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Erratum
Law; Criminal Law; Criminal Procedure; Supreme Court of the United States; Constitutional Law; Fourteenth Amendment; Legal Remedies

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WRONGFUL CONVICTIONS, CONSTITUTIONAL REMEDIES, AND *NELSON V. COLORADO*

*Michael L. Wells**

INTRODUCTION

This Article examines the U.S. Supreme Court's *Nelson v. Colorado*[1] opinion, in which the Court addressed the novel issue of constitutional remedies for persons wrongly convicted of crimes. Governments routinely deprive criminal defendants of both liberty and property and do so before giving them a chance to appeal their convictions and sentences.[2] In addition to imprisoning convicted individuals, the state often imposes charges on them, in the form of court fees, probation supervision fees, fines, and restitution.[3] When a conviction is overturned, the state typically refunds these monetary exactions but seldom compensates for the loss of liberty.[4]

In *Nelson*, the Supreme Court addressed an unusual case in which the state did not return the money.[5] The Colorado Supreme Court held that a Colorado statute called the Exoneration Act[6] provided the sole avenue for obtaining a refund.[7] Under that statute:

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1. 137 S. Ct. 1249 (2017).
2. *See, e.g.*, GA. CODE ANN. § 17-10-1(a)(1) (2017) ("[E]xcept in cases in which life imprisonment, life without parole or the death penalty may be imposed, . . . the judge . . . shall prescribe a determinate sentence"); *id.* § 17-10-9 (instructing on the procedure for calculating a sentence where the defendant "has been incarcerated pending the prosecution of an appeal to any court"); *id.* § 17-11-1 ("If convicted, judgment may be entered against the defendant for all costs accruing in the committing and trial courts and by any officer pending the prosecution.").
3. *See generally* Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/MTK2-DDQX] (describing the trend of increasing fees associated with a criminal prosecution).
4. *See, e.g.*, CAL. PENAL CODE § 1262 (West 2018); DEL. CODE ANN. tit. 11, § 4103(a) (2018); MISS. CODE ANN. § 99-19-73 (2017); N.Y. PENAL LAW § 60.35(4) (McKinney 2018); TEX. CODE CRIM. PROC. ANN. art. 103.008(A) (West 2017); *see also* David G. Post, Nelson v. Colorado*: New Life for an Old Idea?*, 2016 CATO SUP. CT. REV. 205, 207–09.
5. *Nelson*, 137 S. Ct. at 1252.
6. COLO. REV. STAT. §§ 13-65-101, 13-65-102, 13-65-103 (2017), *invalidated by* Nelson v. Colorado, 137 S. Ct. 1249 (2017).
7. People v. Nelson, 362 P.3d 1070, 1071 (Colo. 2015), *rev'd*, 137 S. Ct. 1249.

> a person who has been convicted of a felony . . . and sentenced to a term of incarceration as a result of that conviction and has served all or part of such sentence . . . may be eligible for compensation . . . upon a finding that the person was actually innocent of the crime for which he or she was convicted.[8]

The statute went on to state that, in the event the claim is contested by the state, "the burden shall be on the petitioner to show by clear and convincing evidence that he or she is actually innocent of all crimes that are the subject of the petition, and that he or she is eligible to receive compensation pursuant to this article."[9] With only Justice Thomas dissenting, the Court held that Colorado's Exoneration Act offended the Fourteenth Amendment because it deprived the plaintiff Shannon Nelson, who had obtained reversal of her conviction on appeal, of property without due process of law.[10]

Justice Ginsburg's opinion for the Court focuses largely on how to apply the procedural due process test established in the case of *Mathews v. Eldridge*,[11] under which determining the process that is due depends on a balancing of interests.[12] Applying *Mathews*, the *Nelson* Court held that the state of "Colorado's scheme fails due process measurement because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds under the Exoneration Act is unacceptable, and the State has shown no countervailing interests in retaining the amounts in question."[13] Notably, and in keeping with the general practice of the states, the Court also appeared to recognize a basic distinction between compensating defendants for loss of property and for loss of liberty.[14]

The end result in *Nelson* will satisfy nearly everyone's sense of basic justice, at least insofar as the monetary refund is concerned. Still, the case is interesting not for its outcome but because the Court's analysis touches on, but fails to fully engage with, subtle and difficult questions of constitutional law.

This Article examines three important aspects of the case—outside of the procedural due process balancing question—that receive little, if any, attention in the Court's opinion. Part I shows that the Court's procedural due process analysis skips over the logical first step and doctrinally harder question of whether Nelson had a constitutionally protected property interest once Colorado took the money pursuant to her conviction. On this point, Justice Ginsburg seems to set aside the Court's previously settled doctrine about the nature and source of property protected by the Due Process Clause.[15] Instead, the Court opts for an ad hoc definition of property, perhaps

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8. COLO. REV. STAT. § 13-65-102(1)(a).
9. *Id.* § 102(6)(b).
10. *Nelson*, 137 S. Ct. at 1257–58.
11. 424 U.S. 319 (1976).
12. *Id.* at 348.
13. *Nelson*, 137 S. Ct. at 1257–58.
14. *Id.* at 1257.
15. *Id.* at 1257–58.

because application of the settled doctrine may have allowed Colorado to keep the money, a result which seven Justices very much wanted to avoid.[16]

Part II argues that the Court could have and should have taken a different analytical pathway toward the outcome it reached. In particular, Part II describes a rationale for reversal that would have resulted in return of the money without sowing confusion in Fourteenth Amendment doctrine. This analysis hinges on the rules governing Supreme Court review of state court judgments. Ordinarily, the Court will not examine the state law grounds for a state court's decision in such cases.[17] An exception to this rule exists, however, for cases in which the relied-upon state law undermines federal rights and lacks fair support in prior state law.[18] The Supreme Court could readily have found that the Colorado court's interpretation of the Exoneration Act met the requirements of this exception, thus allowing the Court to reverse the lower court's judgment without relying upon a new and controversial notion of the meaning of property.

Part III turns to the Court's distinction between deprivations of property and liberty. *Nelson* holds that "[t]o comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated."[19] Some of Justice Ginsburg's reasoning strongly suggests that there is no due process right to obtain redress for the lost liberty.[20] Yet the Fourteenth Amendment seems to draw no such distinction between liberty and property.[21] It guarantees "due process" when the state deprives a person of "life, liberty, or property."[22] Part III asks whether there are grounds upon which a backward-looking money-damages remedy can be justified for the deprivation of property alone, or whether the liberty/property distinction is simply an arbitrary one.

