1991); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 223-64 (1979); Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 796 (1988).

108. With the exception of the remedial or second-order powers that the law confers on persons who have been wronged. See *infra* text accompanying notes 119-141.

109. 1 BLACKSTONE, *supra* note 92, at \*123-24.

municipal and business corporations<sup>110</sup> are similarly constructed: Each of these artificial persons, no less than natural persons, owes its status and powers to the law.<sup>111</sup> Book II belongs under the heading of rights for the same reason. It addresses the parts of English law that empower individuals to own things. In Blackstone's view, the only natural component of ownership is God's grant to mankind of the run of the planet, which is a communal rather than an individual right. Thus, for example, it is only by virtue of English law that an owner gains the ability to control the transfer of his property upon death.<sup>112</sup> In sum, just as Book I canvasses how English law, through its declaratory and directive provisions, constructs individuals as bearers of rights of life and liberty, confers on political institutions powers of governance, and grants to fathers privileges with respect to their families, so Book II explains how that same body of law is responsible for constructing the relationship of Englishmen to land and goods as one of private ownership.<sup>113</sup>

After discussing the rights and powers conferred by English law, the *Commentaries* in their remaining two books attend to the prohibitory and remedial parts of the law—those that, in light of the rights articulated in Books I and II, enjoin or demand certain conduct, and provide remedies to victims of misconduct and sanctions for those who engage in it. Book III begins with Locke's sharp distinction between private and public wrongs.<sup>114</sup> Insofar as misconduct amounts to a "violation of public rights and duties, which affect the whole community, considered as a community," it is a public wrong or crime.<sup>115</sup> By contrast, insofar as conduct involves "an infringement or privation of the private or civil rights belonging to individuals, considered as

110. 1 *id.* at \*142-353 (discussing Parliament and King); 1 *id.* at \*364-83 (clergy); 1 *id.* at \*421-54 (families); 1 *id.* at \*455-73 (corporations).

111. Blackstone's treatment of the institutions of English government under the Rights-of-Persons heading also emphasizes his view that Englishmen enjoy a right to forms of government conducive to the protection of their rights. See *infra* text accompanying notes 131-136.

112. Under natural law, the death of the initial acquirer of property would return it to humanity in common, with ownership then vesting in the first person to grab it. 2 BLACKSTONE, *supra* note 92, at \*13; see also 2 *id.* at \*11 ("[Inheritance] is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right."); 1 *id.* at \*134 (stating that rights of ownership and transfer "are entirely derived from society").

113. 1 *id.* at \*6-7. Blackstone's treatment of property also sheds light on his immediate aspiration for the *Commentaries*: By getting his students to grasp that their rights—and particularly their wealth—depended on the law, he hoped to induce in them the sense that it was not only their duty, but in their interest, to serve as guardians of the constitution.

114. 3 *id.* at 2.

115. 3 *id.*



individuals,” it is a private wrong or civil injury.<sup>116</sup> The private wrongs recognized by English municipal law are defined by the common law writs of trespass and case. These actions articulate clusters of relational duties—obligations that require one to act, or refrain from acting, in specified ways toward others so as to avoid interfering with their rights or interests.<sup>117</sup> Blackstone, as Locke had, treated each breach of such a duty as an injuring of that other—i.e., a deprivation of the other’s right.<sup>118</sup> He also followed Locke in seeing tort law as a grant to victims of special remedial privileges or powers by which to respond to their injuries. The primary avenue<sup>119</sup> of redress for victims, he explained, is the common law courts; in particular their recognition, under the writs of trespass and case, of “personal actions”<sup>120</sup> for “torts” and “contracts.”<sup>121</sup> Blackstone’s list of personal tort actions is today entirely recognizable, including assault, battery, defamation, false imprisonment, malicious prosecution, medical malpractice, nuisance, and trespass to land.<sup>122</sup> Each of these actions permitted victims to vindicate one or more of his absolute rights to life, liberty, and the use of property. Other actions stood to vindicate “relative” rights. For example, a man in his capacity as husband could (in Blackstone’s time) obtain redress for loss of his property in his wife’s services from one who abducted her or enticed her away.<sup>123</sup>

The immediate purpose of the typical common law suit was to permit the victim to obtain a pecuniary satisfaction<sup>124</sup> from the wrongdoer as an “equivalent”<sup>125</sup> to a literal restoration of his rights.<sup>126</sup> The equivalence here

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116. 3 *id.*

117. For an elaboration of the idea of relational duties, see *infra* text accompanying notes 377-388.

118. This analysis also applied to the “contract” writ—the action on the case for an *assumpsit*, which identified certain promises or undertakings as imposing a duty to perform on the promisor for the benefit of the promisee. 3 BLACKSTONE, *supra* note 92, at \*157.

119. In some instances, the law would authorize self-help, as in cases of self-defense and recapture of chattels. 3 *id.* at \*3-6. Individuals might also arrange for private dispute resolution, 3 *id.* at \*15-16, or pursue claims arising out of certain wrongs in courts other than common law courts, 3 *id.* at \*61-70, such as military, ecclesiastical, and maritime courts.

120. 3 *id.* at \*117-18. In addition to personal actions were “real” actions, by which courts ordered restoration of ownership in realty of which the victim had been deprived, and “mixed” actions, which included landlords’ actions for waste against tenants. 3 *id.*

121. 3 *id.* at \*117.

122. 3 *id.* at \*120-28, \*138.

123. 3 *id.* at \*138-43.

124. 3 *id.* at \*117, \*121, \*128, \*138-39, \*220.

125. 3 *id.* at \*146; see also 4 *id.* at \*7. An example of a literal restoration of right via a personal action would be court-ordered specific performance.

concerns rights rather than harm or loss. The point of these actions was not (or not only) to compensate for the loss suffered by the victim, although the loss was usually compensated. Rather, the aim was to provide the victim with satisfaction—a payment that, from the perspective of an objective observer, would permit the victim to vindicate himself as against the injurer. Accordingly, a jury would ordinarily be asked to assess damages based on the gravity of the wrongdoer’s misconduct toward the victim as well as its consequences for the victim.<sup>127</sup>

2. *The Right to Law for the Redress of Private Wrongs:  
Blackstone’s Constitution*

The *Commentaries* define a private wrong as a breach of a duty owed by the wrongdoer to the victim and, hence, a mistreatment of (“injury to”) the victim by the wrongdoer. For this class of wrong, Blackstone explained, the law confers on the victim (or his or her survivors) a special privilege to respond to the wrongdoing, consisting typically of a power to invoke the writ of trespass or case to obtain damages from the wrongdoer. This power, Blackstone insisted, is not “merely” a common law entitlement, but rather a right guaranteed by England’s unwritten constitution.

The *Commentaries’* organization—in particular, the framework of Rights and Wrongs—attests to the general importance of both remedy and sanction to Blackstone’s conception of law. A legal system content merely to issue declarations and directives could not claim to be one which offered its citizens the protection of the law:

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126. Blackstone placed his discussion of the appeal of felony in Book IV rather than Book III. 4 *id.* at \*308-12. As noted above, the appeal was a private prosecution that, like actions for trespass and case, was not terminable by officials, but that, in principle, would result in punishment of the offender rather than payment of damages. See *supra* note 79. (I say “in principle” because “appealed” defendants seem often to have reached monetary settlements with their accusers.) There were at least two considerations at work here. First, the appeal was already a relic by the mid-eighteenth century. 4 BLACKSTONE, *supra* note 92, at \*308. Second, the appeal’s availability hinged on the commission of a felony, and therefore arguably was best presented in the Book devoted to specifying the content of that category of wrongs.

127. 3 BLACKSTONE, *supra* note 92, at \*121, \*397-98 (noting juries’ discretion to set damages in light of numerous considerations, including the losses suffered by the victim as well as the nature of the defendant’s conduct); see also John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. (forthcoming 2006) (arguing that tort damages conceived as redress or satisfaction warrant fair compensation, a measure distinct from the notion of make-whole compensation).

[I]n vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said “that the field or inheritance, which belonged to Titius’s father, is vested by his death in Titius,” and the *directory* part has “forbidden any one to enter on another’s property without the leave of the owner;” if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose it’s office; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.<sup>128</sup>

The basic connection between laws recognizing rights and laws providing remedies and sanctions is likewise expressed in Blackstone’s treatment of slavery as a condition of legal disability rather than mere physical domination.<sup>129</sup> A person is a slave, he said, when the law fails to declare him a rights-holder, and when its remedial and sanctioning powers are unavailable to him, for then he is without “the protection of the law.” A slave, in other words, is just a person who may be beaten, confined, and otherwise abused without the violation of a legal directive, liability, or punishment.<sup>130</sup>

These general observations are repeated and sharpened when the *Commentaries* turn to the specifics of English law. Book I commences by declaring that each person enjoys absolute rights to security of person, freedom of movement, and use of property. Again, Blackstone insisted that this declaration would be “in vain” if the “constitution had provided no other method to secure their actual enjoyment.”<sup>131</sup> The constitution “has therefore established certain other *auxiliary subordinate rights* of the subject, which serve principally as barriers to protect and maintain inviolate the three great primary rights . . . .”<sup>132</sup> Blackstone identified five such rights: (1) the right to parliamentary government; (2) the right to clear limits on the royal prerogative; (3) the right to apply to the courts of justice for redress of injuries;

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128. 1 BLACKSTONE, *supra* note 92, at \*55-56.

129. 1 *id.* at \*412; *see also* 1 *id.* at \*122 (“[W]here there is no law, there is no freedom.”). Blackstone did not include in his rejection of slavery the rejection of contracts binding one man to serve another for his lifetime. 1 *id.* at \*412-13.

130. English law, Blackstone claimed, rendered slavery an impossibility by treating all persons subject to it as entitled to its protection. Thus, “a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman.” 1 *id.* at \*123.

131. 1 *id.* at \*136.

132. 1 *id.* (emphasis added).

(4) the right to petition the King, or either house of Parliament, for redress of grievances; and (5) the right of the individual to bear arms for self defense.<sup>133</sup> The first two acknowledge that English citizens are entitled to a structure of government that had proven relatively effective in reducing the risk of rights violations by government itself.<sup>134</sup> The third supplements them by offering protection to the individual primarily against private transgressions. It in turn is supplemented by the last pair of auxiliary rights—the right to petition the King for redress of grievances not cognizable in the courts,<sup>135</sup> and the right to arm oneself for protection against certain forms of violence when protection is not provided by government.<sup>136</sup> In sum, the rights to access common law courts, petition, and bear arms are presented on the same plane as the right to be governed by King-in-Parliament. Each is a “structural” right that Englishmen possess so that they can enjoy their primary rights.

As to the substance of the third auxiliary subordinate right, there can be no mistake: It gives expression to the “settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it’s proper redress.”<sup>137</sup> It likewise instantiates Coke’s maxim that every subject, “for injury done to him *in bonis, in terris, vel persona*, by any other subject . . . may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.”<sup>138</sup> As such, it generates a corresponding affirmative duty on the part of the King to provide law and courts. At least for those wrongs “committed in the mutual intercourse between subject and subject,” he “is officially bound to [provide] redress in the ordinary forms of law.”<sup>139</sup>

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133. 1 *id.* at \*136-41.

134. See 1 *id.* at \*150-51.

135. In modern categories, the petition procedure fell somewhere in between a mere right to complain and a full-blown right to an adjudication. See Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right To Petition*, 66 *FORDHAM L. REV.* 2153, 2169 (1998); James E. Pfander, *Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government*, 91 *NW. L. REV.* 899, 903-26 (1997).

136. See Steven J. Heyman, *Natural Rights and the Second Amendment*, 76 *CHI.-KENT L. REV.* 237, 252-60 (2000) (interpreting Blackstone’s view of the right to bear arms).

137. 3 *BLACKSTONE*, *supra* note 92, at \*109. Hence the importance of the miscellaneous action for trespass on the case, which permitted the articulation of new wrongs and remedies. 3 *id.* at \*122-23.

138. 3 *id.* at \*137 (quoting COKE, *supra* note 35, at 870).

139. 3 *id.* at \*115-16. Here Blackstone set aside for separate treatment claims against the King and his officials. See *infra* text accompanying notes 143-144 (discussing sovereign immunity).

Against these seemingly forthright endorsements of a fundamental right to a law for the redress of private wrongs, a skeptic might raise two kinds of objections. First, she might focus on eighteenth-century usages or doctrines that seem inconsistent with ascribing fundamental importance to tort law. Second, she might claim that the right Blackstone had in mind is a limited right that holds only against what we would today call executive branch interference, not legislative interference. I will address each of these in turn.

One might argue that Blackstone could not have attributed great significance to tort law because the subject of torts was not identified by that name until the mid-nineteenth century.<sup>140</sup> This objection confuses labels for substance. Blackstone understood the law of private wrongs to be largely coextensive with the category of personal actions. (As noted above, at one point he divided these into claims for “torts” and claims sounding in “contract.”<sup>141</sup>) Labels aside, plaintiffs were able to invoke the writ system to obtain redress for conduct that would today constitute familiar torts. To counter this observation by arguing that the law of the writs was procedural not substantive, and therefore could not count as a law of redress, is to engage in anachronism. In sum, the absence of late-eighteenth-century treatises devoted by name to torts in no way entails the absence of a law for the redress of private wrongs.<sup>142</sup>

A second variant on this sort of objection derives from three doctrines that substantially curtailed the availability of redress. The first of these was sovereign immunity. How could Blackstone have supposed that English law regarded access to a law of redress as fundamental if victims of wrongs

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140. See Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1230, 1256-81 (2001) (noting that the first American treatise devoted to “torts” was published in 1860, and contending that torts only achieved the status of a substantive subject in the 1880s, when Holmes defined it as the law of accidents).

141. 3 BLACKSTONE, *supra* note 92, at \*117. Likewise, the fact that Blackstone’s law of private wrongs emerged unsystematically out of the patchwork of actions cognizable under the trespass and case writs hardly provides a basis for refusing to treat it as a category of law to which Englishmen could claim an entitlement. It was one of Blackstone’s great achievements to find a fitting conceptual category for what had been a motley collection of actions.

142. The illegality of contingent fees and the absence of liability insurance made personal injury law less prominent in eighteenth-century England than it is in twenty-first-century America. Still, it was hardly invisible. For example, in the late seventeenth century, early tabloids began covering the trials of actions by husbands for the seduction of their wives. LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530-1987*, at 248-51 (1990). Tort law’s relatively narrow scope of operation did not induce Blackstone to dismiss it as insignificant—he gave tort at least as much attention as contract. Presumably it would be a mistake to infer from the brevity of the latter treatment that there was no law of enforceable agreements in eighteenth-century England; it would equally be a mistake to infer that there was no functioning law of redress.

perpetrated by royal officials could not sue them? The simple answer is that sovereign immunity did not bar such suits. Although the doctrine did prevent the imposition of liability on the King, it did not bar tort suits against individual royal officials—at least not inferior officers charged with ministerial rather than discretionary tasks.<sup>143</sup> In short, sovereign immunity blocked the application of respondeat superior to government. As such, it poses no obstacle to my reading of Blackstone.<sup>144</sup>

Another doctrine, encapsulated in the *actio personalis* maxim, held that if a tort victim (or tortfeasor) died prior to judgment, the action evaporated.<sup>145</sup> How could a legal system committed to the idea of redressing wrongs permit a wrongful killing to go unredressed? The explanation lies partly in the law's refusal (still largely intact) to attribute to decedents a postmortem interest in obtaining redress, and partly in its unwillingness to treat the typical wrongful killing as a separate wrong to the decedent's survivors. Suppose wagon driver *D* negligently ran down and killed *H*, *W*'s husband, as *H* was walking by himself. In wronging and harming *H*, *D* had also harmed *W*. But, in the eyes of the law, *D* had not wronged ("injured") *W*. *D*'s act was legally wrongful as to *H* because it constituted a breach of a duty owed to persons such as *H* to be careful while driving to avoid causing physical harm to them. But *D* did not breach any such duty as to *W*, or commit any other recognized wrong as to her.<sup>146</sup> True, English law could have defined a wrong that would have permitted *W* to sue *D* for the killing of *H*. But the common law's failure to do

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143. See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 15 (1963). Blackstone is often cited for the infamous maxim that "the king can do no wrong." 3 BLACKSTONE, *supra* note 92, at \*254. Yet by this phrase he did not mean that the King stood outside the law. Rather, his point was twofold: (1) that only the King's ministers, not the King himself, could be held to answer in a court of law for official misconduct; and (2) that the King's prerogative was inherently limited by the principle that he must always act for the good of his people and therefore may not "do any injury" (i.e., do wrong) to them. 3 *id.* at \*255.

144. Certain claimants could also seek relief via recognized petitions, such as the petition of right. However, at least by the mid-nineteenth century, courts had ruled that petitions were unavailable to tort claimants, perhaps on the theory that recovery would impute wrongdoing to the monarch. Jaffe, *supra* note 143, at 8.

145. See GOLDBERG ET AL., *supra* note 3, at 341.

146. In other words, a tort action empowers the victim of a certain kind of wrong to obtain redress against the wrongdoer for having been wronged; that an innocent victim suffered harm because of the wrongful conduct of another is not sufficient to support a cause of action. See John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1332-43 (2003) (interpreting the duty and proximate cause components of negligence as setting a requirement of wrongdoing). Even today, post-mortem interests of the decedent—e.g., her interest in sharing the wealth she would have generated with her family but for her tortiously caused death—are not recognized as surviving death.

so does not establish that it failed to function as law of redress, only that it refused to recognize a particular (and expansive) cause of action.<sup>147</sup>

Finally, brief consideration is required of the so-called felony merger doctrine. In the eighteenth century, felony convictions frequently earned the felon the death penalty and forfeiture of his land and goods to the crown. As Blackstone noted without apparent concern,<sup>148</sup> victims of felonies were therefore often unable to pursue tort claims. If Blackstone believed that the law of redress was fundamental, what explains this lack of concern? The answer is that Blackstone did not regard the felony-merger doctrine as a rule of law. Here is how he described it:

In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed . . . it is impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor.<sup>149</sup>

The emphasis on empirics—the frequency with which one “hears” about recoveries, and the “impossibility” of satisfaction—suggests that Blackstone was identifying practical limits on the reach of the law of redress. This reading is bolstered by evidence of seventeenth-century decisions that permitted victims to sue felons who had avoided death and forfeiture by invoking benefit of clergy.<sup>150</sup> Blackstone was probably aware of these decisions, which may explain why he did not describe the extinguishing of tort claims against felons as a doctrine or a rule of law. If this interpretation is correct, then there are no grounds for the current objection. A right of redress is a right as against the wrongdoer. The availability of assets owned by the wrongdoer—or the

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147. To cast *D*'s acts as a wrong to *W* would require the articulation of a cause of action that would hold an actor liable for causing distress or economic loss to persons who were not put at foreseeable risk of physical harm by the actor's conduct. Even modern courts have been reluctant to recognize such a broad cause of action. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 670-72 (2001) (reviewing relevant duty doctrine). The need for courts to articulate this sort of wrong was obviated by the enactment of wrongful death statutes in the nineteenth century.

148. 4 BLACKSTONE, *supra* note 92, at \*6.

149. 4 *id.*

150. 3 HOLDSWORTH, *supra* note 21, at 331-33. Holdsworth noted a 1791 opinion treating the issue as open. 3 *id.* at 333.

availability of his body, in a system that permits punitive forms of redress—will always set a limit on victim recoveries.<sup>151</sup>

The second category of objection mentioned above does not deny that Blackstone regarded Englishmen as enjoying a right to a law of redress that includes much of what we today term tort law. Instead, it maintains that the right he had in mind was a limited right to pursue one's claims free of royal interference, not a right that would block legislative revision or abolition of this part of the common law.

This category of objection has some validity. Blackstone did insist that the entitlement to seek redress for private wrongs was, in part, an entitlement against royal interference. Thus, like the common lawyers before him, he maintained that the victim, not royal officials, determined whether to set the law of redress "in motion"<sup>152</sup> and that, once an action for redress was commenced, no one, not even the King, had the right to call it off.<sup>153</sup> Furthermore, he described the right to apply to the courts for redress of injuries as a right to "the law of the land,"<sup>154</sup> which he defined as a body of substantive rules that is "fixed, and unchangeable, *unless by authority of parliament.*"<sup>155</sup> He also insisted that Englishmen enjoy an entitlement not only to a substantive law of redress, but also to common law procedure, which

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151. Even if one were to construe Blackstone as endorsing felony merger as a doctrine, it would stand only for the proposition that, for a certain class of wrongs deemed egregious, the victim's right to redress must give way to the public's right to impose sanctions on the wrongdoer for the common good. To grant priority to this interest is to set out a relatively narrow ground for suspending the law of redress. See *infra* text accompanying note 431 (articulating a burden of justification on governments seeking to alter the law of redress).

152. 3 BLACKSTONE, *supra* note 92, at \*22. Locke and Blackstone sharply distinguished torts from crimes even though in their times the job of litigating fell either to the victim or to the victim's kin. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 11 (2003). In the absence of the modern division of labor between tort plaintiffs and government prosecutors, Locke and Blackstone distinguished between suits brought by victims of wrongs qua victims and suits brought by victims qua prosecutors.

153. By this time, the King's dispensing power, see *supra* text accompanying notes 71-79, had been eliminated by statute, see 1 BLACKSTONE, *supra* note 92, at \*138, in part because James II had dared to invoke it to insulate Catholics from discriminatory laws. 4 *id.* at \*433. The King's pardon power remained intact, but could not be invoked to waive private causes of action. 4 *id.* at \*391.

154. 1 *id.* at \*137.

155. 1 *id.* (emphasis added).



