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ARTICLES

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Shifting Notions of Free Speech with the Introduction of Artificial Intelligence

Sydney Baker

Legislatures across the United States have been racing to maintain regulation of the rapidly expanding field of artificial intelligence. Artificial intelligence is broadly defined as "a science and a set of computational technologies that are inspired by—but typically operate quite differently from—the ways people use their nervous systems and bodies to sense, learn, reason, and take action."[1] In other words, artificial intelligence is designed to accomplish traditionally human tasks, while still reflecting human qualities such as emotion and preference.

Recently, a new kind of AI has entered the media's limelight: AI recommender algorithms. These algorithms are artificial intelligence systems implemented by internet companies that detect a consumer's preferences and recommend similar content. For example, if someone watches and hits the "like" button of President Joe Biden's inaugural speech, recommender algorithms may present that user with another Democratic politician's social media post based upon that preference shown through liking the speech video. While these recommendations can enhance user experience and customization, they can also limit the scope and variation of ideas users are exposed to. In other words, they create environments in which users only encounter opinions that harmonize with their own, which reinforces their beliefs and suppresses any conflicting ideas. Users then become overly enamored with their individualized internet content to the point where alternate perspectives and factual information are overlooked. This phenomenon can lead to dangerous outcomes for society as a whole.

Within this paper, I will explore the ideas of free speech and marketplace theory in the modern era of AI recommender algorithms. Moreover, I will discuss the current state of the American government, courts, and consumers with respect to these algorithms. Lastly, I will analyze how notions of free speech and marketplace theory may need to be realigned, as their principles currently act as a legal shield for tech companies who seek to reap the benefits of artificial intelligence

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[1] Stone et al, *Artificial Intelligence and Life in 2030: The One Hundred Year Study on Artificial Intelligence*, 4 (2022).

without accepting the liability.

I. Free speech and Marketplace Theory

Free speech is a distinct, enumerated right in the United States' Constitution, specifically in the First Amendment.[2] For decades, various lawsuits have shown the extent to which free speech is prized in American political life. For instance, in *Snyder v. Phelps*, the Supreme Court upheld that a group of protesters, who rallied and chanted heinous speech at a war veteran's funeral, were constitutionally protected by the Free Speech Clause.[3] In contrast, the Court has also established several limits on speech in certain circumstances. Specific types of speech that the Supreme Court has deemed unprotected under the First Amendment include true threats[4], incitement of immediate and illegal action[5], harassment[6], and unlawful expressive conduct such as vandalism. Each of these exceptions have been carved out by various Supreme Court cases, and are upheld by the rule of precedent.

While these exceptions exist, the United States is considered to have some of the most lenient free speech limitations in the world.[7] This liberal approach to speech has been justified by constitutional scholars through what is widely known as the *marketplace of ideas* theory. The root of this theory echoes laissez-faire style economics in that, as legal scholar Frederick Schauer puts it, "just as Adam Smith's 'invisible hand' will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all

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[2] *U.S. Const. amend. I*. n.d.

[3] Roberts, John G, and Supreme Court Of The United States. U.S. Reports: Snyder v. Phelps, 562 U.S. 443. 2010.

[4] O'Connor, Sandra Day, and Supreme Court Of The United States. U.S. Reports: Virginia v. Black, 538 U.S. 343. 2003.

[5] Supreme Court Of The United States. U.S. Reports: Brandenburg v. Ohio, 395 U.S. 444. 1968.

[6] O'Connor, Sandra Day, and Supreme Court Of The United States. U.S. Reports: Davis v. Monroe County Bd. Of Ed., 526 U.S. 629. 1999

[7] Wike, Richard, and Katie Simmons. "Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech." Pew Research Center's Global Attitudes Project, November 18, 2015. https://www.pewresearch.org/global/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-s ome-forms-of-speech/.

opinions are permitted freely to compete."[8]

Marketplace theory often goes hand-in-hand with the idea of uninhibited free speech. At the core of the theory is the idea that a large democratic society will find the objective, discoverable truth through an unbridled "marketplace of ideas" where all perspectives can express themselves even if they are unpopular or offensive.[9] The theory is most notably laid out in Supreme Court doctrine by Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States(1919)*.[9] The case involved two men who were arrested for advertising controversial views that the United States should not be sending troops to fight the Russian Revolution. While the majority ruled in favor of the men's conviction—likely because the case was argued at the height of the Red Scare.[10] Holmes's powerful dissent argued that the government must protect the "expression of opinions we loathe" and that a democratic society must test the truth by establishing a "free trade of ideas." Therefore, he argues that in order to effectively promote free speech, the government must remain virtually uninvolved and neutral, especially in the Courts. Nevertheless, the introduction of AI and the rise of the internet as a streamlined forum for discourse complicates marketplace theory. As technology becomes increasingly more complex, the nuance required to sustain a platform for free speech becomes increasingly complicated. Over the years, legal and communication scholars criticized marketplace theory because of its assumption of objective truth and its failure to recognize the irrationality of the human mind. Historian David Hollinger stated that the Enlightenment "blinded us to uncertainties of knowledge by promoting an ideal of absolute scientific certainty."[11] He explains how absolute certainty is impossible; therefore, marketplace theory's strivings are inherently futile because their goal is beyond human reach. Furthermore, First Amendment scholar C. Edwin Baker

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[8] Schauer, Frederick F. *Free Speech : A Philosophical Enquiry / Frederick Schauer.* Cambridge [Cambridgeshire] ; Cambridge University Press, 1982.

[9] Clarke, John Hessin, and Supreme Court Of The United States. U.S. Reports: Abrams v. United States, 250 U.S. 616. 1919

[10] Schauer, Frederick. "Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition." *Seton Hall L. Rev.* 51 (2020): 205

[11] Hollinger, David A. "The Enlightenment and the Genealogy of Cultural Conflict in the United States." In *Cosmopolitanism and Solidarity*. United States: University of Wisconsin Press, 2006

takes Hollinger's skepticism further by plainly declaring that "Truth is not objective."[12] Baker adapts marketplace theory to his so-called *liberty theory*. Instead of focusing on the right of the receiver to access all marketplace ideas, Baker's liberty theory focuses on the right of the speaker to express their ideas. This theory takes a different lens that focuses on the rights of the speakers whose messages will be lost to some users due to recommender algorithms isolating certain audiences. Thus, algorithms create a dangerous environment that can ostracize both speakers' messages and audiences' ability to hear multiple sides.