I. PROPERTY AND THE FOURTEENTH AMENDMENT

Shannon Nelson was convicted of physically and sexually abusing her children.[23] She paid restitution and court costs and served prison time while her appeal was pending.[24] After obtaining reversal of her conviction, she won an acquittal on retrial.[25] But when Nelson sought restoration of the money she had paid the state during her trial and incarceration, Colorado officials refused her request.[26] The state maintained, and the Colorado Supreme Court agreed,[27] that the Exoneration Act provided the sole means

16. *See* discussion *infra* Part I.B.
17. *See infra* Part II.
18. *See infra* Part II.
19. *Nelson*, 137 S. Ct. at 1258.
20. *See, e.g.*, *id.* at 1257.
21. U.S. CONST. amend. XIV, § 1.
22. *Id.*
23. *Nelson*, 137 S. Ct. at 1253.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See* People v. Nelson, 362 P.3d 1070, 1079 (Colo. 2015), *rev'd*, 137 S. Ct. 1249.

to obtain a refund.[28] Nelson and Louis Madden—the defendant in a companion case decided in the same opinion—were not entitled to restoration, as they had not attempted to meet the requirements of the Colorado statute.[29]

With only Justice Thomas dissenting, the Court held that Colorado had to refund the money notwithstanding Nelson's failure to comply with the Exoneration Act.[30] Justice Ginsburg set forth both the issue and the holding at the beginning of the opinion and stated, "When a criminal conviction is invalidated by a reviewing court and no retrial will occur, is the State obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction? Our answer is yes."[31] Justice Ginsburg dismissed the Exoneration Act as a constitutionally insufficient remedy.[32] As she put the key point, by limiting relief to persons convicted of felonies, and by requiring a defendant to "prove her innocence by clear and convincing evidence to obtain the refund," the scheme could "not comport with due process."[33]

The problem with the *Nelson* Court's reasoning is that it equates Fourteenth Amendment property with common law property. The difficulty with this interpretive move is that it overlooks well-settled Fourteenth Amendment doctrine.[34] When the issue is procedural due process, as the Court said it was in *Nelson*, the Court usually declines to equate Fourteenth Amendment and common law notions of property.[35] And this difference, had it been recognized, might well have dictated a different result in *Nelson*.

This Part first addresses the difference between common law property and property as conceived by Fourteenth Amendment jurisprudence. It then goes on to discuss the *Nelson* decision in light of this jurisprudence.

*A. The Pre-*Nelson *Distinction Between Common Law and Fourteenth Amendment Property*

Justice Ginsburg seemingly took it as self-evident that the money at issue in *Nelson* was property for Fourteenth Amendment purposes.[36] Indeed, the only point in the opinion where she touched on the issue at all was in applying the balancing test of *Mathews v. Eldridge*, a test which typically does not come into play at all unless the Court first finds that a deprivation of property (or life or liberty) has occurred.[37] The *Mathews* test requires balancing "[t]he

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28. *Nelson*, 137 S. Ct. at 1253.
29. *Id.* at 1257.
30. *Id.* at 1257–58.
31. *Id.* at 1252.
32. *Id.* at 1255.
33. *Id.*
34. *See infra* Part I.A.
35. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 756–57 (2005) (stating that the determination of whether a Fourteenth Amendment property interest exists, "despite its state-law underpinnings, is ultimately one of federal constitutional law").
36. *See Nelson*, 137 S. Ct. at 1257.
37. *See Gonzales*, 545 U.S. at 756 ("The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.'").

private interest affected[,] . . . the risk of erroneous deprivation of that interest through the procedures used[,] and . . . the governmental interest at stake."[38]

In analyzing the first element of the *Mathews* test, the *Nelson* Court observed that persons such as Nelson "have an obvious interest in regaining the money they paid to Colorado."[39] Under the Court's precedents, however, it is not at all "obvious" that the state deprived Nelson of her "property" in a constitutionally relevant sense. The Court has not ordinarily defined "property" by reference to ordinary language and conventional understandings and instead finds that the word may be broader or narrower than its use in everyday language depending on the context under which the property issue arises.[40]

Board of Regents of State Colleges v. Roth[41] is the Supreme Court's leading case on the nature and content of "property" as used in the Due Process Clause. The plaintiff in *Roth* was a teacher on a one-year contract at a public college who claimed that he was entitled to due process in connection with nonrenewal.[42] The general issue raised by the case was whether, and under what circumstances, a variety of government benefits would qualify as property entitled to due process protection.[43] Building on recent theorizing on what was becoming known as "new property" claims,[44] the Court declared that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."[45] In particular:

> To have a property interest in a benefit, a person . . . must . . . have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined . . . . Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.[46]

Under this framework, the test for whether a person holds a property interest in a benefit is whether the person has a "legitimate claim of entitlement" under state or federal statutory or common law to getting or

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38. *Nelson*, 137 S. Ct. at 1255.

39. *Id.* Although the Court does not address the issue of whether state sovereign immunity blocks a judicial order instructing it to refund the money, the holding clearly, if implicitly, rejects the defense. Space constraints preclude a thorough analysis of this issue. One possible basis for rejection of sovereign immunity in this context is that the state has waived immunity by initiating criminal prosecution and exacting the money in the course of the prosecution. *See generally* Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613 (2002) (holding that that a state may wave its sovereign immunity by its conduct in litigation).

40. *See generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

41. 408 U.S. 564 (1972).

42. *Id.* at 566–67.

43. *Id.*; *see also* Henry Paul Monaghan, *Of "Liberty" and "Property,"* 52 CORNELL L. REV. 405, 436–37 (1977).

44. *See* Merrill, *supra* note 40, at 918.

45. *Roth*, 408 U.S. at 571–72.

46. *Id.* at 577.

keeping that benefit.[47] For example, it is settled that an employee who may only be fired "for cause" holds a property interest in the job.[48] By contrast, the plaintiff in *Roth* was a college teacher on a one-year contract.[49] He thus had no property interest in his job because he had no "legitimate" expectation of keeping it under applicable state law rules.[50] Accordingly, he was not entitled to a due process hearing in connection with his nonrenewal.[51]

The Exoneration Act aside, there were grounds for finding that Nelson had a state-created property interest in restoration of the money she paid. Citing *Toland v. Strohl*,[52] Nelson's brief to the Court asserted that, before the Colorado Supreme Court's construction of the Exoneration Act, the general practice was to refund money upon reversal of a conviction.[53] The state's brief acknowledged the practice but disputed its generality.[54] As an example, the state pointed to the case of *People v. Noel*,[55] where the Colorado Court of Appeals held that money paid for probation supervision services would not be refunded.[56] The state also identified cases beyond *Noel* in which refund claims were rejected, though most of these authorities were dated and came from other jurisdictions.[57] In any event, the identified exceptions to refund availability would not undermine Nelson's "property" claim. The key issue was whether the exceptions were wide ranging enough to justify a finding that restoration is simply a matter within the discretion of state officers and thus not a property right at all.