“cannot be altered *but by parliament*.”<sup>156</sup> Both italicized phrases seem to envision a right against royal, but not legislative, interference.<sup>157</sup>

In fact, these passages are only the tip of the iceberg, for Book I famously contains others that seem to reject outright the idea that the English Constitution sets limits on parliamentary power. One ascribes to Parliament<sup>158</sup> “omnipotence,” i.e., “a sovereign and uncontrollable authority to change any facet of the English political system.”<sup>159</sup> Another rejects the notion that English law confers on Englishmen a residuum of sovereignty over their political institutions, insisting that “[s]o long . . . as the English constitution lasts . . . the power of parliament is absolute and without control.”<sup>160</sup>

To avoid misapprehending in these passages a commitment to legislative supremacy,<sup>161</sup> one must attend closely to Blackstonian usage. Following Hobbes, he defined the sovereign as that office or institution that operates as the uncommanded commander within a political system,<sup>162</sup> and municipal law as the command of the sovereign.<sup>163</sup> It follows from this way of thinking that, although a constitution can be attested to by law, it cannot be law. Instead, a constitution is a precondition of law; the terms on which the sovereign creator of law is itself created. Given these definitions, Blackstone thought it unintelligible to speak of popular sovereignty. Yet he did not reject Locke’s claim that governments can commit breaches of trust, or that a people might justifiably withdraw their support for a regime.<sup>164</sup> Instead, he argued that any such withdrawal could not properly be described as an exercise of sovereignty. Rather, it was an invocation of “those inherent (though latent) powers of society,” acting as a collective, to disband the polity.<sup>165</sup> Given the claim that sovereignty is the ultimate decision-making power within a legal system, once

<sup>156</sup>. 1 *id.* at \*138 (emphasis added).

<sup>157</sup>. See, e.g., Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search To Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1011-13 (2001) (offering this reading).

<sup>158</sup>. Recall that the term Parliament is short for King-in-Parliament. The powers ascribed to it are thus powers possessed by a mixed institution with checks and balances. 1 BLACKSTONE, *supra* note 92, at \*50-51.

<sup>159</sup>. 1 *id.* at \*156-57.

<sup>160</sup>. 1 *id.* at \*157.

<sup>161</sup>. CORWIN, *supra* note 104, at 83-85; see 1 WILSON, *supra* note 104, at 200.

<sup>162</sup>. 1 BLACKSTONE, *supra* note 92, at \*49.

<sup>163</sup>. 1 *id.* at \*46.

<sup>164</sup>. For instances of Blackstone treating government as holding power in trust for the good of the people, or as under a duty to provide for that good, see 1 *id.* at \*12, \*52-53, \*156, \*257.

<sup>165</sup>. 1 *id.* at \*238.

the system is disbanded, there can be no sovereignty. By the same token, it was impossible for a body of law actually to confer on citizens a legal right to revolt, for any such conferral would be a dissolution of government that would render the law no longer a law.

Another way to grasp the foregoing points is to ask what it was, in Blackstone's view, that rendered Parliament the English sovereign. His answer, of course, was the English Constitution. This is why he stated in the second of the seemingly anti-constitutional passages quoted above that Parliament would remain sovereign "so long . . . as the English constitution lasts." Again, the idea is not that the rejection of parliamentary government would never be warranted. Rather, it is that any such change would be "at once an entire dissolution of the bands of government; and the people would be reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power."<sup>166</sup>

Although Blackstone thus did not confer on the English Constitution the status of fundamental law, he nonetheless did regard it as setting standards against which to evaluate parliamentary enactments and royal conduct. Indeed, it was perfectly intelligible for him to say, as he at times did say, that Parliament had acted unconstitutionally, even though it enjoyed the power to so act under the English Constitution.<sup>167</sup> But of what did these constitutional standards consist? The short answer is: a set of structural guarantees, some of which bleed over into the recognition of individual rights. Here, Blackstone again followed Hobbes, who distinguished between fundamental and non-fundamental features of a legal system.<sup>168</sup> What counted as fundamental for Blackstone? The answer resides in his list of auxiliary subordinate rights: Parliament on its then-current design (bicameral, regularly convening), a monarch with limited prerogative, relatively independent courts prepared to provide redress for injuries under principles of common law, the availability of petitions for grievances, and the bearing of arms for self-defense. Blackstone identified each of these as a "right" precisely because of its importance to the proper functioning of the polity. An act of Parliament abolishing the House of Commons would upset fundamental checks and balances provided by the English Constitution and therefore would be unconstitutional. The same

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166. 1 *id.* at \*52; see also LIEBERMAN, *supra* note 104, at 52 (emphasizing that Blackstone allowed for the extralegal dissolution of parliamentary sovereignty).

167. 1 BLACKSTONE, *supra* note 92, at \*51-52 (noting that Parliament's creation of a unitary government would be the "end of our constitution").

168. HOBBS, *supra* note 102, at 214 ("[A] fundamental law in every commonwealth is that, which being taken away, the commonwealth faileth, and is utterly dissolved; as a building whose foundation is destroyed.").

would be true of legislation or a royal decree purporting to abolish the common law courts.<sup>169</sup> Imprisonment by royal officials of an individual without cause was unconstitutional, not only because it amounted to a transgression of a subject's right to liberty, but because it entailed a claim by the King to a discretionary power that, if granted, would pose a grave threat to everyone's rights.<sup>170</sup>

To be sure, the significance of deeming a law unconstitutional within this frame of thought was not that the law could be declared void by a judge. Instead, it signaled that the officials who enjoyed their powers by virtue of the English Constitution had dissolved it and had erected a new form of government. At this point, the people had to decide whether to acquiesce or resist. While the notion of a people resisting a structural political change might today strike us as far-fetched, it was hardly unimaginable to Blackstone. Indeed, at one point he described the Glorious Revolution as a successful popular rejection of James II's efforts to enslave the country under a new regime.<sup>171</sup>

In sum, there is no basis for inferring from Blackstone's recognition of Parliament's authority to revise the common law that his conception of the right to a law of redress was a right against only royal interference. Nor, in the end, should this be a surprise. The *Commentaries* nowhere suggest that the genius of the English system of government is that it permits King-in-Parliament to do whatever it wants. Rather, the system aspires to define and preserve individual rights.<sup>172</sup> True, Parliament, as sovereign, has the power to trample on these rights; but that risk, Blackstone thought, is present in all systems of governance simply because any system has to place sovereignty—the extralegal power to make laws—somewhere. That Parliament has the ability to run roughshod over rights does not negate their existence; if that were the case, there would be no rights to extinguish.

In Blackstone's work, then, we see a more fully formed rendition of the notion articulated by the common lawyers and by Locke that Englishmen enjoy a right to law that enables them to redress "injuries" or private wrongs—wrongs done to them by others. His rendition is particularly noteworthy for four reasons. First, it grounds Locke's abstract and prescriptive account of the

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169. See 4 BLACKSTONE, *supra* note 92, at \*422 (describing such a law as "unconstitutional").

170. 4 *id.* at \*432 (noting that for officials unjustifiably to imprison a subject is to "unconstitutionally misuse him"); see also 1 *id.* at \*170 (describing a limit on the franchise as "unconstitutional").

171. 4 *id.* at \*433.

172. 1 *id.* at \*141 (positing "political or civil liberty" as the "direct end of [England's] constitution").

right to a law of redress in the legal practices of the eighteenth century. In doing so, it demonstrates that the content of the law in question substantially overlaps with what we think of as tort law. Second, it deems access to a law of redress as significant in part because that law gives content to, and helps make real, the law's declaration that Englishmen possess rights to life, liberty, and the use of property. In this way, Blackstone quite self-consciously treated private law as having comparable significance to public law within a constitutional frame of government. Third, his account treats the right to a law of redress as a structural right—a right to court-access and law no different in kind from the right to the institutions of representative government. Indeed, in his views, it is precisely because access to a law of redress figures centrally among the norms and practices by which Englishmen are constituted as rights-bearers that the English Constitution guarantees them institutions that will provide that body of law. Fourth, as I will now show, there is good reason to suppose that, notwithstanding his opposition to the American Revolution, Blackstone's ideas on this subject, like most others, were influential among early American elites.

## II. RECOGNITION OF THE RIGHT TO A LAW OF REDRESS IN AMERICAN CONSTITUTIONAL LAW

One would expect the right to a law for the redress of private wrongs to appear in early American law. The colonists claimed for themselves the rights of Englishmen and justified their revolution on principles of English constitutionalism.<sup>173</sup> In Section A, I demonstrate that lawyers of the Founding era did in fact recognize this right. I also describe pre-Civil War state court decisions in which the right was enforced against legislation depriving persons of access to common law actions, and marshal evidence that Section 1 of the Fourteenth Amendment was intended to guarantee that states would attend to basic governmental duties, including the duty to provide a law of redress. In Section B, I review U.S. Supreme Court decisions issued between 1870 and 1920 that locate the right to a law of redress in the Fourteenth Amendment's Due Process Clause, and that understand it to set a ceiling over, and a floor under, state tort law. In principle, the ceiling empowered courts to strike down laws that effected a naked redistribution of wealth under the guise of expanding redress. The floor, meanwhile, enabled them to strike down laws

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173. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 14 (abr. ed. 1995); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 36-37, 267 n.9 (2004); GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 54-55, 64 (1979).

that deprived individuals of the ability to vindicate wrongful invasions of basic interests, such as bodily integrity. In Section C, I discuss *Truax v. Corrigan*,<sup>174</sup> the disastrous 1921 decision in which the Supreme Court for the last time held a state statute unconstitutional on the ground that it violated a victim's due process right to a law of redress. I also review the Court's hasty retreat to rational basis analysis.

#### A. 1776-1875: Reception

##### 1. The Founding Era

With certain heresies excised,<sup>175</sup> the *Commentaries* provided the basic text for late-colonial and early-American legal education and practice.<sup>176</sup> American jurists were thus quite familiar with the principle that government owes its citizens laws and institutions for declaring and vindicating basic rights, including the right to a law for the redress of wrongs. It is no surprise, then, that a majority of the original states explicitly incorporated this right into constitutional documents. Five early state constitutions included explicit guarantees of redress.<sup>177</sup> Article 17 of the 1776 Maryland Declaration of Rights was typical. Borrowing from Coke's reading of Magna Carta, it stated that "every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without denial, and speedily without delay, according to the law of the land."<sup>178</sup> Similar language was endorsed by two other states—Virginia and North Carolina—at their conventions for the

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174. 257 U.S. 312 (1921).

175. American scholars believed that Blackstone's erroneous denials of popular sovereignty and of American colonists' rights could be severed from the core insights of his work. See, e.g., 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES iv-vi (Philadelphia, Birch & Small 1803) (praising the perspicuity and organization of the *Commentaries*, while noting the need for supplementation to reflect distinctive features of American and Virginia law).

176. On Blackstone's influence, see Nolan, *supra* note 104; see also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 225-30 (1998); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16 (1975) ("It is impossible to overemphasize the impact of Blackstone on legal education in America.").

177. See DEL. CONST. of 1792, art. I, § 9; MD. DECLARATION OF RIGHTS AND CONST. of 1776, art. XVII; MASS. CONST. of 1780, art. XI; N.H. CONST. of 1784, art. 14; VT. CONST. of 1786, art. IV. Others contained due process, law of the land, and open court provisions that may have been understood to incorporate a right to a law of redress. See, e.g., PA. CONST. of 1776, § 26 ("All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay . . .").

178. MD. DECLARATION OF RIGHTS AND CONST. of 1776, art. XVII.

ratification of the Federal Constitution. In addition to a set of revisions, the 1788 Virginia convention proposed that a separate declaration of twenty “essential and unalienable Rights” be added to the Federal Constitution.<sup>179</sup> The twelfth of these stated that

every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, comple[te]ly and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust.<sup>180</sup>

While it was not clear exactly what these guarantees entailed, the same was true for most, if not all, of the rights enumerated in documents such as these.

Although Madison worked from the Virginia convention’s proposals when drafting what became the Federal Bill of Rights, he excluded Article 12 and several others.<sup>181</sup> He may have regarded it as redundant with extant text or other proposed amendments.<sup>182</sup> More likely, he thought that it did not belong

179. See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 182 (1957).

180. See *id.* at 182; see also *id.* at 198, 200 (reproducing identical language proposed by the North Carolina convention). The Confederation Congress’s 1787 ordinance establishing the Northwest Territory similarly recognized that inhabitants “shall always be entitled to the benefits of . . . judicial proceedings according to the course of the common law.” Ordinance of 1787: The Northwest Territorial Government, 1 Stat. 50 (1789), *reprinted in* 1 U.S.C. LI (2000).

181. See Koch, *supra* note 20, at 374. After the House approved articles of amendment and sent them to the Senate, Virginia’s Anti-Federalist senators moved to insert all the provisions that had been proposed at the Virginia convention but omitted by Madison, including the right-to-redress article. DUMBAULD, *supra* note 179, at 47. For reasons not preserved, their motion—which may have been as much an effort to derail the Bill of Rights so as to prevent Federalists from blunting Anti-Federalist critiques of the Constitution as a sincere effort to improve it—was defeated. See *id.* at 23–24 & n.43 (noting Madison’s concern that inclusion of all of the Virginia convention’s proposed changes would be unacceptable to the Federalist-dominated Congress); *id.* at 34 (noting Anti-Federalists’ recognition that adoption of amendments would undermine their criticisms). On the centrality of federalism concerns to the Bill of Rights, see AMAR, *supra* note 176.

182. At least from the time that Coke linked them together in his interpretation of Article 29 of Magna Carta, the rights to due process, to open courts, to have one’s rights determined by the law of the land, and to obtain remedies for wrongs were regarded as close cousins, if not substantially overlapping. See James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–25 (1999). Bushrod Washington would later take the view that Article IV’s Privileges and Immunities Clause granted individuals a right that imposed on states an obligation to provide a law of redress. See *infra* text accompanying note 190.

in a set of provisions designed to assure Anti-Federalists that the new Constitution was committed to constraining the power of government, as opposed to identifying rights that generated functions to which government would be obligated to attend.<sup>183</sup> In particular, the amendments aimed to limit the power of a federal government that was not intended to be a font of law governing the ordinary interactions of citizens.<sup>184</sup> Especially given Madison's original drafting plan, which called for integration of what became the Bill of Rights into the original articles of the Constitution,<sup>185</sup> the inclusion of right-to-remedy language ran the risk of falsely implying that Congress or the federal courts enjoyed the authority to enact a national body of common law.<sup>186</sup> On this rationale, the exclusion of a right to remedy provision from the Bill of Rights was entirely consistent with recognition of the right as a limit on state governments.<sup>187</sup>

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183. DUMBAULD, *supra* note 179, at 34.

184. Heyman, *supra* note 20, at 525. Madison's one provision pertaining to state governments was killed in the Senate. DUMBAULD, *supra* note 179, at 37, 46.

185. DUMBAULD, *supra* note 179, at 39.

186. See James Madison, Report on the Virginia Resolutions to the House of Delegates (1798), reprinted in 4 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 561-67 (photo. reprint 1941) (2d ed. 1836) (criticizing as destructive of the Constitution's design the notion that Congress enjoys the power to enact any law pertaining to a matter that had been regulated at common law); cf. AMAR, *supra* note 176, at 37-39 (explaining that Madison's assumption that Congress's powers were already limited by Article I explains why he left out various proposals from the Virginia convention). If Amar's account of the interaction of the Fourth and Seventh Amendments is accurate, Madison and Congress were explicitly solicitous of the right to a law of redress in one area in which they perceived a real threat of federal interference with state tort law. These provisions, he argues, were meant, among other things, to prevent federal judges from using warrants to effectively immunize federal officials from tort liability for trespassory searches. AMAR, *supra* note 176, at 70-71. As indicated below, antebellum courts at times invoked the no-takings-without-compensation principle in a similar fashion. See *infra* text accompanying notes 191-195.

187. Madison and other members of his generation accepted that individuals enjoyed unenumerated rights, particularly those that were mainstays of English constitutionalism. See AMAR, *supra* note 176, at 147-56; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1156-67 (1987). The inclusion of the Contracts Clause in the Federal Constitution indicates that the Framers were aware of the possibility that states might sometimes renege on their duties to provide basic categories of law. In theory at least, Madison or other members of Congress could have attempted to convert standard right-to-remedy language of the sort found in the twelfth article proposed by the Virginia ratifying convention into a "Torts Clause" stating, roughly, that no state shall impair the operation of tort law. That no one thought to undertake this sort of innovative drafting hardly supports an inference that the latter type of interference was of no concern. (Recall that the Constitution as ratified also did not specify a bar, applicable to the states, against taking private property without compensation.)

Although “tort reform” was rarely considered by the federal courts in the early years of the republic, the notion of a right to a law of redress still made some prominent appearances. When Chief Justice Marshall asserted in *Marbury v. Madison* that Marbury’s right in his commission entitled him to a remedy, he was not mouthing a tautology.<sup>188</sup> Rather, he was invoking Blackstone for the idea that “the very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives injury,” and that “[o]ne of the first duties of government is to afford that protection.”<sup>189</sup> Significantly, given the attention it would later receive, Justice Bushrod Washington’s description of the Privileges and Immunities Clause in *Corfield v. Coryell* explicitly read into it the right “to institute and maintain actions of any kind in the courts of the state” as a fundamental piece of “[p]rotection by the government” for the individual’s “enjoyment of life and liberty.”<sup>190</sup>

In the face of legislative abuses – many of which involved interferences with individuals’ ability to collect on debts or obtain redress for invasions of property<sup>191</sup> – state judges began to exercise judicial review,<sup>192</sup> particularly on the strength of “due process” and “law of the land” provisions in state constitutions.<sup>193</sup> As Robert Brauneis has explained, the requirement of just compensation for takings of private property was articulated by some of these courts as a limit on the ability of legislatures to reform tort law.<sup>194</sup> Specifically, they invoked the just-compensation principle to nullify provisions in charters granted by legislatures to turnpike, canal, and railroad corporations that purported to immunize them from tort suits for trespass.<sup>195</sup> Other state courts, as Steven Heyman has observed, explicitly invoked right-to-remedy provisions to invalidate legislation denying judicial relief to certain classes of claimants.

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188. 5 U.S. (1 Cranch) 137 (1803).

189. *Id.* at 163; see Heyman, *supra* note 20, at 534-35.

190. *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 3230); see also *Douglass v. Stephens*, 1 Del. Ch. 465, 470-71 (1821) (describing the Privileges and Immunities Clause of Art IV, Section 2 as encompassing Blackstone’s auxiliary subordinate rights for the vindication of the rights to life, liberty, and property).

191. See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830*, at 91-92 (1975); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 436, 453-63 (2d ed. 1998).

192. WOOD, *supra* note 191, at 404-07, 453-63; Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 922-25 (1993).

193. Ely, *supra* note 182, at 327-38.

194. Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999).

195. *Id.* at 83-97.



For example, after the onset of the Civil War the Minnesota legislature enacted a law denying “all persons aiding the rebellion against the United States” the right to maintain judicial proceedings in the state’s courts.<sup>196</sup> The state’s high court struck it down, offering the following emphatic endorsement of the right to a law for the redress of injuries:

We would never for one moment suppose that the Legislature has the power under the constitution, to deprive a person or class of persons, of the right of trial by jury, or to subject them to imprisonment for debt, or their persons, houses, papers and effects, to unreasonable searches; or their property to be taken for public use without just compensation; and yet neither of these is more sacred to the citizen, or more carefully guarded by the constitution, than the right to have a certain and prompt remedy in the laws for all injuries or wrongs to person, property or character.<sup>197</sup>

## 2. Section 1 of the Fourteenth Amendment

Although Section 1 of the Fourteenth Amendment aimed to incorporate rights guarantees against the states, there is considerable disagreement over which rights it incorporated and how.<sup>198</sup> Perhaps this uncertainty is inevitable, given that the Amendment was debated in abstract terms.<sup>199</sup> Nonetheless, there is good reason to conclude that it was meant to guarantee that states would attend to basic obligations, including the duty to provide law for the redress of wrongs, and that federal courts were meant to enforce that guarantee.

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196. *Davis v. Pierse*, 7 Minn. 13, 15 (1862); see also Heyman, *supra* note 20, at 560 n.352.

197. *Davis*, 7 Minn. at 18.

198. See, e.g., AMAR, *supra* note 176, at 181-230 (arguing that Section 1 incorporated only the “individual” rights that were recognized in the Bill of Rights and English constitutionalism); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (arguing that Section 1 incorporated the Bill of Rights against the states); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988) (arguing that Section 1 identified federal rights against state interference while placing significant responsibility for enforcement of those rights on the states); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (arguing that the Privileges or Immunities Clause incorporated the Bill of Rights through an equality principle that required states to grant rights equally rather than selectively).

199. NELSON, *supra* note 198, at 7, 80 (arguing that the abstractness of the debates over the Fourteenth Amendment permits multiple interpretations); see also AMAR, *supra* note 176, at 193 (crediting Professor Fairman with perceiving that there was no single understanding of the rights protected by Section 1).

Fourteenth Amendment proponents repeatedly invoked *Corfield v. Coryell*—which explicitly lists the power to maintain court actions—as providing a useful summary of the rights that Section 1 was meant to secure.<sup>200</sup> Proponents of the Amendment had reasons to focus on access to courts and law: The inability of African-Americans to avail themselves of the law, whether by entering into contracts or by obtaining redress for wrongs, was among the hallmarks of slavery and the Black Codes.<sup>201</sup> This is why the 1866 Civil Rights Act guaranteed to citizens of any race the “same right, in every State . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .”<sup>202</sup> In offering to Congress his Section 1 prototype, Representative Bingham justified it in part on the ground that it was needed to ensure that all citizens would enjoy access to law.<sup>203</sup>

Section 1’s proponents also tied the content of its Privileges or Immunities Clause to the auxiliary subordinate rights that Blackstone had attributed to Englishmen.<sup>204</sup> Invoking the fifth auxiliary right to bear arms along with the Second Amendment, they argued that citizens should enjoy a federal entitlement to carry arms to protect themselves against both official and private violence.<sup>205</sup> Likewise, they drew on the right to petition and the First Amendment to argue for a federally protected right to make formal and public demands on government.<sup>206</sup> Given the incorporation of these Blackstonian rights, it would be odd if his third auxiliary right—the right to a law for the

200. NELSON, *supra* note 198, at 70, 81.

201. *Id.* at 18–19 (noting abolitionist condemnations of slavery as the denial of the protection of criminal and civil laws); *see also* Heyman, *supra* note 20, at 546–51 (emphasizing the salience of slaves’ lack of access to the law to the thinking of Republicans who framed and passed the Fourteenth Amendment).

202. The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981 (2000)). Representative Bingham, the drafter of Section 1 of the Fourteenth Amendment, argued that the Amendment was necessary to ensure that Congress had sufficient authority to enact the Civil Rights Act. CURTIS, *supra* note 198, at 80. In Bingham’s view, the original Federal Constitution’s recognition of slavery meant that it could not be read to guarantee all persons the protection of the law. This is because, following Blackstone, he believed that the absence of such protection was the very definition of slavery. Conversely, abolition meant that states had been placed under a new federal-law obligation to provide law. *Id.* at 101, 107.