Scholars have also critiqued marketplace theory's assumption that all people act rationally when dealing with information. Research from Dartmouth College reveals that misinformation deeply affects people's perceptions of various issues.[13] In the study, when researchers presented correct information to falsely informed participants, they continued to hold on to, or even cling tighter to, their inaccurate, preconceived conclusions. Moreover, scholars are concerned that the marketplace is distorted by an imbalance of power, with some influential voices distorting and overpowering the messages of other speakers.[14] For instance, some speakers will have more resources than others to create compelling messages and utilize paid marketing tools. Thus, external factors, rather than content alone, impact the receiver's opinion. As constitutional law scholar Stan Ingber argues: "The dominant 'truth' discovered by the marketplace can result only from the triumph of power, not the triumph of reason."[15] Moreover, the dominance of independent algorithms as agents in the marketplace of ideas has only exacerbated preexisting critiques of the rationale behind marketplace theory.

Internet Free Speech Precedent: Section 230

With the introduction of the internet as a new forum for free speech, the United States Congress in 1996 recognized the need to protect

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[12] Baker, C. Edwin. *Human Liberty and Freedom of Speech C. Edwin Baker.* New York: ; Oxford University Press, 1989.

[13] Nyhan, Brendan, and Jason Reifler. "When Corrections Fail: The Persistence of Political Misperceptions." *Political Behavior* 32, no. 2 (2010): 303-330.

[14] Purdy, Jedediah. "Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment." *Columbia Law Review* 118, no. 7 (2018): 2161–2186.

[15] Ingber, Stanley. "The Marketplace of Ideas: A Legitimizing Myth." *Duke Law Journal* 1984, no. 1 (1984): 1——-91.

companies seeking to innovate in this field. To continue America's commitment to unbridled free speech, Congress passed Section 230 as part of the Communications Decency Act.[16] Lawmakers established Section 230 with two primary goals in mind. First, Congress sought to prevent children from accessing pornography and other obscene speech on the internet by granting internet providers legal immunity to censor content as they saw fit, thereby preserving their consumer reputations.[17] Second, Congress desired to promote freedom of expression within this new information medium by granting immunity from tort liability to internet companies that provided a platform for users with the potential to produce defamatory content. In the latter section, Congress licensed internet companies to censor undesirable content with total discretion, without the lingering fear of censorship lawsuits.

> §230(c) Protection for "Good Samaritan" blocking and screening of offensive material (1) Treatment of publisher or speaker
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> (2) Civil liability
>
> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;[18]

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[16] Meeran, Yaffa A. "As Justice So Requires: Making the Case for a Limited Reading of 230 of the Communications Decency Act." *The George Washington Law Review* 86, no. 1 (2018): 257-–286.

[17] Dickinson, Gregory M. "An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act." *arXiv.org* (2023).

[18] "Section 230: An Overview." 2021. CRS Reports. https://crsreports.congress.gov/product/pdf/R/R46751.

Since the enactment of this statute, internet companies have enjoyed free reign to censor user content, while maintaining immunity from lawsuits regarding illicit third-party content shared on their platform. As long as the companies themselves are not the users producing the content, they are legally immune from assuming responsibility for the speech occurring on their platform. Under Section 230 (2)(A), Reddit can provide unrestricted site access to anyone, including those who wish to comment falsely on various topics. Elsewhere, Wikipedia can foster user-authored, comprehensive coverage for an array of issues without feeling burdened by the legal threat of misinformation. Moreover, Zoom can offer synchronous video calls to a broad customer base while staying insulated from the potentially illegal conduct of customers during virtual meetings. Along with this immunity, if companies decide to censor certain content they deem against their community guidelines, they are statutorily protected from litigation accusing them of unfairly removing content. Therefore, internet providers and platforms are duly protected in fostering or filtering free speech.

However, the recent question that Section 230 leaves ambiguous is whether internet providers are legally responsible if their artificial intelligence agents distort, filter, or overfeed content that inhibits the user's variety of information. AI algorithms' manufactured flows of repetitive information can have severe consequences when people believe provocative, false information to be true and choose to act on their inaccurate knowledge in harmful ways.[19] This leads to the question that the Supreme Court of the United States has addressed in several 2023 cases: Are internet companies responsible for aiding and abetting extremist actions if their algorithms perpetuated the portrayal of dangerous messages on the user's feed?

Supreme Court Case on AI and Section 230

The responsibility of internet providers for the disturbance of the flow of information, particularly with the use of independent algorithms, is

[19] Unkelbach, Christian, and Sarah C. Rom. "A Referential Theory of the Repetition-Induced Truth Effect." *Cognition* 160 (2017): 110–126.

brought to question in the recent court case, *Gonzalez v. Google.*[20] This case was originally filed in 2015 when a U.S. citizen, Nohemi Gonzalez, was studying abroad in Paris when she was killed in an ISIS terrorist attack. One day later, ISIS claimed responsibility for the attack via Youtube, a Google subsidiary. Nohemi's father, Reynaldo, took legal action against Google, claiming the company had aided, abetted, and revenue-shared with a terrorist organization. Reynaldo argued this violated the Anti-Terrorism Act (ATA)[21] and its amended subsection, the Justice Against Sponsors of Terrorism Act (JATSA).[22] In *Twitter v. Taamneh*, a similar case in 2023, the plaintiffs argued that tech companies have responsibility in terrorist acts because they allow ISIS and other terrorist associations to promote and fundraise via their platforms.[23] However, the Supreme Court unanimously rejected this argument, ruling that tech companies cannot be held liable for content produced by third parties under Section 230. Furthermore, the Court asserted that repealing Section 230 would have colossal impacts on media corporations.[24]

However, the claims in *Gonzalez v. Google* sparked a new conversation regarding the role of AI recommender algorithms in tech companies' aiding and abetting terrorist activities, which violates the Justice Against Sponsors of Terrorism Act (JATSA).[25] Gonzalez contended that recommender algorithms, which corporations implement to increase engagement, act as an extension of the internet provider itself. Moreover, their argument stated that due to these algorithms, users who have shown interest in the Islamic State's activities would be repeatedly recommended ISIS-related content. In turn, oversaturating a user's feed could increase terrorist sentiment and

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[20] Supreme Court Of The United States. U.S. Reports: Gonzalez v. Google LLC, 598 U.S. __. 2022

[21] Anti-Terrorism Act (ATA), 18 U.S.C. § 2333.