Relevant considerations in determining the content of state-created property include not only the formal law but also widespread practices. In *Perry v. Sindermann*,[58] decided the same day as *Roth*, another college teacher named Sindermann, also on a one-year contract and summarily denied a renewal, had more success than Roth.[59] In Roth's case, "the terms of [his] appointment secured absolutely no interest in re-employment for the next year."[60] Nor was there any "state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it."[61] By contrast, Sindermann had alleged that he could show that "the college had a *de facto* tenure program, and that he had tenure under that

47. *Id.*
48. *See* Gilbert v. Homar, 520 U.S. 924, 928–29 (1997).
49. *Roth*, 408 U.S. at 566–67.
50. *Id.* at 578–79.
51. *Id.*
52. 364 P.2d 588 (Colo. 1961).
53. Brief for Petitioners at 2–3, Nelson v. Colorado, 137 S. Ct. 1249 (2017) (No. 15-1256).
54. Brief for Respondent at 15, *Nelson*, 137 S. Ct. 1249 (No. 15-1256).
55. 134 P.3d 484 (Colo. App. 2005).
56. *Id.* at 485–86.
57. Brief for Respondent, *supra* note 54, at 18–22.
58. 408 U.S. 593 (1972).
59. *Id.* at 594–95.
60. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 578 (1972).
61. *Id.*

program."[62] The general principle underlying the *Sindermann* holding is that property can be created by "the existence of rules and understandings."[63]

In the decades after *Roth* and *Sindermann*, courts have recognized state-created property interests in a variety of government benefits and jobs.[64] Still, it is clear that Fourteenth Amendment property does not include benefits that are only available at the discretion of government authorities.[65] That principle proved decisive in *Town of Castle Rock v. Gonzales*,[66] where a woman sought police intervention after her former husband came to her home in violation of a protective order she had obtained against him.[67] Ultimately, after her pleas were ignored, her former husband kidnapped and murdered her children.[68] Despite the language in the order that seemed to mandate police intervention, the Court rejected the property claim, noting that "[a] well established tradition of police discretion has long co-existed with apparently mandatory arrest statutes."[69]

The application of these principles to Nelson's case is unclear. The state-created property approach was not litigated in *Nelson*.[70] In fact, it was not even mentioned by the Supreme Court.[71] The general practice throughout the nation for a long time and in Colorado before this case, or at least before Colorado's enactment of the Exoneration Act in 2013, lent support to the notion that a property interest generated by state law did exist.[72] In the *Nelson* opinion, Justice Ginsburg herself noted that "[p]rior to the Exoneration Act, the Colorado Supreme Court recognized the competence of courts, upon reversal of a conviction, to order the refund of monetary exactions imposed on a defendant solely by reason of the conviction."[73] But none of this seems to matter—or at least to matter much—in applying the principles of *Roth* and *Sindermann*. Instead, for the *Nelson* Court, the decisive issue concerned the impact of the Exoneration Act, since it set forth controlling state law at the time the alleged deprivation of Nelson's property occurred.[74]

Put simply, federal law does not oblige states to recognize any particular set of property interests, at least for the protection provided by procedural

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62. *Sindermann*, 408 U.S. at 600.

63. *Id.* at 602.

64. *See, e.g.*, SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 111–12 (4th ed. 2015) (collecting cases).

65. *See infra* notes 66–69.

66. 545 U.S. 748 (2005).

67. *Id.* at 751–54.

68. *Id.* at 754.

69. *Id.* at 760.

70. *See generally* Brief for Petitioners, *supra* note 53; Brief for Respondent, *supra* note 54.

71. *See generally* Nelson v. Colorado, 137 S. Ct. 1249 (2017).

72. *See id.* at 1254 n.5 (citing Toland v. Strohl, 364 P.2d 588 (Colo. 1961)); *see also* N.Y. PENAL LAW § 60.35(4) (McKinney 2018) ("Any person who has paid a mandatory surcharge, sex offender registration fee, DNA databank fee, a crime victim assistance fee or a supplemental sex offender victim fee under the authority of this section based upon a conviction that is subsequently reversed . . . shall be entitled to a refund.").

73. Nelson v. Colorado, 137 S. Ct. 1249, 1254 n.5 (2017) (citing *Strohl*, 364 P.2d at 588).

74. *Id.* at 1255.

due process.[75] A state may both opt against creating a property right in a particular benefit and decline to continue to create property in a given benefit.[76] Although a state cannot eliminate property rights that already exist, it may, for example, stop issuing new employment contracts that create an expectation of continued employment or decline to renew a business license when its term expires.[77] Under this principle, the Exoneration Act seemed to present an insurmountable hurdle for Nelson and Madden. By its terms, it limited recovery to persons convicted of felonies and required the applicant to prove innocence by clear and convincing evidence.[78] These provisions seem to eliminate any legitimate expectation of recovery for costs related to misdemeanor convictions and for criminal defendants who obtain reversal but cannot meet the clear and convincing test. And, due to the timing of the relevant proceedings, Nelson had no basis for reliance on the previously available refund practice. As construed by the Colorado Supreme Court, the Exoneration Act provided the sole means available to obtain compensation for wrongful convictions.[79] It thus seems entirely sensible to say that any property interest that Nelson had was hemmed in by the requirements of the Act, a process with which she had not even attempted to comply.

B. Property Under Nelson

In *Nelson*, both the Colorado Supreme Court and the U.S. Supreme Court ignored the *Roth* framework.[80] Justice Ginsburg's approach may simply echo the history of the *Nelson* litigation in the Colorado courts, although a remand on the property issue would seem to have been the more appropriate response. An alternative explanation for bypassing *Roth* is that the majority recognized that under the *Roth* test, the Exoneration Act would oblige a finding of no property and no refund—a result it wished to avoid. On this view, seven Justices were determined to see to it that Nelson and Madden received refunds despite the Exoneration Act. With that goal in mind, the Court came up with an ad hoc approach to the property question, a move reminiscent of other instances in which the Court has issued "inconsistent pronouncements" as to "the meaning of property under federal law."[81]

The Court in *Nelson* did not acknowledge its departure from *Roth*.[82] It also did not suggest in any way that it was intentionally endorsing an alternative to the *Roth* test.[83] As a result, one has to sift through the language

75. *See* Merrill, *supra* note 40, at 920–22 (describing the Court's "positivist" approach).

76. *See, e.g.*, Price v. Bd. of Educ., 755 F.3d 605, 610–11 (7th Cir. 2014).

77. *See, e.g.*, *id.*; *see also* Wojcik v. City of Romulus, 257 F.3d 600, 603 (6th Cir. 2001) (business licenses).

78. *See* COLO. REV. STAT. § 13-65-102 (2017).

79. *See* People v. Madden, 364 P.3d 866, 870 (Colo. 2015), *rev'd sub nom.* Nelson v. Colorado, 137 S. Ct. 1249 (2017); People v. Nelson, 362 P.3d 1070, 1076 (Colo. 2015), *rev'd*, 137 S. Ct. 1249.

80. *See Nelson*, 137 S. Ct. at 1254 n.5. *See generally Madden*, 364 P.3d 866; *Nelson*, 362 P.3d 1070.

81. Merrill, *supra* note 40, at 889.

82. *See generally Nelson*, 137 S. Ct. 1249.

83. *Id.*

of the opinion to find clues as to what, in substance, the Court was doing. Bits and pieces of Justice Ginsburg's opinion suggest that the property interest she had in mind reflected a common sense, intuitive notion of "property."[84] On this view, everyone knows that the money in a person's pocket or bank account, if legally obtained, is that person's property. Thus, the starting point was Nelson's uncontested ownership of the money before her conviction. In other words, the case concerned "the *continuing* deprivation of property after a conviction has been reversed."[85] Nelson thus sought "*to get [her] money back*"[86] because she had an "interest in *regaining [her] funds*."[87] In turn, with the conviction overturned, "the State . . . has zero claim of right"[88] to the funds. In short, when Colorado took the money pursuant to Nelson's conviction, the state obtained only a defeasible interest in it. Once the conviction had been overturned, Colorado's basis for taking the money had disappeared, leaving Nelson as the only other stakeholder.