203. CURTIS, *supra* note 198, at 69.

204. *See* AMAR, *supra* note 176, at 225–30, 260–61; CURTIS, *supra* note 198, at 74–75 (citing Congressman Wilson’s invocation of Blackstone); *supra* text accompanying notes 165–166 (discussing Blackstone on auxiliary rights).

205. AMAR, *supra* note 176, at 262–64.

206. *Id.* at 245–46.

redress of wrongs—was excluded. As we have seen, that right was no less tightly linked than those other rights to the protection of person and property.

That Section 1, particularly the Privileges or Immunities Clause, was meant to recognize the affirmative right of all citizens to a law of contract, a law of property, a law of crimes, and a law of redress is further evidenced by critics' complaints that its adoption would entail the complete destruction of federalism. While this objection was hyperbolic, it was by no means unmotivated. If persons were to enjoy a right to these bodies of law as part of their national citizenship, the national government would presumably enjoy a corresponding power to enact these laws. Tellingly, when confronted with this objection, Bingham did not disavow its premise, but rather its conclusion:

The care of the property, the liberty, and the life of the citizen, under the solemn sanction of an oath imposed by your Federal Constitution, is in the States, and not in the Federal Government. I have sought to effect no change in that respect in the Constitution of the country. I have advocated here an amendment which would arm Congress with the power to compel obedience to the oath, and punish all violations by State officers of the bill of rights, but leaving those officers to discharge the duties enjoined upon them as citizens of the United States by that oath and by that Constitution.<sup>207</sup>

In Bingham's view, state governments had always been under a Blackstonian obligation to provide citizens with the protection of the law. However, because of the unholy compromise underwriting the Federal Constitution, that obligation had been neither grounded in federal law nor enforceable by the federal courts. The Civil War Amendments eliminated the states' leeway in this regard. Otherwise, they left the obligation where it had always resided. Section 1, in other words, was meant to set boundaries within which the states could operate, not to displace them.<sup>208</sup>

The main opinions in the *Slaughter-House Cases* provide further support for this account. They reveal, first, that there was in fact no debate among the

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207. Cong. Globe, 39th Cong., 1st Sess. 1292 (1866), quoted in CURTIS, *supra* note 198, at 123.

208. My argument differs from Professor Harrison's argument that the Clause was meant to impose only a requirement of formal equality. Harrison, *supra* note 198, at 1422. Harrison rightly emphasizes that Section 1 required that state laws be "impartial" in the requisite sense, and courts would soon be reviewing statutes that expanded tort liability to see if they amounted to "special" or "class" legislation. See also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 61-76 (1993). But Harrison errs in implying that states were understood to enjoy complete discretion to provide (or not to provide) laws as they saw fit. Rather, they were taken to be under a duty to provide basic categories of law.

Justices as to whether citizens of the states enjoyed the right to various bodies of law, including a law for the redress of wrongs. Both Justice Miller's majority opinion and Justice Bradley's dissent endorsed *Corfield v. Coryell's* list of the fundamental privileges of citizenship.<sup>209</sup> Thus, the dispute proceeded from a shared recognition that the privileges in question generated an affirmative obligation on the part of government to provide law. Miller reasoned that the Privileges or Immunities Clause could not have meant to federalize the basic rights articulated in *Corfield* and elsewhere, including the right to a law of redress, because that would have entailed transferring to the national government the power to fashion national laws of contract, tort, and crime.<sup>210</sup> Reasoning backward from this unthinkable radical result, he concluded that the Clause could only refer to a distinct set of rights tied to issues appropriately addressed by the national government.<sup>211</sup>

For his part, Justice Bradley understood this argument and pointed out its fallacy, just as Bingham had done before him. Miller's concern, he rightly noted, was that a reading of Section 1 that interpreted it to incorporate *Corfield's* broad list of rights

will lead to enactments by Congress interfering with the internal affairs of the States, and establishing therein civil and criminal codes of law for the government of the citizens, and thus abolishing the State governments in everything but name; or else, that it will lead the Federal courts to draw to their cognizance the supervision of State tribunals on every subject of judicial inquiry, on the plea of ascertaining whether the privileges and immunities of citizens have not been abridged.<sup>212</sup>

These fears, he responded, rested on an erroneous blurring of the question of whether Section 1 created a federal right to the protection of the law with the separate questions of who would enforce that right and on what terms:

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209. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1872) (invoking *Corfield's* description of the rights that state governments "were created to establish and secure"); *id.* at 119 (Bradley, J., dissenting) (noting that each U.S. citizen enjoys "the privilege of resorting to the laws for redress of injuries").

210. *Id.* at 77-78 (majority opinion) ("Was it the purpose of [the Clause] . . . to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? . . . All this and more must follow, if the proposition of the plaintiffs in error be sound.").

211. *Id.* at 78-81.

212. *Id.* at 123 (Bradley, J., dissenting).

Very little, if any, legislation on the part of Congress would be required to carry the amendment into effect. Like the prohibition against passing a law impairing the obligation of a contract, it would execute itself. The point would be regularly raised, in a suit at law, and settled by final reference to the Federal court.<sup>213</sup>

Identifying a federally guaranteed set of civil rights, including rights to law, did not entail a federal takeover of basic lawmaking. Instead, it required court supervision of state legislative and judicial decisions to ensure that states were living up to the obligations imposed on them by the Fourteenth Amendment.

*B. 1875-1920: Due Process as Ceiling and Floor*

Bradley's dissent proved prophetic. Prompted by litigants, the federal courts in the period from 1875 to 1920 ruled on the extent to which the Fourteenth Amendment—and more specifically its Due Process Clause—limited the ways in which a state could fashion its law of redress. Because the tort reforms of this era tended to expand liability, these cases usually raised “ceiling” rather than “floor” challenges. As I will now discuss, the Court consistently rejected these challenges, but it did so on the merits. Moreover, the Court insisted that, in substance, due process provides not just a ceiling but a floor—an affirmative duty grounded in federal law to provide a law of redress. And just as it envisioned laws that would exceed the due process ceiling, the Court identified laws that fell below this floor.

*1. Railroads and Ships*

The era of modern Fourteenth Amendment due process analysis opened with *Munn v. Illinois*,<sup>214</sup> in which the petitioner challenged a statute setting maximum charges for grain storage. The Court rejected the challenge using the language quoted at the outset of this Article:

[A] mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at

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<sup>213</sup> *Id.* at 123-24.

<sup>214</sup> 94 U.S. 113 (1876).

the whim, of the legislature, unless prevented by constitutional limitations.<sup>215</sup>

This passage could be read to endorse unfettered legislative discretion to expand or shrink tort law, but that was not its meaning. The Court in *Munn* and subsequent cases repeatedly addressed due process challenges on the merits, albeit with deferential review. For example, in ceiling cases, the Justices asked whether the statute in question had departed so substantially from the terms of regulation at common law as to evidence an attempt at outright redistribution.<sup>216</sup> Thus, in *Munn* itself, the Court emphasized that price ceilings were not so far removed from the common law's requirement of reasonable rates as to suggest an effort to take from *A* and give to *B*.

The Court deployed this mode of analysis a decade after *Munn* in *Missouri Pacific Railway Co. v. Humes*.<sup>217</sup> Humes's mule was killed by the defendant's train. He sued and recovered \$270 under a statute imposing double damages on railroads for harms to livestock caused by a failure to maintain fencing along tracks. Justice Field's opinion for a unanimous Court rejected the railroad's due process challenge to the damages multiplier, but not because it denied the existence of a ceiling on expansions of liability. Rather, the Court reasoned that, because the jury had discretion to award damages above pecuniary loss at common law, the state was at liberty to set a multiplier such as this one. It also emphasized that the interest at stake was ownership of tangible property, that the railroad's conduct likely amounted to gross negligence, and that, in the absence of the multiplier, there might be insufficient incentive for victims to seek redress.<sup>218</sup>

In *Humes*, Justice Field and his colleagues explicitly presumed that due process not only set a ceiling on a state's efforts to expand liability, but also generated a federal-law obligation to provide a law of redress: "*It is the duty of every State to provide, in the administration of justice, for the redress of private*

215. *Id.* at 134.

216. John Witt has observed that a similar line was drawn by state courts confronted in this period with challenges to statutory expansions of tort liability. See John Fabian Witt, *State Constitutions and American Tort Law: A History*, 58 RUTGERS L. REV. (forthcoming 2005); see also GILLMAN, *supra* note 208, at 86-126 (emphasizing the centrality of norms against "special interest" or "class" legislation to late-nineteenth-century constitutional law and theory).

217. 115 U.S. 512 (1885). State safety regulation of railroads began in earnest in the 1840s. State court decisions issued prior to the passage of the Fourteenth Amendment routinely upheld such regulations against the claim that they violated the Contracts Clause by amending the railroads' charters. See, e.g., *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140 (1854).

218. *Humes*, 115 U.S. at 521-23.

wrongs . . . .”<sup>219</sup> Although dictum, *Humes*’s recognition of this duty was not an isolated aside. As Ann Woolhandler has noted, in *Poindexter v. Greenhow*,<sup>220</sup> decided a year earlier, the Court held that Virginia was constitutionally obligated to provide its citizens with a trespass action by which to obtain redress against individual officials for wrongful seizures of private property. As to the existence of the due process floor, *Poindexter* could not have been more clear. “No one,” the Court held, “would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law.”<sup>221</sup>

Between 1885 and 1915, the Court invoked the *Munn-Humes* framework for analyzing tort reform legislation on several occasions, although each of these involved ceiling rather than floor challenges. For example, in *Missouri Pacific Railway Co. v. Mackey*,<sup>222</sup> it upheld the abolition of the fellow servant rule for suits by railroad employees against employers, emphasizing that vicarious liability was a well-established feature of the common law. In *St. Louis & San Francisco Railway Co. v. Mathews*,<sup>223</sup> it upheld a statute imposing strict liability on railroads for causing fire damage, but also granted them the right to obtain insurance for such liabilities, observing that the common law had long been willing to impose strict liability for use of fire causing property damage, and that the legislature had granted the railroad a special privilege to insure itself.<sup>224</sup>

219. *Id.* at 521 (emphasis added).

220. 114 U.S. 270, 303, 306 (1884); see Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 120-21, 123 (1997).

221. *Poindexter*, 114 U.S. at 303; see also Woolhandler, *supra* note 220, at 121. *Poindexter* speaks in terms of redress for invasions of property rights, which were the rights at issue in that case. Given comparable yet more general statements in decisions like *Humes* and *Corfield*, as well as the longstanding treatment of rights to life and liberty as no less sacred than rights of property ownership, there is every reason to suppose that the Justices assumed that a law of redress also had to be made available for wrongful invasions of the former rights.

222. 127 U.S. 205, 208-09 (1888). The fellow servant rule denied employees the ability to invoke respondeat superior to hold their employers vicariously liable for injuries caused to them by the negligence of co-employees.

223. 165 U.S. 1 (1897). State courts followed *Mathews* in rejecting challenges to such statutes. Witt, *supra* note 216.

224. *Mathews*, 165 U.S. at 22-24; see also Chi., Burlington & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 571 (1911) (holding that states may void contracts that purport to reinstate the fellow servant rule); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 73-74 (1907) (holding that states may treat employees’ willful misconduct as a basis for imposing vicarious liability); Chi., Rock Island & Pac. Ry. Co. v. Zernecke, 183 U.S. 582, 587-88 (1902) (holding that states may impose strict liability on railroads for injuries to passengers); Bernstein, *supra* note 14, at 22-25.

During this period, the Court handled Fifth Amendment challenges to federal legislation on the same terms.<sup>225</sup> *St. Louis, Iron Mountain & Southern Railway Co. v. Taylor*<sup>226</sup> involved a question of statutory interpretation with constitutional implications. The 1893 Safety Appliance Act empowered the Interstate Commerce Commission to set standards for equipment used on trains operating in interstate commerce. Taylor, a railroad employee, was killed on the job. His estate sued under the Act, which saved its administrator the trouble of proving negligence by permitting recovery on a showing that the equipment at issue was not up to code. The Court upheld judgment for the estate, rejecting the defendant's argument that Congress did not intend to impose strict liability. The plaintiff's reading of the Act was, in the Court's view, "intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended . . . ."<sup>227</sup>

One final decision worthy of note is *Guy v. Donald*.<sup>228</sup> Guy, a member of the Virginia Pilots Association, carelessly piloted his steamer into a schooner. The steamer's owner sued the members of the Association seeking indemnification for his liability to the schooner's owner. The Court concluded that maritime law ought not be construed to permit the action. While American law had long recognized vicarious liability,<sup>229</sup> here the Association had none of the control over its members' conduct that would evidence a principal-agent relationship.<sup>230</sup> Because members could not select, control, or discharge a pilot, they could not be made to answer for his tort. To hold otherwise would be to "press[] [the law] to the verge of general principles of liability. It must not be

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225. In doing so, the Court incorporated the Fourteenth Amendment's right of due process through the Fifth. See *infra* text accompanying notes 450-454 (arguing that the right to redress, although not understood by the Framers to be guaranteed by the Fifth Amendment, should now be so understood).

226. 210 U.S. 281 (1908).

227. *Id.* at 296.

228. 203 U.S. 399 (1906).

229. *Id.* at 406.

230. As Holmes explained with typical flair:

If we imagine . . . a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change [course] and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best.

*Id.* at 407.



pressed beyond the point for which we can find a rational support.”<sup>231</sup> Although *Guy* construed federal law to avoid constitutional difficulty, it presented an occasion to identify the sort of law that would violate the due process ceiling—namely, a law holding *D* liable to *P* for wronging *P* even though *A*, an autonomous actor over whom *D* exercised no control, was the actor whose wrong harmed *P*. As such, *Guy* stands as an early progenitor of modern decisions like *State Farm Mutual Insurance Co. v. Campbell*.<sup>232</sup> The notion in both seems to be that a law that purports to hold *D* liable to *P* for having wronged *P*, yet cannot plausibly link the redress that *P* stands to receive to a wrong committed by *D* against *P* (or by another actor for whose actions *D* can be deemed responsible), exceeds the ceiling set by the Due Process Clause and thus violates *D*’s federal constitutional rights.

## 2. Workers’ Compensation: *Ives and White*

A final and important source of due process challenges to tort reform in this period stemmed from as the rapid enactment of workers’ compensation laws from 1910 to 1920.<sup>233</sup> Typically, these laws imposed strict liability on certain employers for workplace injuries, but also limited workers’ recoveries to scheduled damages. The decisions addressing these laws deserve attention for several reasons. First, they required the Supreme Court to apply both the floor and ceiling components of its due process framework. Second, they provided the first important instances in which courts were required to consider how the emergence of administrative alternatives to tort law would affect the right to a law for the redress of wrongs. Third, in one very notable instance—*Ives v. South Buffalo Railway Co.*<sup>234</sup>—a state court held that the Fourteenth Amendment blocked the adoption of such administrative alternatives, thereby helping to launch the progressive indictment of due process analysis as the handmaiden of laissez-faire economics. This was an unfortunate and unnecessary development given that other courts, including the Supreme

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231. *Id.* Similarly, state courts in this time struck down statutes that imposed on railroads funeral costs faced by the survivors of passengers who died in transit, even if the railroad’s actions had nothing to do with the death. Witt, *supra* note 216.

232. 538 U.S. 408, 422-23 (2003) (finding that due process bars the imposition of punitive damages on an actor for conduct and injuries unrelated to the actor’s tortious acts); *see infra* text accompanying notes 363-367.

233. *See* JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 126-27 (2004).

234. 94 N.E. 431 (N.Y. 1911); *see also* Bernstein, *supra* note 14, at 25 n.129.

Court, applied traditional due process analysis with a good deal more flexibility than the *Ives* court.

In *Ives*, the New York Court of Appeals held that the state's 1910 workers' compensation law violated state and federal guarantees of due process by imposing on employers strict liability for economic losses incurred by employees injured on the job. The majority conceded that a legislature could impose safety obligations on an employer unknown to the common law (e.g., ordering the installation of fire escapes or ventilation equipment),<sup>235</sup> and that it could expand the terms on which workers who were wrongfully harmed could obtain redress from wrongdoers.<sup>236</sup> But New York's legislation did not specify new duties of safe conduct for employers, and employers were being made to pay for injuries without regard to fault. Thus, according to the court, the law achieved nothing more than taking from *A* and giving to *B*, thereby violating the employer's due process rights.<sup>237</sup>

*Ives's* analysis is filled with errors and gaps. For example, the court failed to consider that the imposition of strict liability might actually be a means of imposing liability for wrongs (e.g., by tipping close cases under a fault standard in favor of plaintiffs). Nor did it recognize the inaptness of the "taking from *A* and giving to *B*" formula. Even the faultless employer has something to do with an injury that befalls its worker while on the job. (At a minimum, it plays a causal role in bringing about the injury and stands to benefit materially from the operation in which the employee was involved.) But the most interesting thing about the *Ives* court's analysis is that there is little reason to believe that its mistakes were traceable to the court's acceptance of due process ceilings and floors on states' ability to modify tort law.

We know this for two reasons. First, the court misconstrued Supreme Court precedents, which had not suggested that the imposition of strict liability was of itself offensive to due process. In fact, *Mathews* and *Taylor* explicitly said otherwise.<sup>238</sup> Second, the Supreme Court undercut *Ives's* reasoning from within the same framework of analysis.<sup>239</sup> Thus, in *New York Central Railroad Co. v. White*,<sup>240</sup> the Court unanimously rejected a federal due process challenge to a second New York workers' compensation law. The

235. *Ives*, 94 N.E. at 442.

236. *Id.* at 444.

237. *Id.* at 440.

238. See *supra* text accompanying notes 223-227. *Ives* distinguished *Mathews* on the ground that railroads, as chartered corporations and common carriers, were a special kind of business entity. *Ives*, 94 N.E. at 447.

239. On *Ives* and its influence, see WITT, *supra* note 233, at 152-86.

240. 243 U.S. 188 (1917).

Court granted that employers and employees had raised legitimate concerns about the statute: employers because of the imposition of strict liability and the elimination of certain defendant-friendly common law doctrines; employees because of the lost ability to seek tort compensation for injuries traceable to employer fault.<sup>241</sup> Still, it upheld the law, observing that the state's substitution of a scheme of broader no-fault liability and scheduled damages for uncertain tort liability was a "just settlement of a difficult problem."<sup>242</sup> In doing so, it again invoked the *Munn-Humes* model of analysis:

Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. . . . [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.<sup>243</sup>

The Court wedded traditional due process analysis and a politically progressive result in other workers' compensation cases. In the *Arizona Employers' Liability Cases*<sup>244</sup> the Court upheld a scheme that did not give employers the benefit of scheduled damages, but instead held them strictly liable for full tort damages. In *Mountain Timber Co. v. Washington*,<sup>245</sup> it rejected the argument that a compensation scheme violated employers' due process rights by requiring contributions even from employers whose employees suffered no injuries, noting that liability was distributed in proportion to the number of employees at, and the relative risks of, each business.<sup>246</sup>

Finally, in an important decision on the floor side of due process analysis, the Court in *Middleton v. Texas Power & Light Co.*<sup>247</sup> rejected the contention that workers' compensation schemes violated workers' rights by denying them the possibility of full tort compensation. *Humes*, *Poindexter*, and *White* had

241. *Id.* at 196.

242. *Id.* at 202.

243. *Id.* at 201; *see also id.* at 205 ("[A State may] impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee . . . in lieu of the common-law liability confined to cases of negligence. This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the others would be supportable.").

244. 250 U.S. 400 (1919).

245. 243 U.S. 219 (1917).

246. *Id.* at 229-32, 244.

247. 249 U.S. 152, 163 (1919).

indicated that the Due Process Clause would likely bar states from abolishing entirely rights of action on behalf of employees suffering physical harm because of wrongs attributable to employers. However, the *Middleton* Court concluded that the scheduled compensation that workers would receive would not differ so dramatically from tort compensation as to render redress for injuries that were caused by employer wrongs merely theoretical.

C. 1920-1976: *Recognition and Retreat*

1. *Truax v. Corrigan and the Arrival of Rational Basis Review*

Unfortunately, the moderate and relatively progressive cast of *White's* and *Middleton's* due process analysis would soon give way to hard-look enforcement of the due process floor in *Truax v. Corrigan*.<sup>248</sup> When Corrigan and other unionized workers picketed Truax's restaurant, Truax sued to enjoin them, claiming that they were using abusive and threatening language to chase off customers and circulating libelous handbills. Corrigan and his co-defendants obtained dismissal by virtue of a state statute that barred the issuance of injunctions against "peaceful" picketing. As interpreted by the state supreme court, the law not only barred injunctions, but rendered such conduct entirely immune from suit.<sup>249</sup> Chief Justice Taft, writing for a bare majority, struck the statute on two grounds. He first assumed that it should be read to immunize wrongful-but-peaceful picketing from any legal sanction. So understood, it violated Truax's due process rights. The Due Process Clause, Taft observed, had always been understood to "make[] a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold."<sup>250</sup> He argued: "To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."<sup>251</sup> Taft next considered the statute as barring only injunctive relief. On

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<sup>248</sup> 257 U.S. 312 (1921). Currie once noted that *Truax* seems to imply that the Federal Constitution might require governments to afford protection of life and liberty through law. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 877 (1986).

<sup>249</sup> *Truax*, 257 U.S. at 328-29.

<sup>250</sup> *Id.* at 332.

<sup>251</sup> *Id.* at 330.

this reading, he concluded, it violated the Equal Protection Clause by denying injunctive relief only to employers seeking to enjoin picketing by employees.<sup>252</sup>

Four Justices dissented, including Holmes and Brandeis. Holmes argued that the majority had erred in treating Truax's interest in future profits as "property" protected by the Due Process Clause.<sup>253</sup> He also thought that the legislature was entitled to address the specific problem of labor relations by denying only employers access to injunctive relief in certain labor disputes.<sup>254</sup> According to Brandeis, the question facing the Court was whether it was better social policy to let businesses operate free of nonviolent union interference or to let unions peacefully interfere. To his mind a state was entitled "to select for its citizens [the position] . . . which its legislature and highest court consider will best meet its conditions and secure the public welfare."<sup>255</sup>

*Truax* is explicable only in light of the majority's concern over the rise of organized labor and perceived threats of socialism and communism.<sup>256</sup> The Court clearly overreached in its equal protection holding. Whatever one's view on the merits of anti-strike injunctions, it is a stretch to suppose that a state would violate employers' constitutional rights merely by withholding equitable relief (which by definition is discretionary), yet leaving them to pursue compensatory and possibly punitive damages. Moreover, as Holmes noted, the owner's underlying tort claim (for "civil conspiracy") fell well outside the core of traditional tort law in that it sought remedy for interference not with bodily integrity, tangible property, or even contractual rights, but with an economic expectancy. In any event, Brandeis's dissent would mark the Court's future course. *Truax*'s overreaching, combined with other notorious decisions, such as *Lochner* and *Ives*, and with brewing changes in prevailing economic, political, and jurisprudential environment, meant that the idea of a right to a law for the redress of wrongs was about to fall victim to the progressive assault on due process and the judiciary.