[22] Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)).

[23] Thomas, Clarence, and Supreme Court Of The United States. U.S. Reports: Twitter, Inc. v Taamneh, 598 U.S. __ 2023.

[24] Millhiser, Ian. 2023. "The Supreme Court decides not to break the internet." Vox. https://www.vox.com/politics/2023/5/18/23728529/supreme-court-google-twitter-clarence-thomas-isis-taamneh-gon zalez.

[25] Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 4(a), 130 Stat. 852, 854 (2016) (codified at 18 U.S.C. § 2333(d)).

strengthen terrorist group numbers through a media echo chamber of dangerous ideas.[26] Therefore, Gonzalez argued that relations between big tech companies and terrorist groups via recommender algorithms are strong enough to amount to "aiding and abetting" acts of international terrorism. This raised the question of whether large corporations could be held responsible for the actions of their algorithms, creating the possibility of a new interpretation of Section 230. However, in May 2023, the Supreme Court evaded this pertinent question posed by *Gonzalez v. Google*.[27] Instead of recognizing the unique discrepancy that independent algorithms may pose to Section 230, the Court sent *Gonzalez* back to the lower courts, citing the precedent formed by the *Twitter* decision. Now, tech companies continue to await the future of Section 230 as the lower courts decide whether to send *Gonzalez* back to the high court if they find his claims about recommender algorithms to be meritorious.

Free Speech, the Marketplace of Ideas, and Section 230 in the Age of AI

One major stipulation in Section 230 is that tech companies are not liable for illegal content posted on their platforms as long as it is not their own. However, AI algorithms pose a unique exigency. On the one hand, if recommender algorithms are designed to filter and saturate a user's feed with misinformation or dangerous content that the consumer has shown previous interest in, one could construe the tech company's "content" as intervening in the natural transmission of information. Advocates of marketplace theory would argue that if a platform desires to truly promote free speech, they will refrain from using independent algorithms since they convolute public discourse and prevent users from experiencing a variety of viewpoints that are necessary to independently discern the truth from a sea of ideas. Furthermore, some marketplace proponents would likely go so far as to say that online platforms should forgo all censorship whatsoever because no matter how heinous some ideas may be, the rational

[26]Vacca, John R. *Online Terrorist Propaganda, Recruitment, and Radicalization*. Milton: CRC Press LLC, 2019.
[27]Barnes, Robert, and Cat Zakrzewski. "Supreme Court Rules for Google, Twitter on Terror-Related Content." *The Washington Post*. The Washington Post, 2023.

discretion of the rest of society will expunge them. Precedent-abiding free speech advocates would contest this in that while they might agree that platforms should allow for as much uninhibited content as possible, they would concede to censor exceptions to freedom of speech, as set out by Supreme Court precedent, to ensure obscene speech and the inciting of true violence can be expunged.

On the other hand, tech companies argue that they are simply trying to create the best experience for their users by recommending content they have previously shown interest in. Thus, if a user's main feed is filled with false or violence-inciting content, this is merely the result of the consumer's interest. Furthermore, Section 230 has provided immunity for nearly three decades, fostering technological innovation unimpeded by litigation. If the Supreme Court weakened this immunity, it could stunt technological growth in the United States because companies would not want to risk being sued for obscene content incited by their users.[28] Moreover, if Section 230(2)(A) was repealed and companies became liable for the content they choose to censor, social platforms could turn into a brothel for lewd images, violence-promoting speech, and generally undesirable content as corporations would refrain from censoring specific content due to the threat of lawsuits. Additionally, privately owned companies, which encompass almost all social platforms, are not held to the same scrutiny of free speech as government entities since the right to freedom of expression only applies to public forums in which the government is involved. This is a nuance tech companies leverage when the threat of censorship lawsuits arises. However, with social media becoming the new "town square" of ideas, this public-private distinction for free speech may be weakened in the interest of the public good.

Future Implications

While the fate of AI recommender algorithms' legality remains uncertain, it is clear these systems have changed the way people communicate on the Internet for better or for worse. It also remains

[28]Sarceño Robles, Christian. "Section 230 Is Not Broken: Why Most Proposed Section 230 Reforms Will Do More Harm Than Good, and How the Ninth Circuit Got It Right." FIU Law Review 16, no. 1 (2022).

unclear the exact timeline that a media user takes action based on their algorithm-driven content, particularly in the context of extremist beliefs. Future research could further explore the ways in which people are persuaded by the ideas they see online, the extent to which repetition of information implies truth, and how long it takes the median user to believe the information they come across online. Furthermore, researching the software development of recommender algorithms, their full capabilities as independent entities, and their competency to filter dangerous content is increasingly important as internet companies scramble to keep online free speech and Section 230 intact despite recent allegations of terrorist misconduct. Lastly, investigations could examine the effects of educating the public about recommender algorithms to find media literacy solutions for misinformation echo chambers, even if companies retain full immunity from legal consequences.

In summary, recommender algorithms form a new hybrid between tech companies and independent entities that must be dealt with by legislatures, courts, and technology experts in open conversation with one another. These algorithms alter users' feeds to fit their personal interests, which can increase user engagement and satisfaction, but also can propagate addictive patterns and dangerous echo chambers. While tech companies claim that algorithms become autonomous after development, and thus are no longer company-controlled, this creates litigious chaos as it leaves no person or entity responsible for online misconduct. Therefore, to account for ever-changing legal and technical developments, America should find ways to hold corporations accountable for their software's actions while maintaining and possibly reorienting the core values of free speech in the market economy of ideas.

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Race Transcends Color: The Legal Evolution of the Black-White Paradigm in Color

Meibeth Cannon

With growing popularity surrounding the skin bleaching industry, the goal of attaining a White ideal has permeated throughout social media to bring a form of privilege to the forefront of society: skin color. Lighter skin color has historically symbolized wealth and purity in numerous cultures, especially within Asian American Pacific Islander (AAPI) and Black communities. Nonetheless, the term "colorism" was only coined in 1982 by Alice Walker to label a centuries-old privilege. Even then, racial protests often eclipse colorism activism, limiting social awareness of this preference for lighter skin colors as well as legislative action to respond in favor of pursuing anti-discrimination policy. Even more so, the Black community lies at the focal point of conversation regarding color discrimination, overlooking Non-Black People of Color (POC) and their experiences with color discrimination.