The presumption of innocence bolstered the reasoning. Between the moment of her conviction and its eventual reversal, Nelson retained the presumption of innocence, itself a constitutional limit on the state's power.[89] Nelson and Madden, according to Justice Ginsburg, ended up in the same position as someone who was never convicted at all because "once [the] convictions were erased, the presumption of their innocence was restored."[90] The state of Colorado asserted that the now-invalid conviction allowed the state to keep the money.[91] But the State of "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions."[92]

This line of reasoning tracked what Professor Thomas Merrill has called a "natural-property strategy," under which "the Constitution is a compact designed to protect certain rights of property that self-evidently belong to all persons."[93] Though some might say that those convicted of criminal charges are different from other persons, the presumption of innocence cuts sharply against the notion that Nelson, once her conviction was reversed, was differently situated from anyone else. Thus, there was a taking of her property because concluding otherwise would not be "natural." Notably, this approach veered sharply away from *Roth* by diminishing—in a sweeping way—the role of state statutes in defining Fourteenth Amendment

84. *Id.* at 1255–57.
85. *Id.* at 1255 (emphasis added).
86. *Id.* at 1256 (emphasis added).
87. *Id.* at 1257 (emphasis added).
88. *Id.*
89. *See* U.S. CONST. amend XIV, § 1; *see also, e.g.*, *In re* Winship, 397 U.S. 358, 368 (1970) (striking down a New York Family Court finding of guilt against a juvenile defendant where the state court's procedure failed to require proof beyond a reasonable doubt for every element of a crime).
90. *Nelson*, 137 S. Ct. at 1255.
91. *Id.*
92. *Id.* at 1256.
93. Merrill, *supra* note 40, at 943. Merrill introduces the idea for the purpose of a thorough analysis of alternatives, not as a description of the Court's doctrine or as a recommendation. *Id.* at 942–44.

property.[94] In effect, according to Justice Ginsburg, Colorado's Exoneration Act was irrelevant as to the existence and scope of any property interest.[95] That statute is merely the state's procedure for obtaining relief, not a mechanism redefining property.[96] And, as such, the procedure failed to meet the test of the Due Process Clause.[97]

As Professor Merrill notes, a natural-property model ignores the Court's own doctrine on the content of property for purposes of the Fourteenth Amendment.[98] In addition, "[I]t is far from clear that it would be coherent or desirable to speak of a set of core property rights protected directly by the Constitution itself. The basic problem is that property seems always to entail a large component of positive regulation."[99] As for the property right recognized in *Nelson*, the practical significance of these objections depends on future developments.

The lack of a sharp split among the Justices—as well as the absence of any overt questioning of *Roth*—suggests that *Nelson*'s conception of property was offered as a case-specific alternative to *Roth*'s state-law-based approach.[100] The generally conservative composition of the current Court makes it unlikely that the *Roth* doctrine will be threatened any time soon by *Nelson*. The likely explanation for Justice Ginsburg's approach in *Nelson* is that the Court defined "property" on an ad hoc basis for the sake of getting the desired result in that one case. The problems raised by a general "natural rights" approach do not arise so long as the *Nelson* doctrine can be cabined by tying it to the narrow circumstances of invalidated criminal convictions.

But the ruling will probably disrupt current practice even if the Court manages to confine *Nelson*'s conception of property to that context. Even in the invalidated-conviction context, there may be good reasons to deny a refund in some circumstances, but those reasons may not be good enough to overcome a doctrine based on the Due Process Clause. For example, in

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94. *See supra* Part I.A.

95. *See Nelson*, 137 S. Ct. at 1255 ("Because no further criminal process is implicated, *Mathews* 'provides the relevant inquiry.'").

96. *See id.*

97. Aside from the natural rights element, this reasoning echoes that of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). *Loudermill* established that "[t]he categories of substance and procedure are distinct" and that "'[p]roperty' cannot be defined by the procedures provided for its deprivation." *Id.* at 541. Perhaps the Court's opinion in *Nelson* is meant to be an application of the *Loudermill* principle. Under this view, the Exoneration Act is merely a procedure for obtaining restoration rather than a substantive limit on the property rights of persons convicted after its enactment. One problem with this view of *Nelson*, however, is that the Court's opinion does not develop its thesis. Another is that the Exoneration Act's terms both expand recovery (to include compensation for time spent in prison) and puts limits on recovery (to persons who are convicted of felonies, sentenced to imprisonment, and have served part of the sentence of imprisonment). *See* COLO. REV. STAT. § 13-65-103 (2017). These features, along with the imposition of a "clear and convincing proof of innocence" burden on the claimant, seem better characterized as the articulation of a substantive right rather than as a procedure for the accurate resolution of traditional restoration-after-reversal cases like Nelson's.

98. *See* Merrill, *supra* note 40, at 943–44.

99. *Id.* at 944.

100. *See supra* Part I.A.

People v. Noel,[101] a conviction was vacated after the defendant had paid a $630 probation-supervision fee.[102] The Colorado Court of Appeals declined to order a refund, mainly "because the purpose of probation is primarily rehabilitative, and because defendant could have benefited from the supervisory services she received and paid for."[103] For many of us, that reasoning makes sense. Yet *Nelson*'s due process rationale may not allow for such a distinction because the constitutional presumption of innocence applied to Noel no less than it applied to Nelson. For Nelson and Madden, "once [their] convictions were erased, the presumption of innocence was restored."[104] At that point, "Colorado has no interest in withholding from Nelson and Madden money to which the State currently has zero claim of right."[105]

In coming years, courts will face potentially thorny issues as to the scope of *Nelson*: Does it apply to a case like *Noel*? Perhaps not, because the state has contributed something of value to Noel. Would it apply to a case in which an admittedly guilty defendant obtains release on account of admission of evidence in violation of the Fourth Amendment exclusionary rule? Are there any limits on its application?[106]

II. SUPREME COURT REVIEW AND THE "ADEQUATE AND INDEPENDENT STATE GROUND" DOCTRINE

Justice Ginsburg's ad hoc treatment of the Fourteenth Amendment raises a question: Could the Court have offered an alternative, and more convincing, justification for the outcome? As it turns out, the Court had a doctrinal route to providing a refund to Nelson without ignoring its settled rules on the content of "property" protected by the Due Process Clause. This analytical pathway involves navigating some esoteric features of Supreme Court doctrine on the proper scope of its review of state court judgments. Under a core principle of this field of law, referred to as the "adequate and independent state ground" doctrine, the Court routinely refuses to examine state law grounds for a state court's decision.[107]

The adequate and independent state ground doctrine may have influenced the petitioners' litigating strategy in *Nelson*. The Court took the Colorado Supreme Court's state law ruling as a given, and thus did not challenge the

101. 134 P.3d 484 (Colo. App. 2005).

102. *Id.* at 485.