The first Court decision heralding the arrival of rational basis analysis was the 1927 case of *Louis Pizitz Dry Goods Co. v. Yeldell*.<sup>257</sup> The estate administrator of a person who was killed by the negligence of the defendant's employee sued

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252. *Id.* at 334-39.

253. *Id.* at 342 (Holmes, J., dissenting).

254. *Id.* at 343.

255. *Id.* at 372 (Brandeis, J., dissenting).

256. Frankfurter supposed that Taft had, by means of formalist methodology, deluded himself into thinking that his decision reflected the plain meaning of due process, as opposed to the pro-business biases of his generation. See FELIX FRANKFURTER, *The Same Mr. Taft*, in *LAW AND POLITICS* 41, 44-47 (1939).

257. 274 U.S. 112 (1927).

and obtained an award of \$9500. The defendant argued that Alabama's wrongful death statute was unconstitutional because it permitted the jury to impose punitive damages on a finding of simple negligence. *Humes* had already noted that juries had been permitted at common law to impose damages at levels above "full" compensation,<sup>258</sup> yet Justice Stone chose a different point of emphasis in rejecting the defendant's challenge. He concluded that the law was justified because it bore a rational relationship to the goal of "making homicide expensive" so as to encourage precautions by those who "are able . . . to guard against the evil to be prevented."<sup>259</sup>

The second and more important decision, rendered in 1929, was *Silver v. Silver*,<sup>260</sup> in which the Court dispatched with a floor challenge. Mae Silver brought suit against her husband Benjamin for carelessly crashing his car and injuring her as she rode in the front passenger seat.<sup>261</sup> Under the terms of Connecticut's guest statute, she could only recover on a showing of at least reckless driving. Finding no evidence of recklessness, the trial court directed a verdict for Benjamin.<sup>262</sup> The Connecticut Supreme Court affirmed, rejecting Mae's equal protection argument that the application of the heightened liability standard unfairly burdened automobile passengers in contrast to others who stood to prevail upon proof of negligence.<sup>263</sup>

Even under traditional modes of analysis, *Silver* seemed an easy case. Guest statutes aim to ward off collusive litigation: Because a guest passenger tends to enjoy an amicable relationship with the driver, in the event of an accident, they sometimes arrange to have the passenger sue the driver to enable the passenger to collect from the driver's liability insurer, even if there is no fault or injury. Given this rationale, and that the Connecticut statute adopted an incremental approach to the problem that meshed well with existing common law doctrine,<sup>264</sup> the statute seemed to operate well above the due process floor. Perhaps because it was a slam-dunk case, Justice Stone seized on *Silver* as another occasion for reshaping due process analysis, even though no such claim was before the Court:

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258. See *supra* text accompanying note 218.

259. *Yeldell*, 274 U.S. at 116.

260. 280 U.S. 117 (1929).

261. *Silver v. Silver*, 143 A. 240, 241 (Conn. 1928), *aff'd* 280 U.S. 117 (1929). Mr. Silver testified as a witness on behalf of his wife. *Id.*

262. *Id.*

263. *Id.* at 242-43.

264. Social guests injured on a host's property usually had to establish something more than negligence to recover for their injuries. The Connecticut statute essentially applied that rule to cars. *Silver*, 280 U.S. at 122-24.

[O]ur review will be limited to the [equal protection claim] . . . considered in the opinion of the court below. We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.<sup>265</sup>

With this aside, Stone fused due process and equal protection analysis within the rational basis framework. In place of the *Munn-Humes* approach, he substituted Brandeis's notion that laws of this sort must be upheld unless a court could say with confidence that "there are no evils to be corrected or permissible social objects to be gained by the present statute."<sup>266</sup> He also killed off *Truax's* equal protection holding, stating that legislatures were free to go about piecemeal tort reform, "strick[ing] at the evil where it is felt and reach[ing] the class of cases where it most frequently occurs."<sup>267</sup>

*Silver* was one of many precedents that Stone subsequently relied upon in *United States v. Carolene Products Co.* to support the use of rational basis review for constitutional challenges to social and economic legislation.<sup>268</sup> More generally, this use of rational basis review corresponded to the effort, on display in *West Coast Hotel Co. v. Parrish*,<sup>269</sup> to eviscerate substantive due process. Indeed, *West Coast Hotel* arguably turned the concept on its head by claiming that due process stood for the power of government to limit rights in the name of the public good: "Liberty under the Constitution," the opinion explained, "is . . . necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."<sup>270</sup>

Decisions such as *Silver*, *Carolene Products*, and *West Coast Hotel* signaled the arrival of a roughly fifty-year period in which the Supreme Court abandoned this particular corner of constitutional law. For most of it, the Court simply declined to entertain due process objections to tort statutes.<sup>271</sup> In 1976, however, it returned to the ceiling issue in *Usery v. Turner Elkhorn*

<sup>265</sup> *Id.* at 122 (citation omitted).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 124.

<sup>268</sup> See 304 U.S. 144, 152-53 (1938) (citing *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1935), "and cases cited [therein]," which include *Silver*).

<sup>269</sup> 300 U.S. 379 (1937).

<sup>270</sup> *Id.* at 391.

<sup>271</sup> By 1928 the Court had substantial control over its docket. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1705-08 (2000).

*Mining Co.*,<sup>272</sup> which involved a challenge by mining companies to Congress's imposition of retroactive liability for disability and death benefits of miners who had left their employment prior to the passage of the statute. True to the New Deal paradigm, the Court treated the law as falling within the category of statutes that aim merely to "adjust[] the burdens and benefits of economic life."<sup>273</sup> It then upheld the scheme as "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers."<sup>274</sup>

While in this period some state courts invalidated automobile guest statutes, statutes codifying charitable immunity, and "anti-heartbalm" statutes eliminating actions such as breach of promise to marry, alienation of affections, and seduction,<sup>275</sup> more commonly these challenges failed.<sup>276</sup> The 1950 decision of the California Supreme Court in *Werner v. Southern California Associated Newspapers* is emblematic.<sup>277</sup> Werner claimed that he had been defamed by a report in defendant's newspaper. Because he neither requested a correction nor offered proof of "special damages,"<sup>278</sup> his suit was dismissed under a retraction statute that specified that a defamation plaintiff suing over a newspaper report or radio broadcast could recover only special damages unless he demanded and did not receive a published or broadcasted retraction. Justice Traynor's majority opinion upheld the law as a rational means of combating unfounded litigation and excessive damage awards flowing from the common law rule of

272. 428 U.S. 1 (1976).

273. *Id.* at 15.

274. *Id.* at 18.

275. See, e.g., *Emberson v. Buffington*, 306 S.W.2d 326, 331 (Ark. 1957) (invalidating guest statute); *Heck v. Schupp*, 68 N.E.2d 464, 466 (Ill. 1946) (invalidating anti-heartbalm statute), *superseded by statute as recognized in Martin v. Kiendl Constr. Co.*, 438 N.E.2d 1187, 1190 (Ill. App. 1982); *Neely v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 391 P.2d 155, 160 (Kan. 1964) (invalidating charitable immunity).

276. See, e.g., *Sanner v. Trs. of the Sheppard & Enoch Pratt Hosp.*, 278 F. Supp. 138, 143 (D. Md. 1968) (upholding charitable immunity granted by Maryland law); *Langdon v. Sayre*, 168 P.2d 57, 59-60 (Cal. Ct. App. 1946) (upholding heartbalm abrogation); *Gallegher v. Davis*, 183 A. 620, 626 (Del. Super. Ct. 1936) (upholding guest statute); *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948) (upholding heartbalm abrogation); *McMillan v. Nelson*, 5 So. 2d 867, 870 (Fla. 1942) (upholding guest statute); *Pennington v. Stewart*, 10 N.E.2d 619, 622 (Ind. 1937) (upholding heartbalm abrogation); *Naudzius v. Lahr*, 234 N.W. 581, 583-84 (Mich. 1931) (upholding guest statute); *Hanfgarn v. Mark*, 8 N.E.2d 47, 48 (N.Y. 1937) (upholding heartbalm abrogation).

277. 216 P.2d 825, 828 (Cal. 1950).

278. To prove special damages, a plaintiff faces the onerous task of tracing specific economic losses to the defendant's publication of remarks defaming him.



presumed damages.<sup>279</sup> Quoting Holmes and Brandeis, he also held that it was enough that the legislature could have concluded that the measure was a rational means of promoting news dissemination.<sup>280</sup>

Justice Carter dissented in *Werner*. Where, he wondered, was the evidence of the flood of litigation necessitating the statute?<sup>281</sup> He also did not see why the state's interest in promoting the dissemination of news extended to intentional and malicious defamation.<sup>282</sup> In his view, the statute's exclusive applicability to newspaper stories and radio broadcasts was the product of special interest lobbying that produced a "wholly unreasonable and arbitrary" exemption from defamation law.<sup>283</sup> In concluding that the statute should be struck down, he offered the following analogy: "If the Legislature should abolish causes of action of replevin and conversion . . . leaving me thus remediless for the loss of my car, I would consider that I was being deprived of my property without due process of law . . ." <sup>284</sup> No other Justice, however, joined his dissent (although one dissented in part on other grounds).

## 2. *Rights-Skepticism, Court-Skepticism, and Wrongs-Skepticism*

Decisions like *Silver* and *Werner* were part of a broader popular, lawyerly, and scholarly reaction to business-friendly decisions like *Ives* and *Truax*. Some saw the latter as proof of the inanity and inherent regressivity of the idea of individual rights against government. Others were less moved by rights-skepticism than by the sense that, at least with respect to rights such as the right to a law of redress or the right against naked redistribution, courts were in a relatively poor position to second-guess legislatures and thus should require no more of them than a good faith effort to accomplish some plausible policy objective.<sup>285</sup> This, at any rate, seemed to be the message of *Carolene Products* and its two-tiered conception of searching review for special cases in which rights could be usefully protected by courts and pro forma review for other laws.

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279. *Werner*, 216 P.2d at 829-30.

280. *Id.* at 830-31.

281. *Id.* at 836-37 (Carter, J., dissenting).

282. *Id.* at 838.

283. *Id.* at 835.

284. *Id.* at 839.

285. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1778-89 (1998) (reviewing attacks raised by Boudin, Cohen, Corwin, Croly, Frankfurter, Hand, Powell, and Thayer, and explaining the linkage perceived by progressives between rights and political regressiveness).

But the familiar story of the emergence of rights-skepticism and court-skepticism in the New Deal period provides only half of the explanation for the emergence of the rational basis paradigm in this area. The other half consists of a contemporaneous attack on the idea that tort law ought to be understood as law for the redress of private wrongs. That idea, progressive and realist scholars argued, had to give way to an understanding of tort law as public, regulatory law. The emergence of this competing conception of tort completed the case for rational basis review: Once tort was depicted as just another form of regulation, it could only qualify for minimal judicial protection in the post-New Deal era. Justice Traynor's opinion in *Werner* vividly displays that rights-skepticism and a certain brand of wrongs-skepticism formed two sides of the same coin. Traynor learned his constitutional law from Thomas Reed Powell, the great rights skeptic.<sup>286</sup> Along with Fleming James, William Prosser, and Leon Green, he was also among the most important of the private-wrong skeptics.<sup>287</sup>

While hardly of one mind, Traynor, James, Prosser, and Green each supposed that twentieth-century tort law had grander aspirations than attending to the humdrum and faintly barbaric matter of settling accounts. Although nominally private disputes, tort cases were, in their view, occasions for public lawmaking<sup>288</sup>: an exercise by judges and juries of regulatory authority delegated to them by legislatures through the creation of the court system.<sup>289</sup> Thus, in 1941 Prosser unabashedly described tort law as "social engineering"—i.e., the adoption of liability schemes that would produce a desired policy outcome.<sup>290</sup>

Members of the tort-law-as-public-law movement differed as to what end judges and juries were regulating. For present purposes, they can be categorized into three broad groups. James and Traynor saw tort suits as a means of achieving localized disaster relief. When consumers sued manufacturers, or drivers sued other insured drivers, tort functioned to spread losses, thereby enabling victims to avoid ruin.<sup>291</sup> The fact that tort law tended

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286. James R. McCall, *Roger Traynor: Teacher, Jurist, and Friend*, 35 HASTINGS L.J. 741, 743 (1984).

287. See William L. Prosser, Book Review, 27 CORNELL L.Q. 292, 294-95 (1942) (singling out Powell for praise).

288. Leon Green, *Tort Law Public Law in Disguise* (pt. 2), 38 TEX. L. REV. 257 (1960).

289. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521-28 (2004).

290. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 3, at 15, 17 (1941).

291. See John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2045-50 (1997); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL

to require victims to prove that someone else was at fault for their injuries to obtain compensation was a mere vestige of the older conception of tort law as a law of redress. In any event, they argued, the supposed dominance of negligence in accident law was more apparent than real. *Respondeat superior* held “faultless” firm owners liable for injuries caused by the actions of employees. In addition, negligence law’s centerpiece—the objective reasonable person standard—often operated as a strict liability standard, especially when supplemented by doctrines such as *res ipsa loquitur* and implemented by lay juries. Moreover, thanks to Traynor, negligence was being replaced in important areas such as products liability by a rule of strict liability.<sup>292</sup> For all these reasons, they believed that the common law of tort was a way-station to legislative schemes that would provide consistent no-fault compensation with lower transaction costs.

Although as a restatement reporter he was among the fathers of strict products liability,<sup>293</sup> Prosser was less programmatic than Traynor and James and more tolerant of the idea of fault-based liability. Still, he rejected any linkage of tort to the Locke-Blackstone notion of private wrongs and redress.<sup>294</sup> Tort was instead, he argued, a means of balancing several intermediate goals, including the shifting of losses from innocent victims to antisocial actors, and the deterrence of antisocial conduct.<sup>295</sup> In striking this balance, judges and juries would, in turn, achieve the utilitarian objective of “the greatest happiness for the greatest number.”<sup>296</sup>

A third strand of public law thinking about tort law, one which emerged a generation after that of the initial wrong-skeptics, is the efficient deterrence conception now associated with Judges Calabresi and Posner. On this model, like Prosser’s, tort law sets standards by which the law specifies when conduct generates social costs exceeding social benefits. The social value of tort suits (to

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STUD. 461 (1985). For Traynor’s views, see Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366, 369, 375-76 (1965). Traynor allowed that the tort system might play a residual role as a vehicle by which victims who had received the guaranteed quantum of need-based compensation could pursue claims of justice against tortfeasors who had wrongfully injured them (subject to offsets for compensation already received).

292. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963); *Escola v. Coca-Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

293. See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (articulating a cause of action for products liability that does not require proof of unreasonable conduct).

294. PROSSER, *supra* note 290, § 1, at 9-10 (arguing that modern tort law sanctions conduct for being “socially unreasonable,” i.e., for generating more social costs than benefits).

295. *Id.* at 4.

296. *Id.* § 3, at 17.

the extent they have any) resides not in loss-spreading or loss-shifting, but solely in the fact that successful plaintiffs operate as private attorneys general who penalize and deter antisocial conduct on society's behalf.<sup>297</sup>

Whether couched in terms of James-Traynor loss-spreading, Prosserian utilitarian balancing, or Calabresi-Posner efficient deterrence, tort law has, since the late 1930s, been widely understood by academics to be just another way in which government regulates conduct for the public good. The rise of these views has threatened to render unintelligible the idea of a right to a law for the redress of private wrongs. After all, if the part of the common law that was most obviously a candidate for judicial protection as a law of redress cannot even be characterized as such, then it is difficult to suppose that the Due Process Clause confers a judicially enforceable right to such law.

### III. THE CONSTITUTIONAL STATUS OF TORT LAW AS A LAW FOR THE REDRESS OF PRIVATE WRONGS

The right to a law for the redress of wrongs is ripe for resuscitation. In Section A, I review recent developments in constitutional law and theory suggesting that its reanimation is already underway. I also fend off certain doctrinal objections to the recognition of such a right. In Section B, I offer an interpretive and normative argument for why, even today, tort is best understood and justified as a law of redress, and why, as such, it has a unique and important role to play in our legal system. In Section C, I provide guidelines for judicial analysis that are more appropriate than the rational basis test for gauging whether legislatures have run afoul of the right by enacting plaintiff-unfriendly tort reform. Finally, in Section D, I briefly canvas some implications of my analysis, including the continued propriety of enforcing due process as a ceiling on liability, the applicability of due process limits to federal tort legislation, and the extent to which judicial recognition of the right to a law of redress promises to prevent state and federal governments from moving to a "post-tort" legal system.

#### A. *Due Process Revisited*

##### 1. *Skepticism's Skeptics*

Insofar as mid-twentieth-century progressives sought a reflective equilibrium between doctrinal principle and progressive results, they had every

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<sup>297</sup>. See Goldberg, *supra* note 289, at 544-48, 555-56.

reason to embrace rational basis analysis. The period from 1925 to 1976 saw a steady expansion of tort liability at the hands of judges and legislatures.<sup>298</sup> Strict products liability emerged. In negligence law, courts and legislatures rejected or loosened traditional “limited duty” rules, adopted broader conceptions of proximate cause, shifted to national standards in medical malpractice, began the move from contributory negligence to comparative fault, expanded the reach of respondeat superior, abolished charitable immunity, and partially waived sovereign immunity.<sup>299</sup> Even plaintiff-unfriendly tort reform often partook of progressive values, as *Werner* demonstrates.<sup>300</sup>

By the mid-1970s, however, the scene was shifting at the level of theory and doctrine. The centrality of rights to constitutional law and the potentially progressive role of courts could not be so easily ignored once issues of race, criminal procedure, and sexual liberation were front-and-center, as decisions like *Brown*,<sup>301</sup> *Miranda*,<sup>302</sup> and *Griswold*<sup>303</sup> attest. In political theory and law, rights discourse was reinvigorated in the academy,<sup>304</sup> and it again became respectable to talk about judicial enforcement of constitutional rights to liberty, privacy, and equal treatment.<sup>305</sup> Soon it would be possible for even moderate Justices to embrace substantive due process openly.<sup>306</sup>

Not coincidentally, the idea of tort as a law of private wrongs began to reemerge at this time. At the doctrinal level, the need for a law of remedies to respond to abuses of official power prompted a wave of litigation under 42 U.S.C. § 1983, as well as the recognition of *Bivens* actions.<sup>307</sup> For similar

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298. See Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 964-70 (1981).

299. *Id.*

300. Progressive approaches to tort law and constitutional law were not always perfectly aligned. For example, in *Brown v. Merlo*, 506 P.2d 212, 217 n.4 (Cal. 1973), the progressive California Supreme Court struck down a guest statute that it viewed as resting on archaic notions of status-based liability and intrafamily immunities. Here, the court’s commitment to modernizing the law of tort overrode its commitment to rational basis review.

301. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

302. *Miranda v. Arizona*, 384 U.S. 436 (1966).

303. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

304. As evidenced by, among other works, JOHN RAWLS, *A THEORY OF JUSTICE* (1971); and ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

305. Goldberg & Zipursky, *supra* note 285, at 1790-98.

306. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

307. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (recognizing an implied right of action against federal agents for violations of Fourth

reasons, this period saw the emergence of a robust law of redress for acts of race discrimination in employment.<sup>308</sup> Jurists influenced by anti-utilitarian theories of justice reanimated the idea of tort law as a law of wrongs.<sup>309</sup> By the turn of the twenty-first century, historically minded torts scholars would marvel at “the unexpected persistence of negligence” – the idea that tort law did not, as many had predicted, evolve into a scheme of enterprise liability.<sup>310</sup>

Of equal importance was the changing economic and political landscape, which disrupted the comfortable alignment between the rational basis approach and the content of tort reform. Starting with the malpractice insurance “crisis” of the mid-1970s, reforms emerged that curtailed tort liability at its core. By the mid-1980s, doctors, insurers, businesses, and the Republican Party embraced the cause of tort reform, and legislatures began in earnest to enact these measures. Progressives were now being forced to choose between allegiance to judicial deference and allegiance to tort.

## 2. *Doctrinal Sightings*

The intellectual climate out of which rational basis review emerged has come and gone. Whatever its problems, the discourse of rights and the idea of judicial enforcement of them is no longer widely regarded as inane or necessarily regressive. Likewise, there is not today a national economic crisis that might warrant the weakening or suspension of rights-based restrictions on redistribution and regulation. The administrative state is far too well established to face a serious risk of being dismantled. It is not surprising, then, that notions of individual constitutional rights, including due process rights that pertain to the availability of tort law, have resurfaced. As noted in the Introduction, most of the action to date on the specific issue of tort reform has been at the state-court level. By contrast, in the federal judiciary adjustments have occurred at the margins. Just as some of the substance of the Privileges or

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Amendment rights); see also *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (ruling that state officials acting outside the bounds of their offices can be deemed to have acted under color of law for purposes of § 1983).

308. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (defining a prima facie case under Title VII).

309. For important early articles interpreting tort law as instantiating notions of justice and rights, see Jules L. Coleman, *On the Moral Argument for the Fault System*, 71 J. PHIL. 473 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); and George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

310. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 244-90 (expanded ed. 2003); Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1046-53 (2003).

Immunities Clause emigrated to the Due Process Clause following the *Slaughter-House Cases*,<sup>311</sup> and just as substantive due process analysis reappeared under the aegis of a right to privacy,<sup>312</sup> so too the idea of a right to law of redress has found expression in alternative doctrinal outlets.