This paper aims to transition from a predominately social focus regarding colorism to explore its legal origins and development in the United States through an examination of the Black-White Paradigm. The foundational nature of the paradigm within U.S. precedent discusses how that which is considered "socially relevant" today often centers around a Black-versus-White narrative, disregarding the skin colors and races that do not completely align with either "Black" or "White." In that regard, a systematic content analysis was employed to examine legal documents from 1790 to 2021 to determine the denotative and implicative nature of the Black-White Paradigm throughout U.S. civil rights advancement. Consequently, each document's modern social relevance suggests future action proves necessary to advance awareness regarding color discrimination as well as validate the non-Black POC experience. Ultimately, by noting the evolution of the Black-White Paradigm, inherent White supremacy may also be traced within legal precedent.

I. Introduction

Brown v. Board of Education of Topeka[1] (1954) is often regarded as the landmark decision that struck down the "separate but equal"[2] precedent in public schools. Even so, the Californian case *Mendez v. Westminster*[3] (1947), determined the unconstitutionality of school segregation as it pertained to Mexican Americans seven years prior. Yet, this case remains arguably less prominent in civil rights history than *Brown v. Board*. This introduces the first purpose of this paper as focusing on the Black-White Paradigm, which assumes, either exclusively or predominantly, "only two classes—White and [Black]—within the contemplation of the Fourteenth Amendment," that hold legal and societal relevance. In other words, the Black-White Paradigm asserts that Black Americans serve as the primary demographic addressed within racial civil rights precedent, resulting in a greater social relevance considering that Black precedent remains better known. In turn, this exclusive focus detracts from non-Black POC, minimizing this broad demographic in civil rights legislation and social relevance. Therefore, I hold the assumption that *Mendez v. Westminster* remains lesser known today because this case does not follow the exclusive Black-White perception of race, and therefore demonstrates the inherent overlooked nature of non-Black POC in policy-making. Accordingly, I hypothesize that non-Black POC legislation will be less prominent than its Black counterpart, which will delineate the underrepresentation of non-Black POC in civil rights legislation as a whole.

[1] Brown v. Board of Education of Topeka, (1954).
[2] Mendez v. Westminster School Dist., (1946).
[3] *Id.*

Additionally, this paper intends to display the minimized social nature of color discrimination in contrast to racial discrimination, focusing on a second objective in examining the perpetuation of the Black-White Paradigm within the already underrepresented skin color discrimination.

"Race" and "color" were first introduced as distinct characteristics in the Civil Rights Act of 1866[4], which guaranteed the "protection to all persons in their constitutional rights of equality before the law, without distinction of race or color." Nonetheless, without a definition to offer differentiation, the aforementioned terms emerged as synonymous, commonly appearing in major pieces of legislation without clarification, including the 15th Amendment[5] (1870), the Civil Rights Act of 1964, and *Loving v. Virginia*[6] (1967). At the same time, *Gray v. State*[7] contributed to establishing a "color-determines-race" precedent, where a person's skin color was legally accepted to indicate their race. Even so, this interchangeable relationship between race and color was undermined in *Plessy v. Ferguson* in how Plessy–a perceived "passing" white man–remained segregated because of his Black ancestry, thus indicating exceptions to the precedent. To that effect, this disregarded distinction between "race" and "color" has resulted in confusion, causing the dismissal of conversations regarding colorism in favor of a racial focus since "race" and "color" are perceived to be synonymous.

[4] Civil Rights Act, (1866).
[5] U.S. Const. amend. 15.
[6] Loving v. Virginia, (1967).
[7] Gray v. State, (1829).

In turn, racial discrimination will be defined as the unfavorable treatment of an individual because of their race. This labeled mistreatment also extends to prejudice based on a person's features that are associated with race, including hair texture, skin color, etc. This leaves color discrimination—or the advantageous or disadvantageous treatment of an individual based on the lightness or darkness of their skin color—to remain a subgroup of racism[8]. Accordingly, the consideration of "Black" as a racial characteristic often supersedes "black" as a skin color (or any non-Caucasian, darker skin tone), demonstrated by how the perception of colorism is often restrictively associated within the Black community (or intraracially) rather than as its own discrimination case for dark-skinned individuals that may include multiple races (or existing interracially). To make a clear distinction within this paper, the capitalized "Black" will indicate Black as a racial term, essentially relating to African ancestry. On the other hand, the lowercase "black" will express black as a color, as it relates to a darker skin tone. The inverse will hold true as "White" will act as a racial term equivalent of Caucasian while "white" will refer to a lighter skin color.

Regardless, a Black-centric focus on color discrimination has begun to shift with the New York decision, *People v. Bridgeforth*[9] (2016). Effectively, this case determined that "dark skin color is a cognizable class" when claiming discrimination, essentially legitimizing colorism as a legal form of discrimination. In this case, a color discrimination claim was made against the exclusion of Black and darker-skinned women from a jury even though they did not identify within the same race. Legally, this set the precedent that darker-skinned women could be grouped together, regardless of their differing races, to set precedent of a form of discrimination rooted in their shared darker skin colors.

[8] Equal Employment Opportunity Commission. (n.d.)., *Race/Color Discrimination.*, https://www.eeoc.gov/racecolor-discrimination.

[9] People v. Bridgeforth, (2016).

With such a great focus on the difference between "race" and "color," I must first establish the historical interchangeability of race and color, thus developing the interdependent relationship between racial and color-based discrimination. For instance, the floor debate for the Civil Rights Act of 1866 merely established a distinction between race and color without defining it. In fact, Vinay Harpalani elaborated upon this lack of clarity. As a Professor of Law at the University of New Mexico, Harpalani's specialization in civil rights enabled the further corroboration of this narrative by quoting Senator Edgar Cowen's floor debate about the Civil Rights Act of 1866, as Cowen argued, "What is meant by the word "race" … 'color' is another word upon which nobody is very well advised just at present."[10] With such an unclear distinction made between the two, colorism has not been as firmly established as racial discrimination and therefore falls within its shadow. Therefore, anti-colorism policy depends on precedent set by racial discrimination, signifying the purpose of this paper as a method to analyze historical racial precedent as a means to guide and predict future color anti-discriminatory policy. In context, the theory that the Black-White Paradigm is based within a racial spectrum will be tested as to if these implications follow suit with regard to colorism.