103. *Id.* at 487; *see also* Brief for Respondent, *supra* note 54, at 20–22 (discussing a variety of equitable considerations courts from a variety of jurisdictions have advanced in declining refunds).

104. Nelson v. Colorado, 137 S. Ct. 1249, 1255 (2017).

105. *Id.* at 1257.

106. The *Nelson* Court does seem to leave the issue open, if only by rejecting the notion that there were any equitable considerations on Colorado's side of these particular cases. *See id.*

107. *See* Harris v. Reed, 489 U.S. 255, 260 (1989) ("This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.").

Colorado court's interpretation of the Exoneration Act.[108] But there is an exception to the general rule of nonreview of state law grounds of decision, and this exception would have provided a viable rationale for reversing the Colorado Supreme Court.[109] Although this issue was not briefed or argued by the parties, it could be that the Colorado court misread the Exoneration Act by treating it as providing the sole basis for recovery of money by persons such as Nelson.[110] On this better view, the Act was not meant to operate in this way and would have instead provided a property right to restoration of Nelson's payments under a straightforward application of the traditional *Roth* test.

This Part begins with a discussion of the development of the adequate and independent state ground doctrine and the Supreme Court decisions that have helped to shape its application and exceptions. It then discusses how this understanding of the doctrine *could* have applied in the *Nelson* case to better align the decision with the Supreme Court's prior property jurisprudence without disturbing the outcome for the plaintiff.

A. The Adequate and Independent State Ground Doctrine

From the perspective of Supreme Court review of state court judgments, a key feature in *Nelson* was that the Colorado court ruled that the state's Exoneration Act provided the sole means by which Nelson and Madden could make a claim to recover any money.[111] Many cases that come to the Supreme Court from state courts include both state and federal issues.[112] But the Court does not ordinarily review the state law issues.[113] The Judiciary Act of 1789 explicitly limited Supreme Court review to federal issues.[114] Although an 1867 amendment to the Act omitted that limit,[115] the Court in *Murdock v. City of Memphis*[116] declared that it would continue to follow this practice.[117] *Murdock* ruled that "[t]he State courts are the appropriate tribunals . . . for the decision of questions arising under their local law,

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108. *See generally Nelson*, 137 S. Ct. 1249.

109. *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1924 (2003) (discussing the "deeply embedded understanding that state-court determinations of state law in federal cases are open to some reexamination by the Supreme Court; certainly so when, in Herbert Wechsler's language, the 'existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law.'" (quoting Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1054 (1977))).

110. *See* People v. Nelson, 362 P.3d 1070, 1076 (Colo. 2015), *rev'd*, 137 S. Ct. 1249.

111. *See Nelson*, 137 S. Ct. at 1254.

112. *See* RICHARD H. FALLON JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 488–89 (7th ed. 2015) (discussing the "interstitial nature of federal law").

113. *See generally* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

114. Judiciary Act of 1789, ch. 517, 26 Stat. 826.

115. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 1257 (2012)).

116. 87 U.S. 590 (1875).

117. *Id.* at 638.

whether statutory or otherwise."[118] Six decades after *Murdock*, the policy behind this holding was bolstered by *Erie Railroad Co. v. Tompkins*,[119] which held that the source of authority for state law is the state's own lawmaking institutions—its legislature and its courts.[120] In the ordinary case, Supreme Court review of state law is thus incompatible with the *Erie* principle. If *Nelson* were an ordinary case, the Court would take the Colorado Supreme Court's reading of the Exoneration Act as authoritative.

But *Nelson* was not an ordinary case because—when thoughtfully considered—it brings into play an exception to the general *Murdock* rule. The exception covers situations in which the state creates a right, and that right then receives protection from federal law.[121] In this type of case, the state court's ruling on the "antecedent" state ground holds the potential of, in effect, denying the protection of a federal right to which the state right is connected. In other words, "where a state law ruling serves as an antecedent for determining whether a federal right has been violated, some review of the basis for the state court's determination of the state-law question is essential if the federal right is to be protected against evasion and discrimination."[122]

A classic illustration of the doctrine is *Indiana ex rel. Anderson v. Brand*.[123] There, a public school teacher was fired despite a provision in state law that, according to her reading, granted her a contract right against termination at will.[124] She sued on the theory that her dismissal violated the Contract Clause of Article I of the Constitution, which forbids states from impairing contractual obligations.[125] The Indiana Supreme Court held that under the state's Teacher Tenure Act, because her contract was for only one year at a time, she was not shielded from dismissal without cause.[126] The case falls into the "antecedent state ground" category because the putative state right to continued employment was antecedent to the teacher's Contracts Clause claim.[127] The Supreme Court explained:

> On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation.[128]

Other cases describe the standard of review as asking whether the state court's ruling has "fair support" in state law.[129] In *Anderson*, the Court

118. *Id.* at 626.
119. 304 U.S. 64 (1938).
120. *Id.* at 80.
121. *See* FALLON ET AL., *supra* note 112, at 487–88.
122. *Id.* at 488.
123. 303 U.S. 95 (1938).
124. *Id.* at 97.
125. *Id.*; *see also* U.S. CONST. art. I, § 10.
126. *Anderson*, 303 U.S. at 99–100.
127. *Id.*
128. *Id.*
129. *See* Monaghan, *supra* note 43, at 1924–25.

examined the state law background and found that the statute that established the teacher's employment terms supported her position that the employment relationship was contractual.[130] A key reason was that "[u]ntil its decision in the present case, the Supreme Court of Indiana had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual."[131] Having found insufficient support for the Indiana court's ruling against the teacher on the state law contract issue, the U.S. Supreme Court held that the Contracts Clause applied.[132]

B. Nelson *as an Exception*

Fourteenth Amendment protection of state-created property rights falls into the "antecedent state ground" category. As with the Contract Clause issue in *Anderson*, state rights are antecedent to federal protection because the rights guaranteed by the Due Process Clause could be improperly nullified by a state court's ruling on the content of state-created property.[133] When the Supreme Court considers a state-created property issue on review from a state court decision, its role as the ultimate arbiter of federal law justifies some examination of the state grounds to be sure that they meet the "fair support" test.[134] As a functional matter, a determination of whether one has a state-law-based "property" interest for purposes of the Due Process Clause is no different from a determination of whether one has a state-law-based "contract" for purposes of the Contract Clause.[135]

The issue in *Nelson* could have been framed in these terms. The Colorado court had found that the Exoneration Act provided the sole means for Nelson and Madden to recover the money they had paid.[136] That construction of the statute provided the state law ground for the rejection of their claim to a property interest in restoration under pre-Exoneration Act practice. As in *Anderson*, the issue that brought *Nelson* to the Supreme Court was whether that state law ruling had fair support in state law.[137] On this issue, the state court's reasoning is key. Yet the Colorado court's treatment of the impact of the Exoneration Act consists of two sentences:

> [A] court may not intrude on the General Assembly's power by authorizing a refund from public funds without statutory authority to do so. The Exoneration Act provides the sole statutory authority for the court to issue a refund to criminal defendants after their convictions are overturned.[138]

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130. *Anderson*, 303 U.S. at 109.
131. *Id.* at 105.
132. *Id.* at 99.
133. *See* FALLON ET AL., *supra* note 121, at 509.
134. *See* Demorest v. City Bank Farmers Tr. Co., 321 U.S. 36, 42 (1944).
135. *See* FALLON ET AL., *supra* note 121, at 514–16.
136. *See* People v. Madden, 364 P.3d 866, 868 (Colo. 2015), *rev'd sub nom.* Nelson v. Colorado, 137 S. Ct. 1249 (2017); People v. Nelson, 362 P.3d 1070, 1076 (Colo. 2015), *rev'd*, 137 S. Ct. 1249.
137. *See generally Nelson*, 137 S. Ct. 1249.
138. *Nelson*, 362 P.3d at 1075–76.