In the 1978 case of *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,<sup>313</sup> the Supreme Court rejected a due process challenge to the Price-Anderson Act's imposition of a \$560 million aggregate ceiling on damages caused by a nuclear incident. Quoting *Usery*, the Court deferred to Congress's decision regarding the liability cap because it was "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.'"<sup>314</sup> Faced with the objection that the Act violated due process for failing to provide those who stood to lose their common law rights with a quid pro quo, the Court expressed skepticism that due process "in fact requires . . . a reasonable substitute remedy."<sup>315</sup> Yet the Court did not leave matters there, instead bolstering its analysis with the observation that the Act's conferral on claimants of the right to recover without proof of negligence and without undertaking the expense of litigation—especially given the likelihood that claims arising out of this sort of event would end up being discharged in bankruptcy—amounted to the provision of a sufficient quid pro quo.<sup>316</sup>

In other lines of cases the Court has likewise recognized access to redress for wrongs as a constitutional norm or value, even if not an inviolable right. In *Bivens*, the issue was whether the Fourth Amendment generates a right of action by which a victim can obtain redress from federal officers who had violated the victim's right not to be subjected to an unreasonable search and seizure.<sup>317</sup> Justice Brennan's lead opinion speaks the language of a public law, deterrence-based conception of tort.<sup>318</sup> But it also invokes, as does Justice Harlan's concurrence, the notion of a right to redress for conduct that is not merely antisocial as a general matter, but a special way in which officials mistreat citizens by abusing their unique power to batter, trespass, and

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311. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 7-2 to -4, at 548-59 (2d ed. 1988).

312. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

313. 438 U.S. 59 (1978).

314. *Id.* at 83 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

315. *Id.* at 88.

316. *Id.* at 90-92.

317. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 388 (1971).

318. *Id.* at 394-95.

imprison.<sup>319</sup> Not surprisingly, post-*Bivens* decisions have focused on whether alternative schemes for dealing with official deprivations of a victim's constitutional rights permit the victim adequately to vindicate her rights.<sup>320</sup> In *Bush v. Lucas*, for example, a federal employee alleged an adverse employment action amounting to a First Amendment violation. The Court refused to recognize the claim, but only because it deemed adequate the existence of an administrative process that entitled successful claimants to reinstatement and back pay.<sup>321</sup> Reasoning very much within the late-nineteenth-century framework, the Court has essentially asked in these cases whether Congress has attended sufficiently to its obligation to provide a law of redress for victims of constitutional torts.<sup>322</sup>

A norm of redress also lurks in cases dealing with § 1983 claims alleging deprivations by government officials of life, liberty, and property without due process. As is discussed below, decisions such as *Board of Regents v. Roth*,<sup>323</sup> *Paul v. Davis*,<sup>324</sup> and *Davidson v. Cannon*<sup>325</sup> make clear that the Due Process Clause does not guarantee the availability of a federal cause of action for redress against injurious misconduct by state officials. Nonetheless, the Court has refrained from holding that states are therefore free to immunize their officials from all liability for private wrongs. Indeed, they have defined the scope of § 1983 in part on the assumption that, in standard cases, state law will provide relief. In *Ingraham v. Wright*,<sup>326</sup> for example, the Court upheld the dismissal of a procedural due process claim brought on behalf of students who had been subject to paddling at school. The availability of a state-law action for battery was critical to the Court's conclusion that no pre-punishment hearing was required. In declining to add this constitutional overlay to existing tort law, Justice Powell acknowledged that due process incorporated the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," and that, among

319. *Id.* at 395-97; *id.* at 407-08 (Harlan, J., concurring).

320. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 428-29 (1988); *Bush v. Lucas*, 462 U.S. 367, 388-90 (1983); *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *Carlson v. Green* 446 U.S. 14, 18-21 (1980).

321. *Bush*, 462 U.S. at 388-90.

322. This is not to say that tort reforms must always be accompanied by the introduction of an alternative remedial scheme. That will depend on various considerations, including the nature of the interest being vindicated by the tort action. *See infra* Section III.C.

323. 408 U.S. 564, 579 (1972).

324. 424 U.S. 693, 712 (1976).

325. 474 U.S. 344, 348 (1986).

326. 430 U.S. 651 (1977).



those liberties was “a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”<sup>327</sup>

Although it in some ways marks the apogee of New Deal constitutionalism, the Court’s preemption analysis has also tended to reflect a default norm of redress. Modern preemption doctrine has generally functioned as a massive grant of power to the federal government against both the states and individuals.<sup>328</sup> In particular, cases such as *Rice v. Santa Fe Elevator Corp.*<sup>329</sup> seem to suggest that Congress is free to supplant any manner of state regulatory or tort law so long as it acts within the scope of its enumerated powers.<sup>330</sup> Formally, at least, the only question for courts is whether there is enough evidence that Congress has so chosen.<sup>331</sup> Yet even in this doctrinal area, concerns about redress have surfaced. For example, *Ruckelshaus v. Monsanto Co.* made clear that the Fifth Amendment’s Takings Clause circumscribes Congress’s preemption power.<sup>332</sup> Further, the Court at least purports to apply a presumption against preemption.<sup>333</sup> This presumption, I would suggest, reflects not only a concern for federalism, but also for the right to a law for the redress of wrongs. This explains why one finds the Court at times alluding to the presence or absence of alternative remedies under the guise of attempting to divine congressional intent. For example, *Silkwood v. Kerr-McGee Corp.*<sup>334</sup> treated Congress’s “failure to provide any federal remedy for persons injured” by nuclear accidents as proof that it did not intend to preempt such actions.<sup>335</sup>

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327. *Id.* at 673 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Note, however, that Justice Powell misconstrues due process as providing protection only against governmental, not private, wrongdoing.

328. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 803-05 (1994) (discussing the rise of modern preemption analysis).

329. 331 U.S. 218, 229-30, 236 n.9 (1947).

330. Lower federal courts seem to have rejected due process challenges to preemption. See, e.g., *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 943 (6th Cir. 1995).

331. See *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996) (holding that a provision in the Medical Devices Act preempting conflicting state “requirements” extends to negligence claims); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (holding that reference in the Federal Railroad Safety Act to any state “law, rule, regulation, order, or standard relating to railroad safety” indicates that the provision applies to common law negligence liability); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (Stevens, J.) (holding that preemption of any contrary state “requirement” covers torts because tort law is a form of state regulation).

332. 467 U.S. 986, 1012 (1984).

333. *Rice*, 331 U.S. at 230 (“[W]e start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress.” (citations omitted)).

334. 464 U.S. 238 (1984).

335. *Id.* at 251.

“It is difficult to believe,” wrote Justice White, “that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”<sup>336</sup> In a similar fashion, the Justices have sometimes declined to extend statutory language that, under certain precedents, could be construed to preempt common law, as limited in application only to *ex ante* state regulation.<sup>337</sup>

The idea of a right to a law of redress has also continued to receive expression within takings analysis. In *Pruneyard Shopping Center v. Robins*,<sup>338</sup> for example, the Court entertained a mall owner’s argument that California had taken his property by preventing him from relying on the common law to exclude peaceful pamphleteers from its premises. The Court dismissed the due process challenge under rational basis analysis, then ruled that no taking had occurred because the mall owner had already opened its property to the public.<sup>339</sup> Concurring, Justice Marshall insisted that the Court’s prior decisions “demonstrate that there are limits on governmental authority to abolish ‘core’ common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.”<sup>340</sup> Such reasoning garnered majority support in *Nollan v. California Coastal Commission*.<sup>341</sup> There, the defendant conditioned the issuance of building permits to owners of beachfront properties on the owners’ granting of a right to beachgoers to traverse the properties. The Court deemed the imposition of this condition to be a taking of private property because it effectively denied the owners their basic right to exclude. In other words, the Commission had enacted unconstitutional “property reform” by disabling owners from vindicating—by self help or at law—their right of exclusion as against even intentional trespassers.

Most recently and strikingly, a majority of the Justices have self-consciously revived the nineteenth-century idea of a due process ceiling on states’ ability to impose liability on an actor under the guise of providing redress. In *BMW of North America, Inc. v. Gore*<sup>342</sup> and its progeny,<sup>343</sup> the Court has struck down

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336. *Id.*; see also *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987) (noting that the decision to give preemptive effect to the Clean Water Act does not leave plaintiffs without a remedy at common law).

337. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) (arguing that preemption of state “requirements” does not cover common law causes of action).

338. 447 U.S. 74 (1980).

339. *Id.* at 83 n.7 (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

340. *Id.* at 94 (Marshall, J., concurring).

341. 483 U.S. 825, 834-36 (1987).

342. 517 U.S. 559 (1996).

punitive damages awards deemed excessive relative to the defendant's wrongdoing. The Court's chief complaint seems to be that the state courts, by authorizing huge awards based in part on evidence of unrelated bad acts occurring in other states, are attempting to regulate or redistribute under the guise of providing redress.<sup>344</sup> A state might be within its authority to impose a \$2 million fine on an automobile manufacturer for not disclosing a cosmetic defect to its customer, or a \$145 million fine on an insurance company for bad faith in handling claims, but doing so requires legislation or the promulgation of regulations. What the states cannot do is achieve these forms of aggressive regulation surreptitiously, by means of a scheme in which the purported justification for sanctioning the defendants is that it provides a plausible measure of the redress to which tort victims are entitled.<sup>345</sup>

*Gore's* revival of the due process ceiling on state tort law is noteworthy for two reasons. First, it raises an issue of consistency. Just as it would be disingenuous to revive only doctrines that confer powers and privileges on states without the responsibilities to which those powers were once inseparably linked, it would be ahistorical and one-sided to resurrect defendant-friendly ceilings without the plaintiff-friendly floors that go with them. Second, in articulating the constitutional ceiling on punitive damage awards, the court has refused to adopt a mechanical test or bright-line formula, instead setting "guideposts" that reference the nature of the defendant's wrong and the way in which states have regulated similar misconduct.<sup>346</sup> As I will argue, the floor set by due process likewise ought to be instantiated in a manner sensitive to the substance of the tort being reformed, and the nature of and justifications for the reform.

### 3. *Affirmative Rights, Rights to Law, and Structural Due Process*

My effort to reinvigorate the right to a law for the redress of wrongs might be thought to run afoul of certain modern constitutional doctrines. For example, a critic might argue that its recognition is incompatible with *Erie*.<sup>347</sup> However, the acknowledgement of this right would no more entail a general

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343. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003).

344. Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 *TEX. L. REV.* (forthcoming 2005).

345. See John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 *HARV. J.L. & PUB. POL'Y* 3, 7-10 (2004).

346. *Gore*, 517 U.S. at 574.

347. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

common law of tort than does the recognition, in cases like *Gore*, of constitutional rights that limit tort claims.<sup>348</sup>

A second line of decisions that might seem to pose an obstacle to the present analysis—exemplified by *Daniels v. Williams*<sup>349</sup> and *Davidson v. Cannon*<sup>350</sup>—addresses the scope of government officials' liability under § 1983. They hold that the rights conferred on individuals by the Due Process Clause do not include a right against being physically injured by mere carelessness on the part of state officials. In stating this rule, the Supreme Court has emphasized that it applies even if the unavailability of a § 1983 claim leaves the injured victim remediless because the relevant state's law has immunized the official against tort liability. Thus, the Court has concluded that “[w]here a government official’s act causing injury to life, liberty, or property is merely negligent, ‘no procedure for compensation is constitutionally required.’”<sup>351</sup>

The liability of government actors to private citizens for wrongs involving the abuse of governmental authority has always been treated as a special category of private wrong.<sup>352</sup> Thus, at a minimum, it would be unwarranted to generalize from these decisions to ones in which one citizen sues another. More fundamentally, the Court is not asserting in these cases a proposition about states' discretion to provide a law by which victims of officials' wrongs can be redressed.<sup>353</sup> Instead, it has taken that discretion for granted in establishing that the scope of the constitutional concept of deprivation does not depend on

348. *Gore*, 517 U.S. at 574-75 (holding that due process forbids the imposition of excessive punitive damages); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the First Amendment bars imposition of defamation liability on a publisher for statements about a public official absent proof of actual malice). Recognition of the right, if coupled with judicial decisions overstating its content, could threaten *Erie*. See John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1476-78 & n.28 (2003) (observing the potential of *Sullivan* and *Gore* to generate general common law).

349. 474 U.S. 327 (1986).

350. 474 U.S. 344 (1986); see also *Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that injury to reputation alone cannot support a constitutional tort action).

351. *Daniels*, 474 U.S. at 333 (quoting *Parratt v. Taylor*, 451 U.S. 527, 548 (1981) (Powell, J., concurring) (emphasis added in *Daniels*)). *Daniels* denied a § 1983 action to a prisoner claiming injury caused by a prison official's carelessness.

352. See *supra* notes 143-144 and accompanying text (discussing sovereign immunity, and its limits, in Blackstone's time). But see *supra* text accompanying notes 220-221 (discussing *Poindexter v. Greenhow*'s holding that states must provide trespass actions to citizens whose property is wrongfully seized by officials).

353. In *Daniels*, for example, there was no analysis of whether Virginia's sovereign immunity law was unconstitutional insofar as it immunized both the government and individual officers from liability for their wrongs.

the content of state law. Negligence on the part of an official toward a citizen, the Court has insisted, is not transformed from an ordinary wrong into a deprivation of a constitutional right simply because the relevant state's law does not provide a separate avenue of redress. At most, then, the Court has assumed for purposes of interpreting the scope of a federal statute that a state legislature could immunize officials from liability for their constitutional wrongs.

*DeShaney v. Winnebago County Department of Social Services*,<sup>354</sup> and the recent case of *Town of Castle Rock v. Gonzales*,<sup>355</sup> also demand mention in this context. In *DeShaney*, the plaintiff brought a § 1983 action against state social workers and their agency for failing to take adequate steps to protect her son from physical abuse by his father. A majority rejected the claim, reasoning that the defendants failed to affirmatively provide a benefit to the boy rather than depriving him of a constitutional right.<sup>356</sup> Likewise, faced with a claim by the mother of three children killed by her husband after he took custody of them in violation of a protective order, the Court in *Castle Rock* declined to recognize a procedural due process right to have police enforce protective orders in strict accordance with the enforcement terms that they specify.<sup>357</sup> Neither holding bears directly on my argument; I am not suggesting that individuals enjoy a substantive due process right to reasonable efforts by officials to protect them from private violence, nor a procedural due process right to efforts at protection in accordance with the terms of a court order. Nonetheless, *DeShaney* has been—and presumably *Castle Rock* now will be—treated as emblematic of a broader idea that the rights enjoyed under the Federal Constitution are negative, not affirmative. Recognition of this distinction might be taken to cast a cloud over my argument. After all, the right I argue for here demands, at least in the first instance, the creation and maintenance of a body of law, including the institutions necessary to administer it.

The slogan that the Constitution is exclusively a “charter of negative . . . liberties”<sup>358</sup> is just that—a slogan.<sup>359</sup> Constitutional rights sometimes do

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354. 489 U.S. 189 (1989).

355. 125 S. Ct. 2796 (2005).

356. 489 U.S. at 196–97.

357. *Castle Rock*, 127 S. Ct. at 2800–03, 2810.

358. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

359. See Heyman, *supra* note 20 (arguing that the Fourteenth Amendment was meant to encompass affirmative rights); see also Currie, *supra* note 248, at 886–87 (1986) (discussing doctrines running counter to the no-affirmative-rights slogan). Even if the various affirmative rights I discuss can be described as negative rights, their amenability to that description only confirms the pliability of the slogan. Readers who cannot stomach the

generate duties to act. If a guard is aware that a prisoner is choking to death, his failure to provide aid deprives the prisoner of life without due process.<sup>360</sup> The Sixth Amendment entitles a criminal defendant to the provision of legal services.<sup>361</sup> Governments must also pay for divorce petitions filed by persons unable to afford court fees.<sup>362</sup> Each of these duties is heavily conditioned. The first, for example, is only triggered when government takes on the role of jailer.<sup>363</sup> The point, however, is not to reason from these cases to a general right of assistance. Rather, it is to establish the falsity of the broad claim that the Constitution never requires government to act for the benefit of an individual.

Apart from *DeShaney*, the decisions most often taken to establish the no-affirmative-rights principle are those declining to recognize a fundamental right to the provision by government of housing,<sup>364</sup> education,<sup>365</sup> and welfare payments.<sup>366</sup> But to cite them for a general principle is to avoid asking whether there is something special about the rights claimed in those cases that distinguishes them from other kinds of affirmative rights. In fact, there are important differences between those asserted rights and rights to law; differences that the Court has implicitly recognized.

For example, the Court has held that individuals are entitled to some version of the law of private property by the Fifth and Fourteenth Amendments. Suppose, improbably, that a state government repealed its law of private property in order to establish communal ownership of land and chattel within its borders. In doing so, it would presumably act unconstitutionally by failing to provide a law enabling the private use and

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notion of rights to law could re-characterize my argument as advocating recognition of a secondary right to compensation for interferences with one's primary negative rights to person, liberty, and property. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 96-98 (1985). In my view, however, the attempt to treat the right to sue for wrongs as a species of property creates more confusion than clarity.

360. See *Estelle v. Gamble*, 429 U.S. 97, 104-5 (1976) (holding that deliberate indifference to an inmate's medical needs by prison officials violates the inmate's Eighth Amendment rights).
361. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); Currie, *supra* note 248, at 873 (noting this example); see also David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229 (2002) (noting that many criminal procedural rights are conditional on actions that the government likely will not forego).
362. *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971).
363. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198-200 (1989).
364. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).
365. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-36 (1973).
366. *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

transfer of property.<sup>367</sup> In the same vein, imagine that a state government, fed up with dysfunctional families, enacted a statute providing that no adult may prevent a competent minor over the age of eleven who resides with that adult from choosing to live with another adult. Now suppose that C, the thirteen-year-old child of X and Y, has moved in with other adults who have offered C a larger inheritance. X and Y sue to regain custody, arguing that the statute is unconstitutional. As applied to X and Y, the law does not trench on their negative liberty. Yet in failing to provide them with powers necessary to the maintenance of a recognizably familial relationship, the law arguably deprives them of a right to be parents within conventional meanings of that concept. The statute's defect seems to be that it denies persons law that is due to them—law without which they will lack the ability, in principle, to maintain families.<sup>368</sup> In sum, by lumping together rights to benefits with rights to law, the negative-affirmative distinction reveals its crudity. The standard distinction between procedural and substantive due process likewise fails to make space for the idea of a right to law.

The problem is not with the idea of such rights, but with our reliance on simple dichotomies. I suggest instead that we should posit a third branch of due process that, to borrow Tribe's phrase, should be designated as "structural due process."<sup>369</sup> Following Blackstone,<sup>370</sup> I would place in this category a set of related guarantees pertaining to the basic structure of government. These consist, primarily, of rights to a system of separated powers, recognizably representative political institutions, and bodies of law that fit certain

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367. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998) (states cannot redefine "property" so as to permit confiscation without compensation); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (states cannot sidestep takings analysis by declaring that the use being regulated adversely affects the public interest); *Hodel v. Irving*, 481 U.S. 704, 717 (1987) (Congress lacks the power to abrogate the right to transfer property to one's heirs); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (Congress may not by *ipse dixit* transform private property into public property). If the Constitution does grant a right to a law of private property, that grant owes its existence, in part, to the Takings Clause. The absence of a "right to redress" clause may suggest a reason to doubt the existence of a comparable right to a law of redress. But the issue of whether one can find rights in the Constitution other than those identified with a high degree of specificity in the text is distinct from the present issue of whether it contains any affirmative rights. As I have argued, the right to a law of redress has firm roots in the text of the Fourteenth Amendment. See *supra* text accompanying notes 198-214.

368. This conclusion seems a fair inference from decisions articulating the right of parents. See *Troxel v. Granville*, 530 U.S. 57, 65-67 (2000) (reviewing decisions).

369. See Tribe, *supra* note 18.

370. See *supra* text accompanying notes 168-173.

descriptions, including laws of ownership, familial relations, and enforceable agreements, as well as law for the redress of wrongs.

As I conceive of them, structural due process rights are distinct from other due process rights in at least three respects. First, they involve entitlements to services uniquely associated with government. Whatever their merits, assertions of rights to education, housing, or a minimum income do not demand things as to which government has historically claimed a monopoly. By contrast, government has tended to insist that it has the final say on setting standards of conduct and resolving disputes (although it is often willing to delegate that authority). Indeed, it is in part because of government's monopoly over the mechanisms for redressing wrongs that there is a good case to be made for recognition of a right to a law of redress.

Relatedly, structural due process rights demand of government something different from familiar negative rights or other affirmative rights. For example, the right against being forcibly deprived by government officials of one's liberty makes a relatively specific demand on such officials: They must take steps to ensure that any confinement is reasonable. Similarly, the right to housing, were it recognized, might obligate governments to tailor their budgets or tax policies to fulfill the responsibilities inherent in its recognition. As we will see, the identification of a duty on the part of legislatures to provide a law for the redress of wrongs can and should leave them with substantial discretion in shaping the contours of that law.

Finally, as holders of structural due process rights, individuals do not necessarily enjoy the kinds of claims often associated with being a right-holder. Standard individual rights, such as the right not to be incarcerated without justification, tend to generate a claim in the right-holder to obtain redress against those who violate it. Other affirmative rights, such as the right to housing, might likewise empower citizens to obtain positive injunctive relief for violations of it, whereby a court, at the behest of a single citizen, would make what have tended to be discretionary taxation and spending decisions. In either case, the fact that the recognition of the underlying right tends to confer on individuals remedial claims that may interfere with executive branch operations or legislative policymaking constitutes a reason for caution in establishing the right. By contrast, recognition of a right to a law of redress need not and should not generate a claim in right-holders for damages against the government or its officials. It also need not entail a claim for injunctive relief that calls for judicial intrusion into core exercises of discretionary policymaking. Instead, it need only mean that judges can sometimes nullify statutory provisions that limit citizens' ability to obtain redress for wrongs. True, one can imagine a situation in which a litigant could claim that the right to a law of redress requires recognition of a cause of action. For example, a



litigant in a state that does not permit actions for invasions of privacy could argue that due process requires their creation. Yet even this suit would not ask the courts to order the political branches to enact legislation or change budgetary priorities. Instead, the claim would be directed at the courts themselves, demanding that they remedy the rights violation by exercising their power to define new wrongs.<sup>371</sup>

### *B. Tort Law Revisited*

The emphasis on history in Parts I and II of this Article might create the impression that my argument rests on the sort of appeal to historical understandings that is characteristic of originalist approaches to constitutional interpretation. Although originalists should recognize the existence of a due process right to a law of redress, I do not mean to offer a purely backward-looking claim that turns only on the views held by eighteenth- and nineteenth-century American jurists. Constitutional rights are not like ornery aunts and uncles who, on certain occasions, can demand that you attend to them simply because a distant relative years ago decided to make them part of your family. Thus, while it is important to establish that those who framed, ratified, and contemporaneously interpreted the Fourteenth Amendment probably understood it to guarantee access to a law for the redress of wrongs, it is no less important to determine whether this guarantee continues to cohere with other values and commitments embedded in our Constitution.