The following research aims to contribute to the theory that U.S. civil rights legal precedent centers around the racial Black-White Paradigm, which translates into an exclusive black-white perception of color without regard for multiracial or non-Black colorism. By deepening the knowledge surrounding historically legal racial discrimination, I intend to establish that a racial focus, and subsequently a color-based focus, on the Black community leaves other victims of color discrimination overlooked.

For that matter, the Black-White Paradigm, as it pertains to race, remains within the body of knowledge. Nonetheless, this paradigm's perpetuation of a binary system between black and white (as they relate to skin color) remains a gap that this paper hopes to address. This research could indicate a correlative relationship in how racial precedent could delineate inclusive policy to combat color discrimination.

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[10] *Id.*

II. Review of Literature: Race v. Color

The unclear differentiation between "race" and "color" evolved into a focus on racial discrimination that left color discrimination unclarified. Jennifer Hochschild and Vesla Weaver–political science professors at Harvard University and Johns Hopkins University, respectively, with in-depth study on racial inequality–attribute the cause of this racial focus to the Skin Color Paradox. This identified phenomenon describes the specifically Black American commitment to racial unity that supersedes any protest of colorism. Because combating color discrimination would force intraracial dissent, this discourse would detract from the racial unity necessary for the advancement of racial civil rights. Put simply, the Skin Color Paradox suggests that colorism protests would create enmity between lighter-skinned and darker-skinned Black Americans, resulting in mutually harmful consequences, and thus explaining why colorism has been largely ignored in civil rights advocacy in favor of counteracting racism.[11]

For that matter, Hochschild reinforces a potential cause of minimized colorism advocacy by presenting the assumption that challenging racism will also combat colorism since both are "based on the same underlying fallacy that links appearance and descent to desirable or undesirable human qualities."[12] This claim would first serve as the foundation for a method that entrusts anti-racism protest to influence anti-colorism aims. Secondly, the Skin Color Paradox is proposed as an explanation to why colorism remains largely undiscussed, especially when compared to racism.

[11] J.L. Hochschild & V Weaver, *The Skin Color Paradox and the American Racial Order.*, 86(2).

[12] *Id.*

III. Review of Literature: Black-White Paradigm

Although the Skin Color Paradox is likely responsible for limited anti-colorism advocacy, the Black-White Paradigm also contributes to the minimization of skin color as a discrimination claim. *People v. Hall*[13] (1854) established this focus, deciding that Chinese individuals could not give testimony against a White defendant according to Section 14 of the Criminal Act. This section merely stated that "no Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man," but "Chinese" was not included. In this manner, the court legally asserted that the race "Black" encapsulated all non-White and non-indigenous individuals. Within a social context, Juan Perea further exposed this inherent Black focus. Professor of Law and Social Justice at Loyola University Chicago, Perea highlighted how the 1992 Los Angeles Riots, typically perceived to center around Black victims, arrested 51% Latinx individuals while only 36% of those arrested identified as Black.[14]

Black Americans experience racial targeting and discrimination, but the exclusive legal and social focus on Black victims of discrimination questions the efficacy of the Black-White Paradigm: whether it is a notable illustration of civil rights history or becomes a hindrance to further progress, especially concerning the minimized representation of other racial minorities.

[13] People v. Hall, (1854).

[14] J.F. Perea, *The Black/White Binary Paradigm of Race: The `normal Science' of American Racial Thought.*, 85(5).

Continuing Perea's line of reasoning, as the Chapman University Professor of Law, Race, and Social Justice, J.Y. Kim suggested that this focus on "Black-versus-White" stemmed from the fact that 96% of minorities identified as Black in 1960; however, today, only 50% of POC identify as Black, entailing a misrepresentation of non-Black POC in precedent.[15] That is to say, the Black community has historically represented the majority of the POC population, which logically resulted in more Black-centric precedent. Even so, this exclusively Black precedent leaves other POC communities without specific precedent to follow. Nevertheless, Kim argued that this paradigm necessarily contextualizes a direction toward civil rights advancement by observing racial oppression and its resistance. This discourse between Perea and Kim introduces dissent surrounding the efficacy of the Black-White Paradigm, which the following paper aims to address.

[15] J.Y. Kim, *Are Asians Blacks?: The Asian-American Civil Rights Agenda and the Contemporary Significance.*, 108(8).

IV. Colonial Roots & Implications on Color Discrimination

Notably, the enslavement of Black individuals is largely responsible for the emergence of the Black-White Paradigm considering this worldwide system contributed to unequivocal mistreatment that demands precise counteraction which focuses on uplifting the Black community. Even so, slavery also denotes the advent of colorism. For instance, J. Camille Hall observed that darker-skinned slaves often received more laborious duties. As the Vice Chancellor For Diversity and Inclusion at the University of Missouri-Kansas City, Hall also observed that slavers' records depicted lighter-skinned slaves as "gentler," "more beautiful," and "smarter," which delineates their increased likelihood to have attained education and freedom.[16] However, this advantage, with respect to the more challenging labor for darker-skinned slaves, began a cycle that continues today. Verna Keith and Carla Monroe–respectively the Professor of Sociology at the University of Alabama at Birmingham as well as a former University of Georgia research scientist and both with expertise in structural racial inequality–assessed that lighter-skinned Black women were more likely to marry high-status spouses with economic stability in contrast to their darker-skinned counterparts, who reported difficulty in occupational opportunity, wages, and romantic options.[17]

In turn, this increased likelihood contributes to a generational cycle of lighter-skinned individuals having greater access to education, socioeconomic opportunity, and as historically noted, an advantage in societal perception that contributes to marrying higher prospects and thus continues the cycle.[18] However, because the Black-White Paradigm centers around Black and White races without regard for non-Black POC, disadvantages related to skin color in non-Black POC communities remain unaddressed.

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[16] J.C. Hall, *No Longer Invisible: Understanding the Psychosocial Impact of Skin Color Stratification in the Lives of African American Women.*, 42(2).

[17] V.M. Keith & C.R. Monroe, *Histories of Colorism and Implications for Education.*, 55(1).