Beyond these two sentences, the Colorado court did not discuss the terms of the statute, its legislative history, or the context under which it was enacted.[139]

To be sure, Nelson did not litigate the issue of whether this state law ruling found adequate support in state law.[140] Curiously, however, her Supreme Court brief pointed to a promising argument that such "fair support" did not exist.[141] The brief described the state law background of restoration in Colorado and elsewhere, including the Exoneration Act.[142] The brief noted the widely recognized rule that "[a] party who has paid money pursuant to a judgment has always been entitled to a refund when the judgment is reversed."[143] It added—without any dispute from the state[144]—that "[u]ntil this case, Colorado followed the traditional rule."[145] Then, in a critical passage, the brief showed that the Exoneration Act was not conceived or enacted with the aim of overturning settled practice.[146]

Instead, Nelson argued that the Act's "immediate impetus" was to deal with the case of a man who served eighteen years for a murder he did not commit before being exonerated by DNA evidence.[147] The statute was "supported equally by prosecutors and defense lawyers"[148] and designed to cover only a narrow range of cases.[149] Thus, "[a] representative of the Colorado Attorney General's office testified that the legislation was '*narrowly defined*' and that it would *not apply* to defendants who 'are just acquitted after trial' or those 'who have their convictions reversed after appeal based on a procedural or a legal error.'"[150] The Colorado State General Assembly thus estimated that "compensation . . . would be awarded to only one defendant every five years."[151] The bill passed the Colorado House by a 60-to-2 vote and passed the Senate unanimously, all of which Nelson documented in her brief.[152] In its own brief, Colorado did not challenge any of these assertions.[153]

In addition to ignoring the legislative history, the Colorado court's reading of the Exoneration Act is hard to square with the terms of the Act, which provide that only certain individuals convicted of a crime may pursue

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139. *Id.*
140. *See generally* Brief for Petitioners, *supra* note 53.
141. *Id.* at 13.
142. *Id.*
143. *Id.* at 2.
144. *See generally* Brief for Respondent, *supra* note 54.
145. Brief for Petitioners, *supra* note 53, at 3.
146. *Id.*
147. *Id.*
148. *Id.* at 4.
149. *Id.*
150. *Id.* at 4–5 (emphasis added) (quoting Recording of Hearing Before the Colorado Senate Judiciary Committee on HB 13-1230 (Apr. 24, 2013), http://coloradoga.granicus.com/MediaPlayer.php?view_id=47&clip_id=3854&meta_id=66420 [https://perma.cc/WH79-28PD] (recording at 1:47:58)).
151. *Id.* at 5; *see also* Nelson v. Colorado, 137 S. Ct. 1249, 1260 (2017) (Alito, J., concurring in the judgment).
152. Brief for Petitioners, *supra* note 53, at 5.
153. *See generally* Brief for Respondent, *supra* note 54.

relief.[154] The statute applies only to "a person who has been convicted of a felony . . . and sentenced to a term of incarceration . . . and has served all or part of such sentence."[155] These limits jibe with the legislative history but make no sense under the Colorado court's broader reading of the statute. If the statute were the sole authorization for refunds, why would payments be available only to persons convicted of felonies and not misdemeanors, only to persons sentenced to incarceration, and only to persons who have served part of the sentence of incarceration?

Having demolished the Colorado Supreme Court's rationale, the petitioners might have gone on to invoke the principle of *Anderson*. They could have argued, in the most powerful way, that the Colorado court's ruling against them rested on an inadequate state ground because its Exoneration Act rationale did not have fair support in state law. They evidently preferred to treat the Colorado Supreme Court's construction of the Exoneration Act as the final word on state law and to instead advance a due process argument.[156] Since they won anyway, it may seem churlish to criticize that choice. And it may be unfair to fault the Supreme Court for failing to opt for a rationale that was never briefed or argued.

Still, there were good reasons for the Court to take the "antecedent state ground" approach to *Nelson*. One of its main advantages is that it avoids any need for the Court to rely (even if implicitly) on a controversial "natural property" line of analysis.[157] A recognition that pre-Exoneration Act principles continued to govern Nelson's case would have permitted the Court to rely squarely on the *Roth* state-created-property line of cases. After all, even Colorado's lawyers relied solely on the Exoneration Act in their brief to the Court, a strategy that seems to implicitly concede that Nelson had a right to secure a refund under state law so long as pre-Exoneration Act law was operative.[158] By avoiding the Court's ad hoc definition of Fourteenth Amendment "property," the antecedent state ground route would contribute to coherence in constitutional law.

In addition, the "antecedent state ground" approach is more flexible than the Court's method. I suggested earlier that the majority's rationale may not admit the equitable exception illustrated by *Noel*.[159] State-created property has no difficulty accounting for such exceptions. For example, government jobs and other benefits are typically subject to conditions, notably that an employee can be fired "for cause" or that a business license may be forfeited for violation of safety regulations.[160] Finally, as Part III discusses, the state-created-property approach puts the property interest on a footing that is analytically distinct from the "liberty" protected by the Due Process

154. COLO. REV. STAT. § 13-65-102(1)(a) (2017).

155. *Id.*

156. *See generally* Brief for Petitioners, *supra* note 53.

157. *See* Merrill, *supra* note 40, at 943 ("It is probably too late in the day to adopt such a natural-property strategy.").

158. *See generally* Brief for Respondent, *supra* note 54.

159. *See supra* Part I.B.

160. *See supra* note 77 (citing cases).

Clause.[161] Thus, a state-created-property approach does not depend on the Court's unconvincing distinction between "property" and "liberty."[162]

A downside of the "antecedent state ground" approach, at least from a property protection point of view, is that it permits a state to do away with restoration if that is its preference. In particular, a state legislature could enact a statute exactly like the Exoneration Act, with an express declaration in the act itself that it provided the sole basis for postexoneration recovery. A state court opinion that implemented such a statute would (to say the least) not lack "fair support" in state law. And many observers would find this result troubling precisely because it seems not at all "natural" for the state to keep money it acquired from persons it has invalidly convicted.[163]

One answer to this objection is that democratic values should count for something in the definition of "property" for purposes of Fourteenth Amendment protection. Given the generally light constitutional scrutiny of property regulation,[164] it seems appropriate to recognize that a democratically elected legislature may decide to reject refunds. In any case, the objection is mainly theoretical. In practice, democratic values seem to favor the right to refund, as it enjoys wide support throughout the nation.[165] It is hard to find critics of the Supreme Court's holding in *Nelson*. Colorado's experience is instructive. Indeed, after the Colorado Supreme Court's decision in *Nelson*, the Colorado legislature enacted a statute that generally authorized restoration.[166]

Colorado's enactment of this statute supports the view that the Colorado court misread the Exoneration Act. In addition, the new statute may help to explain Justice Ginsburg's cavalier treatment of Fourteenth Amendment property doctrine.[167] Since other jurisdictions already allow refunds,[168] and since Colorado will do so in the future under the new statute,[169] the holding will have little impact on the basic issue of whether refunds are available. The Court may have viewed *Nelson* as an occasion for doing nothing more than correcting an injustice in the case at hand.[170] But its "natural" property rationale now lies ready for use—and the creation of still more confusion—in future litigation.