In Section A of this Part, I argued that the Supreme Court has, in various contemporary constitutional decisions, implicitly acknowledged that it does. In this Section, I aim to reinforce the Court's intuitions by outlining a theory of tort law that, building on work stretching from Locke and Blackstone to my own prior work and that of Benjamin Zipursky, attempts to update and reinvigorate the idea of a law for the redress of private wrongs. First, I identify three basic features of tort law—relational duty, injury, and actions for redress—that, taken together, attest to the propriety of understanding tort as a law of redress and that capture what is distinctive about tort. I then explain how this kind of law articulates and advances some of the basic commitments of our constitutional regime.

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371. If a state's courts refused to recognize a new cause of action to which the litigant had a constitutional right, a federal court could perhaps order them to recognize it. *Cf.* *Testa v. Katt*, 330 U.S. 386, 390-91 (1947) (holding that the Supremacy Clause requires state courts to entertain claims authorized by federal law).

*1. A Law of Wrongs*

It might seem banal to point out that that courts' granting of relief in tort cases has something to do with the commission of a wrong. Yet, as discussed above, Traynor and James argued that the tort system has been detaching itself from any notion of wrongdoing. This is not the occasion on which to engage their claims fully. Instead, it will suffice to show that this claim is not particularly compelling. For starters, tort doctrine has not evolved in the manner they predicted. If anything, courts have pulled back from strict liability, as in cases alleging defective product designs.<sup>372</sup> Statutory torts alleging intentional wrongs, in particular § 1983 and Title VII claims have flourished. And various common law actions linking liability to wrongdoing, ranging from battery to fraud to intentional interference with contract, remain vibrant. Tort, in short, continues to function as a diverse gallery of wrongs, rather than trending toward strict or enterprise liability.

James's claim that various features of modern negligence law amount to the imposition of strict liability were and are highly contentious. The fact that negligence turns on an objective standard of reasonable care does not entail that it somehow fails to instantiate notions of wrongdoing. To fail to act like a person of ordinary prudence, when under a duty to another to so act, is to fail to live up to a norm of right conduct set by judges and juries based on considerations of morality, fairness, and administrability. To say this is not to say that negligence is about wrongs only because it gets to define what counts as wrong. Rather, it is to say that the legal concept of fault tends to track, but not exactly match, ordinary notions of fault, in part because of special considerations that come into play when a moral norm of conduct is given the stature of a legal norm. Likewise, the doctrine of respondeat superior is not obviously best cast as a species of strict liability. Alternatively, it can be taken at face value as a principle of agency law, whereby acts of an agent on behalf of a principal are imputed to the principal. This is presumably why the doctrine is limited in application to acts by employees undertaken within the scope of employment, a limitation that is not easily explained by a Jamesian concern for loss-spreading.

It is also worth noting that many causes of action with a strict liability component are entirely intelligible as wrongs. For example, the tort of trespass to land requires that the trespasser act with the intent of making contact with a particular patch of land or structure on land. A driver who unwittingly veers off of a road onto another's property has not committed trespass because he

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372. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. d (1998).

had no intent to make contact with the land.<sup>373</sup> But trespass also has a strict liability component, because it does not require that the person who intends to make contact with land have reason to know that the land is owned by someone else.<sup>374</sup> Thus, a driver who deliberately drives his car on what he reasonably believes to be a public road, when in fact it is a private road, has committed a *prima facie* trespass. Once trespass is understood as a tort that combines an element of intentionality with an element of strict liability, it becomes more comprehensible as a wrong involving an intentional using of another's property without permission.<sup>375</sup>

Finally, even when one encounters genuine strict liability in tort, one has to know more about the rationales for its adoption before concluding that this is an area in which tort law is not operating as a law of wrongs. If, for example, the principal justification for adopting no-fault liability in manufacturing defect cases is that victims face systematic difficulties in proving what went wrong in the manufacturing process, there need not be any tension between the imposition of strict liability and the notion of tort as wrongs-based. Rather, the law is simply creating a presumption of wrongdoing.<sup>376</sup> For this to be a convincing interpretation one would need to know more. (Is the presumption rebuttable? By what sort of showing? Why does the presumption apply here and not elsewhere?) The point for now is that one cannot simply conclude from the existence of strict liability doctrines that they have nothing to do with redress.

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373. RESTATEMENT (SECOND) OF TORTS § 166, illus. 2 (1965).

374. *See, e.g., Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998) (applying Illinois law to hold that a fence reasonably but mistakenly built on neighboring property constitutes a trespass).

375. Again, the point is not that intentional but reasonably mistaken invasions are necessarily blameworthy. Rather, they violate a legal norm of conduct that states, roughly: "Do not use another's property without permission." Why the law might adopt this relatively stringent norm for invasions of property is a separate question. The answer may lie partly in the fact that possessors enjoy less legal leeway to engage in self-help to protect their property rights than they do when protecting themselves. *See, e.g., Katko v. Briney*, 183 N.W.2d 657, 660 (Iowa 1971). This might warrant making property owners the beneficiaries of a legal norm that is relatively generous in its protection of their right to exclude.

376. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) (identifying the difficulties faced by victims of manufacturing defects in proving fault as a reason for adopting a strict liability standard).

2. *A Law of Private Wrongs: Relational Duties and Injuries*

To establish that modern tort law is concerned with wrongs is not enough for present purposes. For as we saw above, the Prosserian and Posnerite depictions of tort as regulation aiming for utilitarian loss-allocation or efficient deterrence also treat modern tort law as in some sense a law of wrongs. Specifically, each depicts tort suits as a response to conduct that is wrongful in the particular sense of being socially undesirable—what Judge William Andrews’s dissent in *Palsgraf v. Long Island Railroad Co.* described as conduct that is wrong “to the world.”<sup>377</sup> By contrast, to say that tort law is a law for the redress of private wrongs is to say that it empowers a victim to seek redress from a wrongdoer because that other has acted wrongfully toward him (or persons such as him)—not merely because the actor acted in a sufficiently antisocial manner for government officials to be justified in sanctioning him.<sup>378</sup> As Cardozo explained, a tort suit involves a claim pursued by the victim “in her own right,” rather than as the vicarious beneficiary of a duty owed to the public at large.<sup>379</sup>

The key to grasping tort law’s character as a law of private wrongs is to appreciate that it is constructed around what Zipursky and I have described as analytically relational duties.<sup>380</sup> Indeed, as Zipursky explained in a pathbreaking article, some basic features of tort doctrine are inexplicable without reference to the idea of relational duty.<sup>381</sup> For example, defamation actions include an “of and concerning” element that requires the plaintiff to prove that the defamatory statement of which she is complaining is a statement

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377. 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

378. *Id.* at 100 (majority opinion) (Cardozo, J.) (“What the [tort] plaintiff must show is ‘a wrong’ to herself; i.e., a violation of her own right, and not merely a wrong to some one else, nor conduct ‘wrongful’ because unsocial, but not ‘a wrong’ to any one.”).

379. *Id.* at 101.

380. Goldberg & Zipursky, *supra* note 285, at 1812-32. Picking up on Cardozo’s famous observation that “negligence is a term that imports relation,” *Palsgraf*, 162 N.E. at 101, we have elsewhere analogized the contrast between analytically relational and analytically simple (i.e., non-relational) duties to the contrast in English grammar between transitive and intransitive verbs. GOLDBERG ET AL., *supra* note 3, at 302 (noting that, until one specifies to which class of persons and with regard to what sort of harm a tort duty is owed, one has not adequately specified the duty). To say that duties are analytically relational is not to say (absurdly) that a victim must have enjoyed a pre-existing relationship with the tortfeasor in order to be the beneficiary of a tort duty. Goldberg & Zipursky, *supra* note 147, at 707-09.

381. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 15-40 (1998).

about her.<sup>382</sup> The same idea of relationality is built into trespass. Suppose driver *D* intentionally but unwittingly drives on a road located on private property owned by *O*. Suppose further that *T* happens to be walking along the road without permission. If *D* runs over *T*, *T* cannot recover for his injuries on a claim of trespass, even though *D*'s trespass caused *T*'s injury. The trespass was not a trespass as to *T*, who has no property interest in the road.<sup>383</sup>

Relational duties are also at the heart of the flagship modern tort of negligence. Indeed, this is precisely the point of *Palsgraf*<sup>384</sup>: Mrs. Palsgraf was denied recovery because she could not show that the defendant's employees' conduct was careless as to the physical well-being of persons occupying the position that she did relative to their conduct. The conductors may have been careless as to the physical well-being of the passenger whom they pushed (he might have fallen) or others in his immediate vicinity (who might have been hurt if the passenger or his package were to fall on them). But they could not plausibly be deemed careless as to the physical well-being of someone like Mrs. Palsgraf, standing far away. Because its employees committed no wrong as to her, and because tort law, as a law of redress, insists on proof of such a wrong, the railroad was not liable, even though it had acted wrongfully toward others in a manner that caused harm to her.

To conceive of tort law as a law concerned with private wrongs is thus to conceive of tort law as built around relational duties. But it is also to conceive of tort as built around the idea of injury. Part of what separates wrongs in their public aspect from wrongs in their private aspect is that something different has happened to a particular person so as to render his relationship to the wrongful conduct distinct from the general population's. In short, for there to be a private wrong there must not only be a wronging but a victim—a person who suffers a special sort of adverse effect by virtue of being wronged.

The foregoing helps to explain why the notion of an inchoate tort is oxymoronic. An attempted murder that fails, and of which the intended victim remains unaware, is not a tort.<sup>385</sup> This is so even if, unbeknownst to the victim, the perpetrator were successfully prosecuted for the attempt. There is no injury—here defined as the kind of adverse effect on the victim that distinguishes her from the rest of the population—and hence no completed

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382. *Id.* at 17-18.

383. See RESTATEMENT (SECOND) OF TORTS § 157 (1965) (defining persons who possess land for purposes of trespass claims).

384. *Palsgraf*, 162 N.E. at 99.

385. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636-37 (2002).

wrong for which to seek redress.<sup>386</sup> Likewise, crimes such as unlawful possession of a controlled substance, though criminal wrongs, need not be and usually are not tortious as to anyone.

To say that the idea of injury is no less central to tort than the idea of relational duties is not to suppose that there are always going to be easy answers to the inherently normative question of what should count as an injury. Interferences with autonomy, bodily integrity, and freedom of movement are readily recognized as injuries that, if wrongly inflicted, give rise to tort actions such as battery, false imprisonment, and negligence. Destruction or damage to property has likewise long been understood to constitute an injury to the property owner, supporting actions for trespass, conversion, and negligence. Interference with other interests, including enjoyment of land and economic expectancies (particularly those rooted in contract) can also count as injuries. These translate into causes of action for nuisance, fraud, tortious interference with contract, and negligent misrepresentation. And an important innovation of modern tort law has been to confer on emotional distress the status of injury.<sup>387</sup> The denial or withholding of certain benefits can also amount to an injury. This is why an actor's nonfeasance—failure to protect or rescue a person placed in peril by something other than an exercise of the actor's agency—can sometimes generate tort liability. By contrast, annoyance and moral outrage usually do not count as injuries, nor do exposures to risks of harm that do not ripen into actual harms.<sup>388</sup>

### 3. *A Law for the Redress of Private Wrongs*

The foregoing explains that tort law, as a law for the redress of wrongs, conditions the imposition of liability on conduct that is wrongful toward, and injurious to, the victim. The third feature that marks tort law as a distinctive department of the law derives from the core idea of redress. Tort law is a law for the redress of private wrongs because it empowers victims in particular ways.<sup>389</sup> Most importantly, the decision to complain about an alleged wrong lies uniquely with the victim. In Blackstone's phrase, the victim is the one who

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386. Here, I am using "injury" to refer to the sort of adverse effect suffered by a victim that can support a tort claim, as opposed to Locke's and Blackstone's use of the term to refer to the wronging of the victim. See *supra* note 92.

387. See GOLDBERG ET AL., *supra* note 3, at 695-702 (reviewing this development).

388. Goldberg & Zipursky, *supra* note 385, at 1650-60.

389. See Zipursky, *supra* note 80, at 632-36; see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 733-40 (2003).

decides whether to set the law in motion.<sup>390</sup> In this respect, tort stands in contrast to criminal prosecutions and administrative proceedings that are conducted at the behest of, and formally controlled by, government officials. A right to redress is, as Zipursky has emphasized, a legal power conferred on a victim to pursue an action against the alleged wrongdoer if she chooses.<sup>391</sup> If she sees no value in obtaining redress, concludes that its costs outweigh its benefits, or prefers to deal with her injuries by channeling her energies into social activism, the law takes no interest in the matter.<sup>392</sup>

The idea of redress, like the idea of a private wrong, is also relational. As Ernest Weinrib has emphasized, an action for redress in tort is a suit that seeks to assign responsibility to a wrongdoer for having wronged the victim.<sup>393</sup> It might well be desirable from a public policy perspective to have victims of wrongs sue someone other than the alleged wrongdoer(s).<sup>394</sup> That such a justification generally has not carried weight within our tort law demonstrates that tort aims to provide redress for wrongs (as opposed, say, to achieving efficient deterrence).

Tort redress is not to be confused with vengeance. Vengeance is an unregulated response by which a victim seeks satisfaction directly and by the means of her choice. For good reasons, Anglo-American law allows almost no room for it. Because it is unmediated, vengeance runs high risks of error, overkill, additional violence, and ongoing feuds, which tend to work against the resolution of disputes and to undermine civil order. Even when the law permits self-help—e.g., recapture of chattels—it limits the privilege by requiring that it be done peaceably. Redress through law, as Locke and Blackstone understood, is a substitute for vengeance.<sup>395</sup>

While the idea of redress through law is hardly self-defining, it does suggest a limited universe of possibilities. If successful tort claimants were provided only with an apology, or a framed copy of the judgment that had

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390. See *supra* text accompanying note 152.

391. Zipursky, *supra* note 389, at 733-40.

392. Thus, studies decrying the fact that a small percentage of potential tort claimants bring suit ought not to presume automatically that this is a public policy problem—one needs to know more about why people do not sue. To the extent such decisions are knowing and voluntary, it might be a desirable feature of a system that places the decision to respond on the victim.

393. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 142-44 (1995).

394. For example, it might make sense to permit a victim who suffers a loss to hold liable a third party who did not even cause the loss because that party happens to be in a good position to prevent that sort of loss in the future. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 137-38 (1970).

395. Zipursky, *supra* note 381, at 85.

been entered against the tortfeasor, it would fail to provide satisfaction, at least to victims of egregious wrongdoing or to those who have suffered significant harm.<sup>396</sup> The idea of satisfaction literally requires that the victim get “enough.” Locke, as we have seen, was prepared to suppose that, at least for certain wrongs, the victim would be entitled even to claim the “services” of the wrongdoer.<sup>397</sup> Medieval English law similarly allowed the victim to demand the infliction of an appropriate punishment on the tortfeasor in the case of certain (felonious) wrongs.<sup>398</sup> Why, then, does modern tort law close off these potential avenues of redress? The case is perhaps not as open-and-shut as one might at first glance suppose. Some victims would fare better given the option to initiate punishment, including most obviously those wronged by judgment-proof wrongdoers.<sup>399</sup> Moreover, the relentless monetization of redress has arguably introduced pathologies, including the commodification of injuries,<sup>400</sup> and the transformation of some plaintiffs’ lawyers from victim-representatives to injury entrepreneurs.<sup>401</sup> Still, a system of privately initiated prosecutions poses enough problems to explain and justify the exclusive preference for monetary redress. If the history of the old appeal of felony is any guide, punishment may in practice tend to devolve into a system of payments as tortfeasors attempt to buy off their prosecutors.<sup>402</sup> The greater threat value of the prospect of imprisonment might also skew the system too much in favor of victims, at least without the procedural protections granted criminal

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396. This is not to deny the potential significance of apology as an appropriate response to the commission of wrongs. See Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002); see also Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004).

397. See *supra* note 100 and accompanying text.

398. See *supra* note 79 and accompanying text.

399. This observation raises thorny questions about the interrelation of redress law to laws pertaining to bankruptcy, corporations, insurance, and trusts. The legalization and growth of liability insurance has generally enhanced the ability of victims to obtain meaningful redress. Yet by limiting victims to monetary redress, our law has enabled savvy wrongdoers to structure their affairs to avoid liability, while also disabling victims of impecunious wrongdoers from obtaining redress. One can perhaps view the modern victims’ rights movement as an effort to forge an alternative avenue of redress through criminal law.

400. See MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 184-91 (1996).

401. This is not necessarily to lay blame exclusively or mainly at the feet of plaintiffs’ lawyers. Litigation has grown more complex and expensive in part because it is in defendants’ interests that it do so.

402. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 504 (4th ed. 2002). It may be independently desirable to give victims more of a role in criminal prosecutions that nonetheless remain under the control of officials.



defendants. In turn, the adoption of these protections might render civil justice too hard to come by. And there are virtues associated with a system keyed to reparations rather than punishment, including the ability of victims to attract lawyers to take on their causes.

The appropriate amount of wealth to transfer from wrongdoer to victim is also an open question. On this issue, redress theory differs significantly from corrective justice theory. The latter is built around the idea that a tort suit aims to restore the equilibrium between victim and wrongdoer. Alternatively, it speaks in terms of the idea of a loss or “mess” being shifted from victim to wrongdoer on the ground that, in justice, the wrongdoer ought to be the one to bear it.<sup>403</sup> Either picture naturally sits well with the idea of returning to the pre-tort status quo. By contrast, redress theory is not tied to a notion of restoration or making whole. Tort suits and damages, in this view, do not aim to cancel out or annul a wrong and its consequences. They are a means by which the wrong is acknowledged, rather than erased, and by which the victim responds to or retaliates against the wrongdoer.<sup>404</sup>

Compared to a corrective justice conception of damages, a redress conception carries with it certain descriptive advantages. Jury instructions do not always or even typically direct juries to restore the status quo ante, instead telling them to provide an amount of compensation that is reasonable in light of what the wrongdoer has done to the plaintiff.<sup>405</sup> Moreover, the redress model can explain why awards of punitive damages, at least in some instances, do not involve an illicit blending of criminal with civil law.<sup>406</sup> Punitive damages are quite intelligible if understood as a type of damage payment reserved for victims of a particularly egregious kind of wrong, which, in turn, generates an entitlement in the victim to a particular kind of response. This is

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403. See Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *ANALYZING LAW* 257, 302 (Brian Bix ed., 1998).

404. Tort law does not promise always to deliver a remedy that will provide a subjective sense of satisfaction in the victim, as that would leave defendants completely at the mercy of victims' felt needs. Rather, it promises a remedy that would provide satisfaction to a reasonable person in the position of the victim.

405. See, e.g., CIVIL COMM. ON CAL. JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) § 14.01 (2005) (stating that in a case of admitted liability, the jury should award damages that will reasonably compensate the plaintiff); 1B COMM. ON PATTERN JURY INSTRUCTIONS, ASS'N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTIONS § 2:277 (3d ed. 2005) (stating that the jury should award damages that will fairly and justly compensate the plaintiff for all losses resulting from her injuries).

406. By contrast, corrective justice theorists such as Ripstein and Weinrib see little place in tort law for punitive damages. ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 152-55 (1999); WEINRIB, *supra* note 393, at 135 n.25.

not to say that “making whole” is always or even usually an inappropriate measure of redress. In the typical case of accidental harm, the victim perhaps ought to be content if the law stands ready to force the wrongdoer to make good on the losses that his carelessness has caused. There need not, however, be a tight linkage drawn between tort law and the idea of making whole.

Finally, the notion of tort as a law of redress should be distinguished from the notion that alleged victims of wrongdoings are entitled to a day in court, or must otherwise have their claims treated and resolved on a highly individualized basis. Tort causes of action are bound up with courts in that the latter are prototypically the institutions to which aggrieved victims complain, as well as the ones that secure the appearance of the alleged wrongdoer, determine the validity of the claim, and, if it is valid, issue and order enforcement of judgments. Yet to acknowledge this is not to commit to the proposition, sometimes associated with justice-based views of tort, that it is a desideratum of tort law that each alleged victim of wrongdoing will have the validity of her allegations determined in open court, or that her claim will be resolved by a judge or jury without regard to the resolution of any other actual or potential claims, or that each suit will result in a published, merits-based declaration as to whether the alleged wrong was committed.<sup>407</sup> The core claim of redress theory is that tort law’s distinctiveness resides in conferring on individuals (and entities) a power to pursue a legal claim alleging that she (or it) has suffered an injury flowing from a legal wrong to her by another. How that claim is pursued and resolved is, accordingly, a matter for the victim to decide. If it is vitally important to her to obtain a public acknowledgment of wrongdoing from her peers or a presiding official then she is entitled to ask for a jury trial and pursue the claim to judgment. But she is also entitled to settle the claim in a manner that she – with the advice of a lawyer, one hopes – deems appropriate, or not to bring a claim at all. Assuming that there is a court system available to claimants, as well as the opportunity for victims to obtain adequate representation and make reasonably informed decisions as to whether and how to pursue their claims (surely ideals of which our system regularly falls short), redress theory is indifferent to whether claims are resolved by trial or by the negotiation of settlements, whether individual or aggregate.

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407. See, e.g., Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1572-73 (2004) (suggesting that practices of “aggregate settlement” by lawyers on behalf of clusters of clients run counter to justice-based conceptions of tort).

#### 4. *Torts, Rights, and Duties*

Armed with a better understanding of what it actually means for tort law to be a law for the redress of private wrongs, we can appreciate why it has long been understood, and should continue to be understood, as having an important place within a polity such as ours. By identifying tort law's linkages to liberty, democracy, equality, limited government, and the rule of law, I aim to explain why even today courts and legislatures have reasons to take seriously the idea that our Federal Constitution includes a right to a law for the redress of wrongs.