[18] *Id.*

V. Objective

For that reason, I intend to analyze the evolution of racially-based to color-based legislation through a content analysis, assuming that racially-based civil rights advancements can guide future policy against skin color discrimination. Subsequently, the following research encompasses legal documents following the more popular and overarching "Black Civil Rights Movement." Thus, it highlights the Pre-Civil War Era, Post-Civil War Era, the Civil Rights Movement itself, and the Modern Era, to discuss the broader implications of these legal advancements on other racial minorities.

Acknowledging the interdependent nature of racism and colorism, it is necessary to interpret existing research surrounding race since colorism cannot be analyzed without additional precedent through a content analysis method. Considering current colorism precedent has only recently emerged, there are not enough varying noteworthy samples to analyze through a content analysis approach, resulting in a limited color perspective in even my selected sample. For that matter, I aim to expand knowledge surrounding the Black-White Paradigm and its unexplored correlation with the a) minimization of color discrimination and b) detraction from non-Black POC subject to colorism, articulating the gap of this paper. Conversely, ignorance toward colorism relating to non-Black POC further perpetuates this Black-White Paradigm by introducing the question:

To what extent has a Black American focus within U.S. legal precedent perpetuated the Black-White Paradigm within colorism?

VI. Synopsis of Study

In the following study, I utilized a mixed-methods content analysis of sixteen legal documents according to four civil rights periods including the (1) Pre-Civil War Era, (2) Post-Civil War Era, (3) Civil Rights Era, and (4) Modern Era. Because of the under-researched nature of color discrimination in legislation, I found it imperative to utilize pre-existing documents related to racial discrimination to guide the following research, preventing me from conducting experimental, explanatory research in favor of aligning with the research question. Employing a purposive sampling method to determine the impact of precedent on the Black-White Paradigm, my sample was relatively biased to ensure a relation to the Black-White Paradigm, which serves as a limitation. Even so, I mitigated this bias by quantifying the number of explicit references toward various racial and skin color groups as well as to contrast the presence of "race" and "color." Thematic analysis was then used to compare the prominence of themes in different periods.

Nonetheless, it was unfeasible to consider every piece of racially-based legislation since 1790 due to the restricted time allotted, thus forming a limitation to this research. It must also be conceded that this research was conducted within the span of one year, which cannot fully capture three centuries of racial civil rights precedent. This acts as the primary limitation to this paper, and therefore, this research must be further developed. Even so, I specifically chose a broad scope of legal documents according to Anders Walker's analysis of racialist thinking as a mentality, "not simply a single theory or idea, but a whole realm of thought that captured the nation both before and after the Civil War–even into the post-Civil Rights Era." Therefore, the aforementioned limitations were combated by the formation of 4 civil rights periods to best depict this racialist mentality.

Accordingly, a legal approach was taken where "facts and legal issues similar to [the] case" point to their "outcomes and how the courts applied and interpreted the relevant statutes and regulations," justifying a purposive sampling method considering precedent is selected with bias when developing a case.[19] Each document met the criteria in either its focus on color, overall popularity, and/or representation of non-Black POC to necessarily isolate the Black-White Paradigm.

VII. Procedure

A systematic content analysis was employed to explore the development of the Black-White Paradigm and its impacts on modern-day color discrimination, aligning with Anca Olimid's[20] 2018 paper. Olimid, serving on the University of Craiova Faculty of Social Sciences with expertise in political science, Olimid discussed both the meaning and application of "human values" and "ethical behavior" within EU law. Likewise, this paper aims to observe the same with regard to the references to the assigned values (Figure 2) and observed subthemes (Figure 6) with respect to their application (or relevance) within a social context (Figure 3).

Olimid first defined a systematic content analysis as the consideration of, "the frequency distribution of the values, the meta-analysis, [and] the comparative contextual analysis of the [document] settings."[21] She continued to describe the meta-analysis as the interpretation and frequency of the data according to a set of values, utilized to correlate the impacts of the legal documents on current society. In turn, the frequency distribution of the denotative values contributed to the meta-analysis of thematic meaning, presented in the primary and secondary analyses.

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[19] California Courts: The Judicial Branch of California. (n.d.)., *Finding and Using the Law That Applies to Your Case.*, https://www.courts.ca.gov/1097.htm?rdeLocaleAttr=en.

[20] A.P. Olimid, *Framing Human Values and Ethical Behavior in the European Union Participatory Governance*, 9(2).

[21] *Id.*

To first determine the prominence of exact words in the documents, the denotative frequency was observed and noted in Google Spreadsheets. I provisionally coded nine values, as presented in Figure 3: “African-American” (AA); “Caucasian” (CA); “black” (B); “white” (W); “Black References” (BR); “White References” (WR); “non-Black POC” (NB); “race” (R); “color” (C) and observed their frequency distribution within individual documents, periods, and cumulatively.

DISCLAIMER: Some words used under "Included Word Choice" are considered offensive to the parties to which they pertain. Words included solely intend to denote the meaning of the given values within their historical use in legal documents, and they are not intended to be offensive.

Values	Included Word Choice
AA: "African-American"	"African," "Mulatto," "Negro," "Octaroon," "Quarteroon"
CA: "Caucasian"	"Caucasian," "European (ancestry)"
B: "black"	"Black," "Dark(er)-skin(ned)/complexion(ed)"
W: "white"	"White," "Light(er)-skin(ned)/complexion(ed)"
BR: "Black References"	Includes the summation of "AA" & "B" values
WR: "White References"	Includes the summation of "CA" & "W" values
NB: "Non-Black POC"	"Asian," "Chinese," "colored," "Iraqi," "Latino," "Mexican," "Middle Eastern," "Native/Indigenous/Indian," "Yellow"
R: "Race"	"Race," "Racial"
C: "Color"	"Color"

This initial frequency coding centered upon the denotative meaning of the values, or the objective definition. “African-American” and “Caucasian” were presented as racial terms, denoting African and European ancestry while “black” and “white” referred to skin color, denoting either a darker or lighter skin complexion. Nevertheless, “non-Black POC” values were categorized as such regardless of whether the value denoted race or color to gauge exclusive reference to non-Black POC. In turn, “Black References” and “White References” were quantified to compare their frequencies to that of the non-Black POC reference (i.e. “White References” is a summation of “Caucasian” and “white” values). Lastly, “race” and “color” aimed to assess the ratio of race-based language in contrast to color-based diction.