III. PROPERTY AND LIBERTY

Nelson was an unusual case because states generally refund most payments made pursuant to nullified convictions.[171] But the Due Process Clause

161. *See infra* Part III.
162. *See infra* Part III.
163. *See* Post, *supra* note 4, at 209.
164. *See* Merrill, *supra* note 40, at 943–44.
165. *See supra* note 4 (citing state statutes).
166. COLO. REV. STAT. § 18-1.3-603 (2018).
167. *See supra* Part I.A.
168. *See supra* note 4 (citing state statutes).
169. *See* COLO. REV. STAT. § 18-1.3-603.
170. The Court took note of the new statute in a footnote. *See* Nelson v. Colorado, 137 S. Ct. 1259, 1254 n.4 (2017).
171. *See supra* note 4 (citing state statutes).

protects liberty as well as property.[172] Besides imposing fines and other charges, states typically lock people up upon conviction and do not compensate them for their loss of liberty if and when their convictions are dislodged.[173] In *Nelson*, the Court held that in the property context, "[t]o comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated."[174] How does this reasoning apply to liberty?

The very core of Fourteenth Amendment "liberty" is "freedom from personal restraint."[175] And, broadly speaking, modern Supreme Court doctrine systematically accords far greater constitutional protection to liberty in this essential form than to interests in property.[176] The question thus arises, If due process requires nothing more than "minimal procedures" to vindicate through monetary recovery the deprivation of one's property, why should it require anything more to vindicate, through a monetary recovery, the deprivation of one's liberty? To be sure, recognition of such an obligation would potentially impose far greater costs on state governments than the property holding in *Nelson*. And the current Supreme Court surely will not extend *Nelson* to cover liberty. In fact, Justice Ginsburg's opinion for the Court gives no reason to think that even a more liberal Court would do so. But as a matter of constitutional principle and doctrine, why should it not?

This Part begins with a discussion of Justice Ginsburg's efforts to distinguish between property and liberty in her majority opinion in *Nelson*. It next discusses the alternative, historical-perspective approach advocated for by Justice Alito in concurrence and considers whether relying on history and tradition was the better approach to addressing the plaintiff's claim in *Nelson*.

A. *Distinguishing Liberty and Property in* Nelson

The three opinions in *Nelson* give three different reasons for not requiring states to compensate for lost liberty. In his dissent, Justice Thomas declined to distinguish between liberty and property.[177] His view was that Nelson and Madden had no constitutional right to recover anything.[178] In a concurring opinion, Justice Alito cited the general principle that "historical practice is probative of whether a procedural rule can be characterized as

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172. *See* U.S. CONST. amend XIV, § 1.

173. *See* Teressa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 691 (2008) ("Although wrongful convictions may be an inevitable consequence of our criminal justice system, it would seem that a person wrongly deprived of his liberty is entitled to a civil remedy to compensate for the mistakes of the criminal system. Yet persons wrongly convicted . . . are often denied monetary compensation.").

174. *Nelson*, 137 S. Ct at 1258.

175. *See* Monaghan, *supra* note 43, at 411.

176. *Compare* Roe v. Wade, 410 U.S. 113, 164–66 (1973) (striking down a state law that criminalized abortion), *with* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474 (1987) (upholding a Pennsylvania law prohibiting coal mining that caused underground damage to an existing building).

177. *See Nelson*, 137 S. Ct. at 1263 (Thomas, J., dissenting).

178. *Id.*

fundamental."[179] Building on this principle, he emphasized that, as a matter of historical practice, states routinely refund money while not compensating for lost liberty, except in exceptional circumstances.[180] Thus, "history and tradition" operated to support a distinction between property and liberty in this setting.[181]

The majority took a different tack. Colorado had argued that "if the Exoneration Act provides sufficient process to compensate a defendant for the loss of her liberty, the Act should also suffice [for loss of her property]."[182] But Justice Ginsburg rejected the property/liberty link on the ground that an act of restoration by the state differs fundamentally from an act of compensation by the state.[183] As she explained:

> The comparison [suggested by Colorado] is inapt. Nelson and Madden seek restoration of funds they paid to the State, not compensation for temporary deprivation of those funds. Petitioners seek only their money back, not interest on those funds for the period the funds were in the State's custody. Just as the restoration of liberty on reversal of a conviction is not compensation, neither is the return of money taken by the State on account of the conviction.[184]

Under scrutiny, this property/liberty distinction seems to dissolve. Restoration of funds is the functional equivalent of compensation. That restoration, after all, is what makes the plaintiff whole.[185] The Court stressed that Nelson and Madden did not seek interest on the money, which means that they were not made completely whole.[186] But the interest was a minor matter—the tiny tail of the dog when it came to *compensating* these defendants for their losses.

The final sentence of Ginsburg's passage quoted above both falsely equates the restoration of liberty with the restoration of property and confuses two senses of the term "restoration."[187] As to the first point, money can be reduced to a physical object so that an order requiring the state to return money will make the plaintiff almost whole. Liberty, by contrast, is an experience. When someone is confined, their experience of liberty is lost forever. One might attempt to distinguish liberty and property on the ground that the state is enriched when it deprives a person of property but not when it deprives a person of liberty. But that distinction fails in this context because the Due Process Clause focuses on what happens to the "person"

179. *Id.* at 1258 (Alito, J., concurring).
180. *Id.* at 1258–63.
181. *Id.* at 1261.
182. *Id.* at 1257 (majority opinion).
183. *Id.*
184. *Id.*
185. *See* Leading Case, Nelson v. Colorado, 131 HARV. L. REV. 283, 287 (2017) ("Nelson's central problem is why the petitioner's substantive entitlement to a refund is different from an entitlement to compensation for wrongful imprisonment."); *cf.* Edelman v. Jordan, 415 U.S. 651, 668 (1974) (holding, in the context of upholding a state Eleventh Amendment immunity defense, that restitution is the functional equivalent to compensatory damages).
186. *Nelson*, 137 S. Ct. at 1257.
187. *Id.* at 1258.

who is "deprive[d]," not what happens to the state.[188] One might even imagine a world in which money paid to the state as fines or fees pursuant to conviction is immediately destroyed by the state. In such a case, the state is not enriched. Even so, for Due Process Clause purposes there is still a deprivation of "property"—just as surely as there is a deprivation of liberty when a defendant is placed behind bars.