As we have seen, the linkage of tort law to individual rights goes back at least to Locke.<sup>408</sup> Government, by taking on the task of maintaining civil society, obtains from individuals a variety of powers that they would otherwise be entitled to exercise. Thus, apart from special cases such as self-defense, the victim of a wrong is by law disabled from responding to the wrong on his own, or with the aid of his friends or kin. If he attacks or seizes another or expropriates her goods in an effort to obtain satisfaction for the wrong done to him, he will be subject to liability for battery, false imprisonment, and/or conversion, as well as criminal punishment. With resort to self-help blocked by the law, government is obligated, at least to some degree, to provide an alternative path for the attainment of satisfaction. Granting the victim a right to redress is an obvious way for government to fulfill that duty, particularly when the law declines to impose affirmative legal duties on officials to act in other ways for the protection of individuals.<sup>409</sup>

Tort law also functions in other ways to articulate and vindicate rights and interests that individuals are taken to enjoy under liberal theory. For example, the tort of battery at once recognizes, defines, and protects the right of persons to be free of unwanted intentional touchings by others. As Blackstone suggested, we act in the belief that our physical selves are, in principle, inviolable in part because the law recognizes that it is usually a wrong for persons purposefully to touch others without consent. By the same token, the tort of defamation articulates a right not to be burdened in our social

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408. See Zipursky, *supra* note 381, at 85 & n.284.

409. By limiting the ability of individual citizens to demand official protection *ex ante*, decisions like *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005), strengthen the case for recognition of a right in the victim of wrongs to pursue a cause of action against wrongdoers, including, when appropriate, officials or government employers. For example, one could argue that a state law that grants immunity both to individual officials who have committed otherwise actionable legal wrongs and to the government in its capacity as their employer (as opposed to immunizing one or the other) violates, at least in some applications, a victim's due process right to a law for the redress of wrongs.

interactions by virtue of certain statements about us that cast us in a negative light. Conversely, the absence of tort liability helps define realms in which we are at liberty to act without regard to certain interests of others. The fact that, today, tort liability cannot attach to defamatory political speech uttered in good faith is understood as part of what it means to have a right of free speech. Likewise, the absence of a general duty to take reasonable care against interfering with others' economic prospects is a recognition that, in a capitalist system, there is a legitimate sphere of economic competition that permits actors to undertake actions that risk devastation to one's competitors.

Construed as a law for the redress of wrongs, tort law also confers on individuals a certain status vis-à-vis government and other citizens. Tort law involves a literal empowerment of victims—it confers on them standing to demand a response to their mistreatment. In this sense it affirms their status as persons who are entitled not to be mistreated by others. It also affirms that a victim is a person who is entitled to make demands on government. A tort claimant can insist that government provide her with the opportunity to pursue a claim of redress for the purpose of vindicating basic interests even if government officials are not inclined to do so. Ex ante safety regulations, even though they may protect individuals at risk of being wrongfully harmed, do not confer the same sort of standing. Indeed, intended beneficiaries of such regulations usually have no right to demand that the regulations be enacted for their benefit, or even that existing regulations be enforced.<sup>410</sup> As such, tort law contributes to political legitimacy. As a forum that is in principle available to anyone who has been victimized in a certain way, tort law demonstrates to citizens that the government has a certain level of concern for their lives, liberties, and prospects.

For related reasons, tort law helps maintain and promote a nonhierarchical conception of social ordering. As the Framers of the Fourteenth Amendment understood, to render a person capable of suing (and being sued) for injuries suffered (and caused) is to enforce a conception of equality. Each of us is in principle accountable to each other; none is above or below the law. If, to update Coleman's example, Bill Gates is run over by the careless driving of an assembly-line worker, that worker has to make good, to the extent he can, on the breach of the duty he owed to Gates.<sup>411</sup> More tellingly, if the tables are turned, Gates is accountable to the worker. Four centuries ago, to the discredit of English law, nobility were immunized by virtue of their status from many

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410. Goldberg & Zipursky, *supra* note 385, at 1655-56.

411. JULES COLEMAN, RISKS AND WRONGS 304 (1992).

tort obligations.<sup>412</sup> While today some immunities remain, and wealthy defendants undoubtedly enjoy important advantages in the litigation system, tort law instantiates a notion of equality.

As explained above, tort law is built around relational duties of non-injury. As such, it carves up the social world into “loci of responsibility”<sup>413</sup>—i.e., particular contexts governed by norms of appropriate conduct that actors must observe for the benefit of identifiable classes of potential victims. For example, as applied to driving, negligence law reinforces and elaborates social norms of safe conduct that drivers must observe for the benefit of other drivers, cyclists, pedestrians, persons occupying storefronts, and storeowners. By the same token, malpractice law generates norms of safe practices that doctors are obligated to heed for the benefit of patients (and sometimes non-patients), while product liability law articulates safety norms to be observed by sellers on behalf of product users and certain others. The same goes for the range of torts that can arise out of various different modes of social interaction—e.g., employer-employee, business-customer, lawyer-client, neighbor-neighbor, carrier-passenger. Of course, tort is not solely responsible for the emergence of the norms applicable to these sorts of interaction. It does, however, build on, amplify, and revise obligations that are already recognized, in part because of habits and customs that both shape and are shaped by law.

As a body of law that carves out these loci of responsibility, tort helps to maintain a version of civil society that is distinctively liberal. First, the ties in question consist mainly of negative obligations—obligations not to injure, as opposed to duties of positive assistance. To say this is by no means to accede to the standard charge that liberalism is wedded to an atomistic conception of social life, as if the only duty one owes is to refrain from consciously injuring others. The everyday operation of tort law, particularly negligence law, often requires substantial investments of attention, time, and money on behalf of others. For individuals, going about one’s business with care for the well-being of certain others requires routine self-monitoring (“How am I driving?”). It may also require taking affirmative precautions, such as tending to slippery surfaces on one’s property. Needless to say, firms find that taking care is no mean feat, requiring, for example, the installation of expensive safety equipment, or the development of protocols to reduce the risk of accidental injury (which is why they often complain bitterly over the imposition of these obligations).

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412. HERZOG, *supra* note 36, at 131.

413. John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 U. MD. L. REV. 364, 403-04 (2005).

Second, the articulation of duties that are specific to roles and activities that, in principle, might be assumed by a wide range of actors is compatible with our relatively open and fluid society. The duties of tort law tend not to be rarified or esoteric. They are everyday duties that inhere in ordinary conduct.<sup>414</sup> As such, they remind us that we live within an elaborate network of relations from which we benefit and to which we must attend. Nor are tort obligations reserved in principle for a particular status or social group. Whoever assumes the role of a driver or property occupant assumes a set of obligations associated with those roles.

Third, the imposition of obligations provides a scheme of regulation that operates, when working well, by reinforcing social norms rather than by Holmesian prices.<sup>415</sup> By imposing legal obligations whose basic contours are already recognizable, the law enhances its own legitimacy. It also may permit regulation to be achieved with less reliance on bureaucracy, which must rely on carrots and sticks to impose alien standards of behavior. The point is not that other forms of regulation are undesirable or inappropriate. Rather, it is that tort law can claim as one of its advantages that, insofar as it regulates behavior, it does so without requiring an elaborate administrative apparatus.

Fourth, tort law, by articulating and enforcing relational duties, treats actors as agents who are responsible to others for the consequences of their actions. One hallmark of liberal politics is the central place given to the individual as autonomous agent. And when liberal politics are linked to capitalist economics, the notion is that individuals ought to enjoy at least a prima facie entitlement to a substantial portion of the fruits of their labors. Holding persons responsible for some of the negative consequences of their conduct is a related practice. The assignment of responsibility for outcomes acknowledges agency.<sup>416</sup> By contrast, a system that treats injuries as commonly owned, however commendable for other reasons, removes one of the major avenues through which law affirms agency.<sup>417</sup>

Fifth and relatedly, the responsibilities identified by tort law are owed by persons and entities to other persons and entities. Although these include obligations owed by individual government actors to citizens and entities (e.g., a police officer's duty to refrain from unjustifiably arresting or beating a

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414. See Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 689-90 (1931).

415. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

416. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 489-90 (1992) (developing Honoré's concept of "outcome-responsibility").

417. RIPSTEIN, *supra* note 406, at 246-63 (critiquing a system of sharing adverse outcomes that would negate the notion of individual responsibility instantiated through tort and criminal law).

person), they are for the most part obligations owed by nongovernment actors to other nongovernment actors (or by and to government when it acts in its capacity as private actor—e.g., as an entity with ownership rights in property). In this respect, tort law operates predominantly as part of a liberal conception of civil society—a realm of duties and rights operating between citizens. The state plays a vital role, but it is that of a Lockean umpire. This understanding differs from one in which duties are seen as imposed by and owed to the state, even duties that, in the end, benefit other citizens. For example, in a statist depiction, the duty owed by a doctor to provide competent medical care to a patient is a duty imposed by and owed to the state for the benefit of patients and perhaps society generally.<sup>418</sup> As conceived by tort law, the state is not regarded as the font or the object of such a duty. Instead, the doctor's duty is properly described as owing to the patient.

Sixth, tort law is recognizably liberal in how it factors causal contingencies into assignments of responsibility. A standard puzzle for tort theorists is why outcomes should matter to such assignments. If *A* and *B* independently drive badly in the same way under the same circumstances, but only *B* hits and harms a pedestrian, *B* is subject to tort liability but *A* is not. From the perspective of moral desert, *A* and *B* perhaps should face the same sanctions. Tort law, however, is not a system for punishing on the basis of desert. It is a system that empowers victims of wrongs to seek redress for those wrongs. Thus, it is not at all mysterious that tort liability will attach only to *B*'s conduct. There is no one who is entitled to invoke the law of redress against *A* because she did not wrongfully injure anybody. Wrongdoers who are in this sense lucky enough not to injure others are, for purposes of tort law, granted the benefit of that luck as part of the liberty of action that they enjoy.

In sum, tort law's distinctive features give it a unique role to play in our legal and political system, which in turn helps make the case for interpreting the Constitution as recognizing a right to it. Yet there is within this argument an important implication cutting in the opposite direction. Obviously, I have been arguing that tort law forms a basic component of our constitutional order only insofar as it operates as a law for the redress of private wrongs. By contrast, Fleming James's conception of tort law as an instrument of loss spreading, if accurate, would not earn tort law fundamental status as a law of redress. The same is true for Prosserian or Posnerite public-wrong accounts, or the Naderite-populist conception of tort law as a lever by which ordinary citizens can bring the powerful to heel. Because each of these is an avowedly

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418. See Goldberg & Zipursky, *supra* note 285, at 1753-56 (discussing Holmes's top-down approach to duty).

regulatory theory of tort, none connects up to liberal-constitutionalism in the ways just described (although each may do so in other ways).<sup>419</sup>

Finally, to fend off potential misunderstandings of this argument, it will be worth reviewing what this Section has and has not established. That tort law can be understood as a law of redress, and that such a law has a distinctive role to play in a polity such as ours, does not by itself suffice to demonstrate that the Constitution is best interpreted as recognizing a right to a law of redress. However, when read in conjunction with the historical and doctrinal analysis provided in Parts I and II, this analysis bolsters an already strong case that such a right is enshrined in the Fourteenth Amendment. The argument of this Part also does not impugn the validity of other forms of law. Rather, it identifies the distinctive contribution that tort law is in a position to make. Nor, as will be discussed below, does it assert that our polity must, in the end, maintain a law of private redress, or that a society that has no tort law cannot possibly be a liberal-constitutional polity. Finally, it does not imply that tort law in principle perfectly matches tort law in practice, or that procedural, substantive, and remedial aspects of tort law could not benefit from reform. Again, the point is merely to elaborate the reasons why one might think, and why various important jurists have thought, that a law for the redress of private wrongs is a basic component of our political regime.

### C. *Guidelines for Enforcing the Right to a Law of Redress*

Supposing that the right to a law of redress was meant to be, has been, and is part of our constitutional law, the question with which we began can finally be addressed: What rules of decision or standards should courts use to enforce it?<sup>420</sup>

#### 1. *Possible Frameworks*

Although it is conventional wisdom today, the rational basis test's appeal as a rule for enforcing the right to a law for the redress of private wrongs is hard

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419. An irony of modern debates over tort reform is that those most eager to argue that tort law ought to be immune to substantial legislative revision are also those least attracted to the picture of tort law as a law for the redress of private wrongs. They seem not to notice that there is a profound tension between claiming that tort law is a form of social and economic regulation and claiming that tort reform legislation ought to be evaluated under a more stringent standard than rational basis scrutiny.

420. See Berman, *supra* note 17, at 61-63 (explaining the difference between a right and a rule adopted to enforce it).



to fathom given that it entails rubber stamping even the most irresponsible defendant-friendly reforms. Some might suppose that it is a bullet that must be bitten; that it alone promises appropriate deference to legislative judgments. Yet the Supreme Court's track record deploying the *Munn-Humes* floor-ceiling framework hardly suggests that it entails a rabidly interventionist approach.<sup>421</sup>

Perhaps the main prop supporting the rational basis test is the failure to identify a superior alternative. Certainly, it looks attractive relative to two possible alternatives. The first is the vested interest model, under which individuals enjoy a veto power over legislative tort reforms. One of several problems with this model is the protean nature of the common law itself. To which version of tort law are individuals entitled? Negligence with the privity rule or without? Strict products liability or not? Contributory negligence or comparative fault? Given that the history of American tort law is a history of significant doctrinal variation, it seems bizarre to posit an entitlement to one or another set of tort rules. This is presumably one reason why the model was so decisively rejected by the Court in *Munn v. Illinois*.

The second alternative—the quid-pro-quo test—has some support in Court decisions. For example, the Court reasoned in *White* that workers' compensation laws passed constitutional muster in part because they contain benefits for both workers (strict instead of fault-based liability) and employers (scheduled damages instead of tort damages) that correspond to the loss of potential advantages that they had enjoyed under tort law.<sup>422</sup> In dicta, the *White* Court also expressed doubt that a legislature could substantially interfere with plaintiffs' or defendants' rights under the common law without providing a "reasonably just substitute."<sup>423</sup>

Yet *White*'s holding and dicta are quite different. It is one thing to say that the provision of a compensating benefit to adversely affected parties helps to justify a given piece of tort reform. It is another to make its provision a constitutional necessity. Wisely, *Duke Power* expressly declined to adopt a quid-pro-quo requirement, and decisions stretching back through *Silver* to *Humes* and *Munn* have upheld tort reforms that imposed costs unilaterally on the actors challenging them.<sup>424</sup> Should a legislature today really have to provide a benefit to a husband who can no longer sue a third party for having an affair with his wife? To those who are required to prove recklessness instead of carelessness under an automobile guest statute?

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421. See *supra* text accompanying notes 214-247.

422. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 202 (1917).

423. *Id.* at 201.

424. See *supra* text accompanying notes 215-219, 262-268, 313-316.

Recognition of the failings of these alternatives marks the path forward. Although different in substance, rational basis analysis, the vested interest model, and the quid-pro-quo test are all mechanical in two senses: They aim to handle floor and ceiling challenges on the same terms, and they invite courts to assess the constitutionality of tort reforms without attending closely to the nature of the tort and the reform at issue. In my view, courts should abandon the search for a single test in this area and instead recognize that discrete questions are posed by ceiling and floor cases.<sup>425</sup> And when it comes to analyzing the floor, they should employ a framework that requires them to consider carefully the justification for the reform legislation, the nature of the tort under reform, and the effect of that reform on the interests of plaintiffs who stand to invoke the tort.<sup>426</sup>

These considerations point toward a three-step framework for due process floor challenges:

- (1) What is the wrong that stands to be redressed by the tort cause of action?
  - (a) Does the tort cause of action really aim to redress a wrong?
  - (b) What sort of interest of the victim does the tort action vindicate?
  - (c) What sort of interference does the tort identify as wrongful?
- (2) What is the effect of the reform legislation on the tort cause of action?
- (3) What are the stated or implicit justifications for the legislation?

The first step calls for close analysis of the underlying tort cause of action. It can, in turn, be broken down into three sub-steps. Sub-step one asks whether the tort in fact aims to provide for the redress of wrongs, as opposed to achieving some other goal. Given tort law's historic function as a law of redress, the strong presumption will be that the action is so functioning. But doctrines that fall under the heading of tort sometimes impose liability for other reasons. For example, if, as Traynor supposed, the application of products liability law to manufacturing defect cases really aims primarily to spread victims' losses, then it is not entitled to constitutional protection out of recognition of the right to a law for the redress of wrongs. By contrast, if manufacturing defect doctrine is instead justified as a means of easing the

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425. The remainder of this Section will develop floor guidelines. Section III.D briefly considers ceiling issues.

426. Perhaps not coincidentally, this test somewhat resembles the test for procedural due process violations put forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

victim's burden of proving fault, then it falls within the class of torts that provide redress.

Once the court concludes that the tort cause of action is functioning as a claim for redress, the court must next consider (in sub-step two) the individual interest that the tort aims to vindicate. Is it the interest in bodily integrity, liberty of movement, the ownership of tangible property, reputation, privacy, wealth, emotional well-being, or some other interest? Because the common law of tort itself distinguishes between these interests, giving greater protection to the first trio and lesser protection to others, it will be more difficult for litigants to establish a rights violation when the tort reform in question bears on torts that protect interests such as the interest in accumulating intangible wealth. Suppose, for example, a state had enacted legislation comparable to the federal Y2K legislation, which eliminated liability for carelessly causing intangible economic loss through the sale of defective software.<sup>427</sup> That statute would be a candidate for more deferential judicial analysis. By contrast, laws abolishing or limiting tort actions that respond to physical injuries, invasions of liberty, or interferences with the use and enjoyment of tangible property will generally warrant less deferential analysis.

Having determined the type of interest in question, the court must (in sub-step three) consider the type of interference to which the tort responds. If the tort claim responds to the sort of misconduct that has historically supported punitive damage awards—i.e., conduct that is malicious, intentional, or knowing as to the victim, or that displays reckless or contemptuous disregard for the victim—there is a stronger case for invalidating tort reforms barring or burdening the claim. Of the various ways that persons can mistreat and injure one another, those that involve malice or contempt toward the victim prompt a justifiably greater sense of victimization, and with it, a stronger claim for—and perhaps a stronger urge for—redress.<sup>428</sup> In operation, this sub-step probably would have to be invoked on an as-applied basis. Thus, suppose a legislature abolished the law of trespass to land, and a plaintiff complaining of a deliberate and malicious trespass was thereby left without remedy. If she could prove that

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427. 15 U.S.C. § 6611 (2000).

428. It might be said against this facet of the test that it sets the impossible task of rank-ordering different forms of mistreatment. Such a task is hardly impossible. Tort law and criminal law already draw such distinctions in their daily operation. For example, “intentional” torts such as battery are treated, as a class, as relatively serious wrongs, which helps explain why they are not barred by workers’ compensation laws, and why liabilities for intentional wrongs are not dischargeable in bankruptcy or covered by liability insurance. Moreover, a majority of the Court has already demonstrated its willingness to engage in such ordering under the reprehensibility prong of its ceiling test for excessive punitive damages. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-76 (1996).

the trespasser acted with the requisite disposition, she would have a stronger claim that the legislation should be struck down as applied to her. By contrast, to the extent that the law applies to strict liability trespasses—i.e., intentional use of land that the invader had no reason to know was owned by the owner—it would be entitled to greater deference.<sup>429</sup>

With the first step complete, the court must in the second step consider the severity of the legislation's interference with the plaintiff's tort action. Outright abolition is the most significant form of interference. Across-the-board limitations on remedies, such as the Virginia damages cap, are less intrusive, but still substantial. Other measures, such as partial damage caps (e.g., on pain and suffering damages) or additional evidentiary burdens may be less intrusive, although this may again require as-applied analysis. For example, an outright ban on punitive damages might, in the vast run of cases, amount to a constitutional piece of tort reform with respect to cases in which a plaintiff, by collecting full compensatory damages, is left with enough by way of redress. Yet, as applied to a particular class of claimants—say, those who have suffered an intentional violation of a core interest that generates little or no physical harm—the ban might be constitutionally problematic because it essentially prevents meaningful redress.<sup>430</sup>

Finally, in the test's third step, the court should consider the purposes that the legislation aims to serve. Here it is worth recalling *Munn*'s observation, in support of its influential “no vested interest” proposition, that “the great office of statutes is to remedy defects in the common law . . . .”<sup>431</sup> The suggestion seems to be that particular deference is owed to legislatures when they can claim to be reforming tort law to enable it to operate more effectively on its own terms. Thus, reforms that are plausibly construed as part of an effort to weed out false claims, or reward valid claims, are entitled to relatively greater deference. By the same token, legislation that is predicated on the notion that the tort system is functioning properly, but that it has become too expensive

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429. Sub-steps two and three help explain why typical automobile no-fault plans will likely pass constitutional muster, given that they generally bar claims for relatively modest amounts of property damage or minor physical injuries and exclude from their ambit intentional misconduct. See EPSTEIN, *supra* note 359, at 252 n.45.

430. Cf. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159-60 (Wis. 1997) (holding that a willful trespass that causes no harm can provide the basis for a punitive damages award; otherwise the violation of the plaintiff's property right would go unredressed). Or consider the case of the flight attendant who secretly spikes an infant passenger's juice with a sedative so as to render him docile, which results in no physical harm and of which his parents later learn. If the suit has any hope of securing meaningful redress on the child's behalf for the attendant's battery, it will only be if the court permits an award of punitive damages.

431. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

for society to maintain, should invite more searching review. Intermediate cases might involve legislation that restricts the reach of tort liability, but does so in order to protect the same interests of the same class of persons as existing tort law. Suppose a state enacts legislation that sets specific design standards for a particular product in order to better secure the physical well-being of product users, and that creates a meaningful enforcement apparatus to back up these standards. If the law also exempts manufacturers subject to it from tort liability arising out of acts that constitute statutory violations, it would be entitled to greater deference than a statute restricting tort law in the name of general prosperity.

## 2. *Applying the Guidelines*

To provide a better feel for the content of the foregoing guidelines, I will briefly consider how they can help us to analyze familiar cases that implicate the due process floor. Regrettably, the discussion here consists only of suggestive remarks. I do not pretend to offer the sort of in-depth and context-specific analysis that judges would undertake in resolving actual cases.