VIII. Secondary Coding: Connotative Thematic Analysis

For the secondary analysis, I evaluated individual and comparative themes to assess the connotative meaning of the documents, a process complementary to Olimid’s defined meta-analysis. Each document was read in chronological order and noted for themes to maintain the integrity of the document. Comparative analysis followed to contrast the evolution of themes among periods.

Following the first read of each document, the following 4 values were noted as prevalent: (a) Race versus Color; (b) Black-White Paradigm (c) Argument; (d) Non-Black POC Perception proved necessary in noting changes and continuities of motifs within the legal documents.

The Kami Software was employed throughout primary and secondary coding as it provided a digital annotative feature and the Find Command to clarify frequency analysis. Values were analyzed in frequency coding, ensuring that each word maintained the integrity of each value, but human error must be considered nonetheless. Legal documents in Portable Document Format (PDF) were transcribed in Google Docs, which was the software also employed to track the presence of the observed themes individually, period-based, and cumulatively.

IX. Contextual Analysis

Olimid lastly called for a comparative contextual analysis to determine the correlation between the aforementioned values and historical influence, determining the extent of their influence on social perception. Essentially, Google's searchability was utilized to determine which type of legislation proved the most socially relevant based on legal document type, explicit demographic, and status.

As the most frequented search engine, I first utilized Google to determine modern accessibility to acquiring more knowledge surrounding each legal document, determining their relative influence today through the number of search results available in March 2023. A greater amount of search results for a topic would indicate that, a) more people have written about the topic based on perceived importance, and b) general searchers would encounter less restrictions to developing further knowledge about a topic. Essentially, quantifying modern relevance would indicate the significance of a topic from both the academic researcher and the general public perspectives. To most accurately quantify the results, I employed quotation marks surrounding the name and date of the document in the search engine (i.e. '"naturalization act" and "1790"'), which possibly disregarded results concerning the document but also ensured that each returned result was certainly related to each document. Another limitation of note, determining the amount of Google searches does not present a direct correlation to a topic's modern relevance today. Nonetheless, this method was employed to numerically define social relevance based on how significant parties believe a topic to be, indicated by if they create the news articles and/or search for precedent. Secondly, the type of legal document was considered to determine the efficacy of various document types. Thirdly, I noted the explicit target demographic to determine its association with the Black-White Paradigm. For instance, Oliver Brown, a Black plaintiff, characterized *Brown v. Board of Education* as, specifically, the Black desegregation in schools within social perception. Lastly, the status of the document was noted in depicting its efficacy with regard to the breadth of people impacted.

X. General Analysis

The research most generally sought to determine the presence of the Black-White Paradigm within U.S. civil rights racial and color-based precedent, culminating in the analysis of the contrast among word choice frequency and the prominence of assigned themes.

Value	Mean Frequency	Standard Deviation
R: Race (explicit word)	27.250	35.124
WR: White Reference (race & color)	19.438	36.949
W: white (color)	17.250	36.870
NB: Non-Black POC (race & color)	16.313	25.395
BR: Black Reference (race & color)	15.688	31.379
C: Color (explicit word)	14.063	21.558
AA: African-American (race)	9.500	28.425
B: black (color)	6.188	15.039
CA: Caucasian (race)	2.188	28.425

Considering the mean frequency for “race” demonstrated the highest frequency of 27.250, this illustrates a “race” focus that continued over time, especially in contrast to “color,” which had a relatively low standard deviation of 21.558 and would support consistently fewer references toward color. Therefore, it can be noted that “race” appeared more prevalent than “color” within the sample.

Nonetheless, the standard deviations of "color" references indicated a disparity in the presence of "color" in each period. In fact, the standard deviation of the references of "color" between Periods 1 and 2 (21.74) lessened when compared to Periods 2 and 4 (18.74), and further decreased between Periods 3 and 4 (14.55). The general decrease in standard deviation between each period, with respect to Period 4, which reported the highest frequency of "color," implies the growing relevance of color today.

Furthermore, White References (WR) possessed the second-highest mean value of 19.438 with a standard deviation of 36.870. With a relatively high standard deviation, a Two-Sample t test Assuming Unequal Variance was utilized to most accurately determine the extent of the Black-White Paradigm, comparing the references between Race-Color (R-C), Black References-White References (BR-WR), Black References-Non-Black POC (BR-NB), White References-Non-Black POC (WR-NB), African-American-Black (AA-B), and Caucasian-White (CA-W). Although a t test condition requires thirty samples and greater homogeneity than purposive sampling can ensure, a t test was selected to best distinguish the significance of the disparity between references. None posed a p value less than 0.05–indicating a lack of statistical significance—but Figure 5 displays the results of the t test from lowest to highest p value to establish a comparison between values even if it is not statistically significant.

In that way, the distinction between the use of Caucasian and White proved the most significant when compared to the other values analyzed. That difference opens the discussion toward the disparity of CA-W in contrast to AA-B, where color-based diction is more significantly used to refer to White individuals, whereas racially-based language is typically utilized in regards to Black individuals. A cause of this disparity could be the evolution of Black-focused language in how racial terms (i.e. "African-American" values) were more historically used in an offensive manner whereas "black" as a color appeared less commonly.

On the other hand, BR-NB held the highest p value, noting a low disparity in Black references in contrast to Non-Black POC references. In that way, that limited differentiation in their frequencies suggests relatively equal representation of Black and non-Black POC in the selected legal documents. However, it must be reiterated that "colored" was noted as a reference to Non-Black POC because of its denotative meaning that is not associated with Black individuals. Even so, this overall finding would support the existence of the Black-White Paradigm within the legislation, considering the definite representation of Black individuals equals (or perhaps surpasses) that of non-Black POC references.

To clarify, these p values are too high to be considered statistically significant, which would indicate a failure to reject the null hypothesis that there is an arguable difference in the representation of Black, White, and Non-Black POC. Even so, I wanted to address that the raw means would indicate White representation as the most prominent when compared to Black and Non-Black representation.

XI. Period Analysis

To maintain the purpose of this paper as it aligns with the research question, four themes were chosen to delineate the connotative meaning of the documents in contrast to the explicit meaning assessed through frequency coding. In this manner, overall trends could be observed within periods, and subthemes were counted.