As to the second point, the Court's "just as" comparison lumps together two distinct senses in which "restoration" can occur. Restoration of liberty signifies only that liberty is no longer being taken—not that one is getting back the lost liberty. The Court correctly points out that "restoration of liberty on reversal of a conviction is not compensation."[189] But the Court is mistaken when it asserts that "the return of money" is not compensation.[190] In every functional sense it is, and that is true regardless of academic hairsplitting about the distinction between the "return" of the money, on the one hand, and "compensation" through the payment of interest, on the other. It is beside the point that no interest was paid. The essential purpose of making a payment equivalent to the amount of fees and fines is to compensate the plaintiff for the (now found to be erroneous) extraction of those amounts from the plaintiff.

B. An Appeal to History and Tradition: Nelson *Reconsidered*

In light of all of this, the Court would have done far better to rely on history and tradition, as Justice Alito suggested.[191] This suggestion may seem wrongheaded, and its shortcomings must be acknowledged. In many situations, a strictly historical rationale for a rule is vulnerable to the objection that it favors the status quo, even when there are compelling reasons for change. And there surely are good reasons of constitutional principle for requiring governments to compensate defendants for confinement when their convictions are overturned. In these cases, the state has deprived a person of constitutionally protected liberty for a reason now shown to be unsound. If an appellate reversal provides a sufficiently strong ground to oblige states to pay for property deprivations, as *Nelson* holds, then a strong a fortiori argument for requiring similar payments for liberty deprivations surely exists.

Justice Ginsburg's "natural property" approach unwittingly adds force to the case for compensation. As discussed, she seems to treat the Fourteenth Amendment as the source of property rights, just as the Court has traditionally done with liberty.[192] Her analysis thus seems to place the two rights on the same footing. And if property and liberty have the same Due Process Clause source, it becomes more difficult to see why they should not enjoy the same Due Process Clause protection. *Nelson* holds that property

188. U.S. CONST. amend XIV, § 1.
189. *Nelson*, 137 S. Ct. at 1257.
190. *See id.* at 1252.
191. *See id.* at 1258–63 (Alito, J., concurring).
192. *See supra* Part I.B.

loss triggers the right to a remedy pursuant to "minimal procedures."[193] Why should liberty not get the same protection? If the Due Process Clause creates a property right for Nelson to be restored to the status quo ante when her conviction is overturned, it seems sensible to say that the Due Process Clause likewise creates a liberty right to be restored to the status quo ante.

The "history and tradition" rationale fares much better if liberty and property are kept separate, as they are under *Roth*,[194] a case in which the Court drew a sharp distinction between the Fourteenth Amendment content of property and of liberty.[195] Property interests are created by state or federal statutory and common law and practice.[196] But *Roth* "outlined distinctively different methodologies for identifying constitutional liberty and property."[197] In describing the source and scope of Fourteenth Amendment "liberty," the Court did not turn to state law. Instead, it cited *Meyer v. Nebraska*,[198] a substantive due process decision.[199] According to *Meyer*, liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[200]

The Court's post-*Meyer* body of case law on "liberty" treats the Due Process Clause as the source of these rights.[201]

Under the *Roth* approach, "history and tradition" are not just boilerplate arguments for the status quo.[202] They provide viable doctrinal grounds for continued adherence to the rule that the Due Process Clause does not entitle defendants to compensation for confinement pending appeal.[203] The criminal procedure may provide sufficient process to justify the deprivation of liberty, so long as that process is not tainted by the constitutional or common law tort of malicious prosecution.[204] By contrast, under *Roth*, the content of Nelson and Madden's property right is defined differently.[205] It depends on legitimate expectations formed by reliance on state or federal statutory law, common law, and the policies and practices of institutions.[206]

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193. *Nelson*, 137 S. Ct. at 1258 (majority opinion).
194. *See generally* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972).
195. *Compare* Monaghan, *supra* note 43, at 411–34 (discussing liberty), *with id.* at 434–44 (discussing property).
196. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005).
197. Merrill, *supra* note 40, at 919.
198. 262 U.S. 390 (1923).
199. *See Roth*, 408 U.S. at 573.
200. *Meyer*, 262 U.S. at 399.
201. *See* Merrill, *supra* note 40, at 919.
202. *See Roth*, 408 U.S. at 578.
203. *See id.*
204. *Cf.* Baker v. McCollan, 443 U.S. 137, 145–46 (1979) (holding that a person confined for three days on account of mistaken identity, but pursuant to a valid warrant, is deprived of "liberty," but the deprivation is not "without due process of law").
205. *See Roth*, 408 U.S. at 577.
206. *Id*.

The general practice, including pre-Exoneration Act practice in Colorado, was to refund much of the money exacted from the defendant upon conviction.[207] Based on this practice, Nelson and Madden can claim a state-created property right to a refund. As for the impact of the Exoneration Act, the Colorado court's reading of it lacks fair support in Colorado law.[208] The Supreme Court should have ruled that it is not an adequate state law ground for the holding against Nelson and Madden.

The tradition of distinguishing between liberty and property in the "restoration" context probably reflects a pragmatic judgment that the cost of compensation for lost liberty would be much higher than paying for fees and fines. If that judgment clashes with the maxim that a remedy should be available for every violation of a constitutional right,[209] the maxim must give way in the face of reality. As Daryl Levinson has shown, "the actual practice of constitutional law" is that "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence."[210] Building on the work of Levinson and others, Richard Fallon has developed the "Equilibration Thesis," which "holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies."[211] None of this settles the issue of whether persons in Nelson's place should have a remedy for their lost liberty. But the Equilibration Thesis does suggest that if a remedy is too costly it will not be made available.[212] Thus, a distinction between property and liberty claims is broadly consistent with the general principles governing the relations between rights and remedies in our system.

CONCLUSION

This Article's analysis is limited to the Supreme Court's opinion in *Nelson*. It is not a comprehensive treatment of issues raised by "liberty" and "property" claims in other contexts, including "restoration" cases. It also fails to examine two other avenues of relief that may have been available to the plaintiff in *Nelson*. First, *Nelson*'s procedural due process reasoning does not apply to a claim that a statute like the Exoneration Act—one enacted with the avowed aim of denying restoration—would violate *substantive* due process. In that context, constitutional property may be defined differently,[213] and *Roth* would not control. The Court may define property without regard to the entitlements created by state law, strike down the

207. *See* Brief for Petitioners, *supra* note 53, at 2–3.

208. *See supra* Part II.

209. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

210. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

211. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006).

212. *See id.* at 649–52.

213. *See* Merrill, *supra* note 40, at 893, 955–60.

hypothesized statute as an arbitrary exercise of the state's legislative power, and distinguish "liberty" on grounds of history and tradition.

Second, and relatedly, Colorado's refusal to return the money may amount to a "taking," such that the state would be obliged to return it under the Court's Takings Clause jurisprudence.[214] The important point here is that the Court's ruling in *Nelson* itself raised far more questions than it answered. In later cases, more than the Court seemed to realize, it will have no choice but to deal with the complex problems lurking beneath the surface of the *Nelson* opinion.

214. *See* U.S. CONST. amend. V.