### a. *Workers' Compensation*

In retrospect, it is not surprising that workers' compensation statutes of the sort considered by the Supreme Court in *White* have overwhelmingly tended to pass constitutional muster. The negligence law that such statutes supplanted is a law of wrongs (Step 1(a)). The interest at stake is the interest of workers in protection from bodily injury (Step 1(b)). Nonetheless, the protection that tort law provided was for injuries caused by negligence, rather than intentionally (Step 1(c)). Here, it is important, not incidental, that workers' compensation statutes tend explicitly to enable employees to sue in tort for workplace injuries caused by intentional wrongs.

As discussed above in connection with *White*, workers' compensation schemes do not simply leave victims high-and-dry, instead offering them health benefits and lost wages (Step 2).<sup>432</sup> Significantly, these schemes were fashioned so as to retain the tort-based idea of the workplace as a locus of responsibility. Even though, as a formal matter, tort law ceased to govern workplace accidents, the idea of the employer being responsible for worker

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432. It might be the case that judgments as to the constitutionality of workers' compensation laws will change over time depending on, among other things, the compensation actually being delivered by these schemes. See EPSTEIN, *supra* note 359, at 254.

safety was retained, both symbolically and materially. A workers' compensation claim is still a claim filed against an employer. And insurance devices like experience-rating create incentives within workers' compensation schemes for employers to attend to workplace safety and to the physical well-being of their employees. Thus, the elimination of the tort right of action was accomplished in a manner that did little to undermine the duty owed by employers to their employees to maintain a safe workplace.<sup>433</sup>

Finally, the fact that these statutes were enacted in part as a result of complaints by representatives of workers about the ability of the negligence system to deliver reliable redress tells us something about their purposes (Step 3). It matters that a significant portion of the identifiable and relatively cohesive class of persons who stood to be adversely affected by these reforms were willing to accept them.<sup>434</sup> In particular, their endorsement suggests that it is unlikely that workers' compensation laws were an effort to trade off victims' rights for an aggregate good such as economic prosperity.

*b. Peaceful Picketing*

If *White* represents a sensible application of due process analysis, *Truax* does not. The claims there were for wrongs. However, as noted earlier, the interest that the *Truax* majority was so eager to protect was not an interest in autonomy, physical integrity, liberty, or property ownership, but instead a mere economic expectancy. The protection provided to that sort of interest by tort law has traditionally been quite modest. Absent some special undertaking by the defendant to the plaintiff to look out for that sort of interest, no liability will attach to careless conduct that causes a loss of business to another, even if

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433. The terms on which the Supreme Court in *White* validated New York's scheme is very much in keeping with the post-*Bivens* decisions of the modern Court, discussed above, which have denied constitutional tort actions to litigants because of the availability of alternative remedial schemes adequate to vindicate their protected interests. See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *Bush v. Lucas*, 462 U.S. 367, 388 (1983). But see *Carlson v. Green*, 446 U.S. 14, 20-23 (1980) (concluding that the Federal Tort Claims Act does not provide an adequate substitute for a *Bivens* action for an Eighth Amendment violation).

434. This is not to say that majority approval by the class of persons who stand to be affected by a given tort reform is necessary or sufficient to validate the reform. After all, a majority might well approve (and, through their representatives, did approve) the Virginia damage cap discussed in the Introduction. Part of the reason that this support was forthcoming was that workers in the early twentieth century confronted several liability-restrictive tort doctrines. But these were hardly set in stone—many were relatively new, some had already been rejected in some jurisdictions, and others were under fire from an army of critics, which meant that there was a respectable chance in many jurisdictions that workers would benefit in the medium term from favorable doctrinal reforms.

that loss was foreseeable.<sup>435</sup> Even with respect to intentional interference with expectancies, tort liability is circumscribed. Typically, there is a requirement not only that the interference be intended, but that it be motivated by malice toward the victim or effected by independently wrongful means.<sup>436</sup> (Thus, in *Truax*, Corrigan and his union were free to set up a competing restaurant across the street, knowing that its success would entail the destruction of Truax's business, so long as they did so out of self-interest rather than, or in addition to, spite.) For these reasons, it is not at all clear that a case like *Truax* warrants a finding of a legally cognizable claim. Even if it does, the lesser status of the interest at stake and the presence of a countervailing right to free speech (at least under modern conceptions of that right), strongly support the conclusion that *Truax* was or is an indefensible over-enforcement of the right to a law of redress, particularly insofar as it denied states the ability to eliminate injunctive relief.

### c. *Anti-Heartbalm Statutes*

"Anti-heartbalm" statutes were enacted primarily in the early twentieth century to eliminate particular actions, including criminal conversation, alienation of affections, seduction, and breach of promise to marry.<sup>437</sup> Application of the proposed due process framework to these statutes demonstrates why attention to the nature of the underlying tort claim will be critical to a court's constitutional analysis. It also demonstrates that the proposed framework, although less deferential than the rational basis test, would permit courts to uphold even the outright abolition of certain causes of action.

From the late seventeenth century until the mid-nineteenth century, actions for criminal conversation, alienation of affections, and seduction were available only to husbands and fathers against third parties who had sex with, or who kidnapped or enticed away, their wives or unmarried daughters. The injuries redressed by these actions were conceptualized in patriarchal terms. In

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435. To take a classic example, suppose truck driver *T* carelessly crashes his truck, as a result of which a bridge is closed for a month, and that *B*, a business owner on the far side of the bridge, loses a month's worth of revenue because the bridge provides the only access to his business. *B* will not have a negligence action against *T*. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54-55 (1st Cir. 1985) (stating the majority rule and offering justifications for it).

436. DAN B. DOBBS, *THE LAW OF TORTS* § 446, at 1260-63 (2000).

437. Jane E. Larson, "Women Understand so Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," 93 *COLUM. L. REV.* 374, 394 n.85 (1993).

criminal conversation actions, the injury was a trespass by the wife's lover against the husband's "property" interest in his wife's body and services, or an affront to his honor, or an interference with his line of succession (given that the affair may have created uncertainty as to paternity).<sup>438</sup> Likewise, seduction was understood to harm the father's interest in his unmarried daughter's household services.<sup>439</sup>

Once women were granted the capacity to sue and be sued, courts and legislatures were faced with the question of whether these statutes had rendered wives eligible to bring actions such as criminal conversation, and daughters eligible to sue for seduction. Many concluded that they did. In extending the protection of the law, however, these courts were required to reconceptualize the interests that stood to be vindicated by these torts, and the wrongs they identified. Suits for criminal conversation and alienation of affections were now suits alleging wrongful disturbance of the marital relationship.<sup>440</sup> Suits for seduction now sought redress for the dignitary, emotional, and economic injuries unmarried women suffered as a result of being wrongfully induced into having sex.<sup>441</sup>

In the early twentieth century, several state legislatures enacted laws abolishing these actions.<sup>442</sup> Legislators were entitled to doubt that some of these redefined torts were actually defining legal wrongs. For example, a typical claim for criminal conversation was predicated on the theory that a third party had destroyed a sound marital relationship by "seducing" one of the spouses, albeit with that spouse's willing participation. Given the problems posed by such a theory with respect to causation and damages, as well as a history of notable verdicts and evidence that a significant percentage of this litigation was extortionate or collusive, legislatures could fairly have concluded that this tort was failing to function as a tort. In other instances, as was the case for claims of seduction, the newly recast actions still articulated serious wrongs involving intentional interferences with core dignitary interests. Yet the wrong in question—that of deceiving an unmarried woman into consenting to sex—was already tortious as a battery under the law of every state.<sup>443</sup> While there might well be reasons for legislatures to mark off a special subset of batteries

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438. See PROSSER, *supra* note 290, § 101, at 919.

439. *Id.* at 932-33.

440. *Id.* at 928-29.

441. Larson, *supra* note 437, at 386.

442. *Id.* at 395.

443. PROSSER, *supra* note 290, § 18, at 121-22 (noting that fraud vitiates consent defenses to batteries involving intercourse).



with a separate cause of action, they presumably also enjoy discretion to forego that route and eliminate one of two redundant causes of action.

In short, given significant doubts about the continued functioning of claims for alienations of affections as wrongs, and the minimal degree of interference posed by the elimination of seduction claims in light of the availability of the tort of battery, courts were quite reasonable to disregard due process objections to the anti-heartbalm statutes in their typical application.<sup>444</sup>

*d. Trespasses and Takings*

Consider next the application of the proposed due process test to a variation on *Nollan*, discussed above. The analysis in the actual case turned on the idea that a condition placed on the issuance of a building permit was equivalent to a legislatively imposed easement granting beachgoers the right to cross beachfront property intentionally, and that the imposition of such an easement was a taking of private property. Now suppose that, instead, the state legislature enacts a law that established the “beachgoer defense” to actions for trespass brought by owners of beachfront property. This law differs from the *Nollan* legislation because it does not render such crossings lawful in all respects. For example, the trespasser might in principle still be punishable for criminal trespass, or the landowner might still be entitled to put up a fence around the property to dissuade persons from crossing it. Would such a law violate the right to a law of redress?

It might. The interest at stake is the interest in controlling access to tangible property owned by the victim-plaintiff. Moreover, the legislation leaves the owner subject to both accidental and purposeful invasions of his property—at least if they are undertaken for the right purpose (going to the beach). And the main aim of the legislation, it would seem, is to render nugatory property owners’ rights to exclude so that others may benefit at the expense of those owners. That fences (which could be lawfully scaled by beachgoers) and police protection are in principle available is arguably insufficient to vindicate the owners’ interest in excluding others from their properties, particularly if one presumes that police would not be making it their business to arrest beachgoing trespassers.

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<sup>444</sup> Because the anti-heartbalm statutes abolished several causes of action, and because each covers a range of misconduct, it may be that courts should find that certain applications of these statutes are unconstitutional, even though many are not.

*e. Damage Caps*

Damage caps are perhaps the provisions most closely identified with the modern tort reform movement. Not coincidentally, their propriety and constitutionality have been hotly contested. It would be misguided to suppose that the general analytic framework offered here can spit out a uniquely appropriate resolution of the difficult questions raised by caps. Rather, by isolating considerations relevant to the assessment of their constitutionality and ordering our thinking about them, this framework explains why caps pose difficult questions.

One way of seeing why damages caps pose hard questions is to see how, as applied to them, the guidelines I have identified point in opposite directions. Consider, for example, caps on damages in medical malpractice cases. On the one hand, they limit or even block claims that vindicate core interests in bodily integrity and autonomy. And, while proponents sometimes argue that they protect the integrity of the tort system by preventing juries from awarding damages on the basis of passion or prejudice, they are at least as often justified as implementing a regrettable but necessary sacrifice of victims' interests in the name of aggregate goods such as cheaper or more available health care. In both of these ways, such caps seem constitutionally suspect. On the other hand, the tort claims at issue typically allege negligence rather than wrongs involving intent, conscious indifference, or recklessness. And, at least with respect to partial caps (e.g., caps on noneconomic damages), the degree of interference with these claims seems on the surface to be moderate as compared to outright abolition. These considerations favor a finding of constitutionality.

This analytic ambivalence suggests that courts ought not to approach caps generically, but instead should consider their particular terms, as well as their consequences for particular classes of claimants. There may be good reason for distinguishing the Virginia flat cap discussed at the outset of this Article from other caps, and for distinguishing between particular applications of caps. On its face, at least, the Virginia cap seems uniquely odious. For, by limiting recovery even of out-of-pocket damages, it disavows any interest in improving the operation of tort law as a law of wrongs. Instead, it is fully prepared to pay for improved public access to medical services out of the pockets of victims with serious injuries and clear entitlements to readily quantifiable damages. Step 2 of the proposed guidelines, in a manner roughly akin to the tailoring requirement of intermediate equal protection scrutiny, suggests that the crudity of this approach is simply unacceptable, given the availability of less

regressive alternatives.<sup>445</sup> Indeed, by interfering almost gratuitously with the rights of malpractice victims, the Virginia law presents itself as an out-and-out dereliction of the legislative “duty to provide, in the administration of justice, for the redress of private wrongs.”<sup>446</sup>

Now contrast the Virginia cap with a provision limiting noneconomic damages in medical malpractice cases to \$250,000. Whatever its merits as a piece of health care policy, the latter stands a better chance of surviving constitutional scrutiny precisely because it seems on its face to leave open a meaningful avenue of redress. Yet it is conceivable that a court should strike down even this more modest form of cap as applied to classes of plaintiffs whose claims will effectively be wiped out by it. These might include, for example, plaintiffs who will not have the sort of significant economic losses that render them eligible to obtain meaningful redress, such as homemakers and the elderly.<sup>447</sup>

#### D. Implications

##### 1. Defendants’ Due Process Rights

The framework articulated and applied above is designed to determine whether a state has violated the right to a law for the redress of wrongs by not

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445. *Craig v. Boren*, 429 U.S. 190, 204 (1976). Needless to say, many other tort reform measures aimed at improving access to health care, including possibly other forms of damages caps, would pass constitutional muster. For example, if a state legislature were to remove from the tort system a certain class of potential claims, such as claims for malpractice against obstetricians, and set up instead a publicly funded program to pay medical and other expenses of children who suffer injuries at birth, there would probably be no issue. Likewise, measures aimed at improving the functioning of the tort system, such as screening panels or enhanced proof requirements on elements such as breach or causation, would also almost certainly pass muster.

446. *Mo. Pac. Ry. Co. v. Humes*, 94 U.S. 113, 134 (1876). Certain applications of statutes of repose might provide another example of tort reforms that violate the due process floor. Suppose, for example, a state law sets a ten-year statute of repose on all product liability claims running from the date of sale. Now suppose a manufacturer produces a defective product that generates serious illnesses that could not be discovered by the victims until fifteen years after use of the product. A court might, in my judgment, strike down such a statute as applied to this class of plaintiffs. Less drastically, it might read into the statute a “discovery rule” exception to save it from constitutional difficulty.

447. See Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1281-1312 (2004); see also David M. Studdert et al., *Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California*, 23 HEALTH AFF. 54, 60-62 (2004) (arguing that caps on pain and suffering damages unfairly burden certain malpractice victims).

providing such law. It does not speak to the question of the degree to which states enjoy discretion to permit the imposition of liability for wrongs. Even in the late nineteenth century, the Supreme Court routinely allowed legislatures to modify tort law in defendant-unfriendly directions by substituting strict liability for negligence, providing damage multiples, abolishing common law defenses, and enacting wrongful death statutes. As we have seen, few courts found constitutional difficulties with these reforms.<sup>448</sup> That courts granted greater room for maneuver for expansionary tort reform than for liability-contracting tort reform makes a certain amount of sense. The interest at stake among tort defendants is usually that of retaining wealth. For this reason alone, there is and should be ample room for revision of the law in ways that impose additional burdens on tort defendants.

Nonetheless, in decisions stretching from *Guy* to *Gore*, the Court has identified some due process limits on states' ability to regulate or redistribute under the guise of providing redress.<sup>449</sup> And one can certainly imagine other instances in which a defendant ought to have a winning due process objection. Consider, for example, a statute enacted by state *S* that, in the name of redressing wrongs, creates a new cause of action dubbed "strict software seller liability." It holds any software manufacturer with more than fifty employees that does business in *S* liable for injuries suffered by the faultless victims of car accidents that occur in *S*. This statute is instrumentally rational as to compensating car accident victims. Given that bargains can take place under the shadow of liability, it might also be rational as a means of deterrence. (For example, the software companies can pay auto manufacturers to make more crashworthy cars.) Nonetheless, even if such a law would survive rational basis analysis, it would be unconstitutional simply because the justification for making a software company transfer assets to a car accident victim quite evidently has nothing to do with the notion that the company wrongfully injured the victim.

## 2. Federal Tort Reform

This Article has not discussed the issue of limits on Congress's power to engage in tort reform. Those limits might come from various sources, including restrictions built into its enumerated powers, as well as the Seventh

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448. See *supra* text accompanying notes 222-227. On wrongful death statutes, see Witt, *supra* note 216; see also *Owensboro & N. Ry. Co. v. Barclay's Adm'r*, 43 S.W. 177, 178-79 (Ky. Ct. App. 1897) (upholding a wrongful death act against a due process challenge); *Carroll v. Mo. Pac. Ry. Co.*, 88 Mo. 239, 246-47 (1885) (same).

449. See *supra* text accompanying notes 228-232, 342-346.

Amendment right to a jury trial. As a matter of original understanding, the Fifth Amendment's Due Process Clause probably was not meant to guarantee a right to a law of redress.<sup>450</sup> Yet, if this is so, it is only because the Framers did not contemplate—and in fact sought to avoid implying—that Congress would be making or reforming tort law. Today Congress looms much larger in our political system, and Article I has been interpreted expansively. Even under *United States v. Lopez*,<sup>451</sup> it seems highly unlikely, for example, that a court would deny Congress the power to enact national products liability law. With Congress now empowered to enter the business of tort reform, it would seem logical that constitutional restrictions previously addressed to the states should be brought to bear on Congress through reverse incorporation. In fact, the Supreme Court long ago acknowledged the need for this sort of symmetry in decisions like *Taylor* and *Truax*.<sup>452</sup>

Application of the due process floor guidelines articulated above may shed some much needed light not only on Congress's ability to engage overtly in tort reform, but also on the preemptive effect of federal laws and regulations. Apart from obsessing over a snippet of legislative text, as the Supreme Court has done in its ERISA preemption jurisprudence,<sup>453</sup> the courts ought to ask what sort of interest is being protected by the underlying tort cause of action against what sort of interference. They should then inquire about the degree to which the federal statute or regulation undermines the protections of the tort action, and the degree to which those burdened by its loss will benefit from the federal scheme that has been put in place.<sup>454</sup> Even if the application of this test results in only a few decisions declining to give preemptive effect to federal laws, it might serve as a signal to Congress and federal agencies that they are obligated to consider the effects of their enactments on potential tort claimants.

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450. See *supra* text accompanying notes 181-186.

451. 514 U.S. 549, 559-60 (1995).

452. See *supra* text accompanying notes 225-226, 251.

453. See generally Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How To Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L. REV. 457 (2003) (criticizing as formalistic the Court's ERISA-preemption decisions).

454. Apart from the issues posed to judges in reviewing legislation under due process principles, there is the additional point that legislatures, as the bearers of the duty described herein, ought to be mindful of this duty as they legislate. A legislature that goes about immunizing HMOs from liability for negligent coverage decisions, if it is acting responsibly, ought to be thinking about what it must do for those who will suffer injuries as a result of such decisions.

3. *Structural Due Process*

I suggested above that it might be helpful to conceive of the right to a law of redress as one of a special set of due process rights that entitle individuals to certain governmental structures and certain bodies of law. If this notion of structural due process is sound, it will encompass more than just tort law, understood as a law for the redress of wrongs. Contract, criminal, family, and property law likewise seem plausible candidates for inclusion. To make this claim is not to treat as natural or neutral a set of baselines for constitutional analysis arbitrarily drawn from the common law. Quite the opposite, it is to recognize and self-consciously theorize a connection between private and public law. Indeed, one of the potential attractions of the concept of structural due process is that it provides a framework for bridging the chasm that has emerged between these two broad fields. Our tort law looks like it does because it is grounded in the same notions of right as our constitutional law, and there is no reason to think that this correlation is the product of some sort of mistake by foolish turn-of-the-twentieth-century judges. As even a quick read of Blackstone reveals, there is a long tradition of holistic thinking in Anglo-American constitutional law, one that treats private law not as sub- or non-constitutional, but as a part of an overall constitutional order.

Apart from reunifying public and private law, the concept of structural due process might explain and justify other sorts of claims that do not fit neatly into conventional categories. To take one example, the idea of an individual's right to vote within a non-gerrymandered district is difficult to pin down within a conventional negative rights framework.<sup>455</sup> Perhaps it would be less mysterious if the right was understood as an individual entitlement to certain political institutions, operating in accordance with certain norms or principles. The right to a vote that takes place under appropriate conditions, one might argue, is a guarantee of structure of the same sort as the right to a law for the redress of private wrongs, and the right to a government of separated powers. Each is a modern-day articulation of what Blackstone called "auxiliary subordinate rights" – rights to structures essential to the proper functioning of our liberal-democratic government.<sup>456</sup>

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455. See Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 578 (2004) (noting the poor fit of anti-gerrymandering claims into the traditional rights frameworks and suggesting that the issue be reframed in terms of governmental structure).

456. See *supra* text accompanying notes 132-136.

#### 4. *Constitutional v. Constitutive: Eliminating the Law of Redress of Wrongs*

Recognition of a due process right to a law of redress would set judicially enforceable constraints on how legislatures may go about tort reform. However, if they proceed in the right ways (e.g., by setting up meaningful alternative remedial schemes) they perhaps can succeed in supplanting tort law entirely. Thus, it is possible to imagine that our legal system will one day operate with some combination of regulation and insurance schemes that take the place of a law of redress. Nothing I have said here necessarily suggests that a post-tort society would be, on balance, a worse society to live in, or a less just society, or an illiberal society. This Article does suggest, however, that this imagined polity would be fundamentally different from our own. In Blackstone's terms, by undertaking this sort of transition, government would be reconstituting the polity. At a minimum, then, legislators, courts, and citizens must consider carefully its potential implications before embracing this possibility as a desirable development. Whatever its advantages, a society without a law for the redress of private wrongs may be a society more prone than ours to accept a relatively thin, Holmesian notion of legal obligation, a less robust civil society, and a more statist conception of how government interacts with its citizens. And because its law will no longer assign downside responsibility to individual actors for wrongfully caused harms, it may also be a society that is less apt to assign upside responsibility to individuals who claim to have merited or earned various goods.

#### CONCLUSION

Under one name or another, a law for the redress of private wrongs has been a part of Anglo-American law since before the advent of liberal-democratic government. That law has varied enormously in its substantive, procedural, evidentiary, and remedial dimensions, and in its political, economic, and cultural significance. This Article aims to make sense of this historical record of discontinuity within a continuous tradition. The law of redress is basic to our conception of liberal-constitutional government, and was built into the fabric of our legal system. Yet the proper description of its constitutional status must accommodate its protean nature, as well as the obligation of government to attend to other vital concerns. Critics of judicial decisions striking down modern tort reform statutes are correct to insist that governments have considerable leeway in determining how to discharge the duty that corresponds to the right to a law of redress. They are wrong, however, to suppose that the state and federal governments enjoy plenary power in this area. Courts are entitled to ask, and should ask, whether a given

reform unduly burdens the ability of individuals to vindicate their rights and interests by obtaining redress from others who have wrongfully injured them. If a reform does so, courts may strike it down as a violation of the due process right to a law for the redress of private wrongs.