Because Period 1 only consisted of two documents, this era held less significance within the connotative nature of this paper, serving a contextualizing purpose instead. A Google search returned a mean value of 42,895 search results related to the documents, implying limited knowledge surrounding Period 1 and therefore relative social insignificance concerning this sample in contrast to the others. To determine the amount of search results deemed relatively significant within the sample, the median served as the mode of comparison considering the mean was heavily influenced by outliers. That is to say, a median of 52,300 was reported, indicating this value as the benchmark for what was relatively significant within specifically this sample. Even so, Black References garnered the highest mean-value frequency within this period, thus contextualizing civil rights precedent as holding a Black focus even before legal and social anti-discriminatory action.

With an average of 166,517 findings, Period 2 reported the second-highest searchability, implying its significance in developing a social understanding of historical racial discrimination. For that matter, the thematic analysis determined that Period 2 held the greatest perpetuation of the Black-White Paradigm, contradicting my expectations considering the Period 2 sample held the most specificity concerning non-Black POC. Because one-half of Period 2 specifically concerned non-Black POC (Chinese Exclusion Act, Ozawa v. United States), this finding contradicted my expectations. Even so, the standard deviation between “color” and “race” was 19.98, demonstrating a relatively high disparity between the two. Considering “race” reported a higher frequency (see Appendix B), this disproportionality could support a racial focus.

Additionally, Period 2 accounted for the most references to the subthemes “Social versus Political Equality” (from Argument theme) and “Dehumanization” (from Non-Black POC Perception theme). Aligning with its shift toward legally combating racial discrimination while not addressing it socially, Period 2 established the greatest disparity between social and political equality, demonstrated by the argument that the 13th Amendment “could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality” in *Plessy v. Ferguson*.[22] Moreover, the dehumanization of non-Black POC was observed in the Chinese Exclusion Act[23] and *Ozawa v. United States*[24], which denied Chinese and Japanese people citizenship.

Reinforcing the ideas apparent in Period 2, Period 3 demonstrated the continued perpetuation of a racial focus while also contributing to the highest focus on “Explicit Exclusion of Non-Black POC" (from Non-Black POC Perception theme) and “Democratic Values" (from Argument theme). For that matter, the standard deviation between the mean frequencies of the “color” and “race” references in Period 3 decreased to 15.67. This generalized decline could reflect the less clear distinction made between race and color. Another consideration, Period 3 marked the most expansive social activism since it contained the Civil Rights Movement. National unity was necessarily employed to pass legislation and promote action against racial discrimination. Legislators likely focused on eliminating the distinction between “color” and “race” in hopes to increase unity, which also could contribute to the subthemes that were identified.

[22]Plessy v. Ferguson, (1896).
[23]Chinese Exclusion Act, (1882).
[24]Ozawa v. United States, (1922).

In fact, the emergence of the "Explicit Exclusion of Non-Black POC" subtheme could expand upon the Skin Color Paradox in how, most notably, the Civil Rights Movement targeted Black equality with the expectation that defined non-Black POC rights would follow. This corroborates the theory that legislation and activism of certain groups may be hindered, even if colorism isn't the motive. Nonetheless, the sole designated focus on one racial group also led to the ostracization of non-Black POC in *Korematsu v. United States*[25], noted by the blunt exception of Japanese individuals from guaranteed equality while simultaneously encouraging Black equality in *Brown v. Board of Education*.[26] Even so, Period 3 garnered the highest-mean search results, with 8,850,000 Google Searches, highlighting the relevance of the Period 3 sample. Effectively, the prominence of democratic values could contribute to Period 3's significance, considering U.S. history has historically focused on the recounting of American pride. In fact, that pride was encapsulated by the argument in Executive Order 8802 that the "democratic way of life… can be defended successfully only with the help and support of all groups."[27] Additionally, the Civil Rights Act generated the highest search results, of 8,850,000, but its significance suggests more social relevance concerning a document not associated with a specific race at face value, regardless of its generalized association with the Black community. For that reason, the Period 3 sample could indicate a Black-centric undertone that lacks specified equality. Considering the Civil Rights Movement largely encompassed this period, the prominence of democratic values likely promoted a sense of unity needed to motivate this anti-discrimination legislation and the ones to follow.

[25]Korematsu v. United States, (1944).
[26]Brown v. Board of Education of Topeka, *supra* note 1.
[27]Exec. Order No. 8802 3 C.F.R., (1941).

Because of the under-researched nature of Period 4, this sample returned the least Google searches of 4,075 results and contributes to the limitations of this paper. Expectedly, the mean-value frequency of "color" was more prevalent than "race," consistent with the purposive sampling method that intentionally incorporated color-based precedent to align with the research question. Corresponding to this shift toward the recognition of color discrimination, the "Established Distinction" subtheme (from Race-versus-Color theme) proved most prevalent in Period 4. A clarified distinction was likely out of necessity to finally clarify the difference between "race" and "color" in which precedent had failed to do previously. Nonetheless, the most modern sample, Executive Order 13985 (2021)[28] promoted "Racial Equity" and failed to reference color at all. In turn, this document strayed from a positive trend of recognizing colorism as its own exclusive form of discrimination.

Furthermore, the prominence of "Unspecified Inclusion" (from the Non-Black POC Perception theme) emerged. For instance, Executive Order 13985 also encouraged the advancement of "equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."[29] Even though "underserved communities" were defined later in the document, the breadth of this definition—as it pertained to racial, sexual, disabled, rural, and impoverished minorities—limited its impact on even racial discrimination considering its lack of specificity and broad target demographic.

[28] Exec. Order No. 13985 3 C.F.R., (2021).
[29] Id.

Moreover, the denotative frequencies reported support this unspecified inclusion, returning a mean value of 1.5 explicit references toward non-Black POC in Period 4. On the other hand, the mean values of Black and White references, respectively, were 18.5 and 15.5, demonstrating a greater focus on Black Americans. In turn, this sample implied a shift toward a designated advocacy for Black individuals, rather than merely ensuring equality to White individuals. For that matter, equity emerged in samples concerning colorism, but non-Black POC are overshadowed by Black individuals in how they are less referenced. Although the inclusion of all racial minorities increased in contrast to the previous periods, unspecified inclusion leaves uncertainty concerning color discrimination against non-Black POC. In that way, uncertainty has resulted in a lack of overt reference to non-Black POC, resulting in minimal precedent to reference in developing a case against color discrimination.

XII. Contextual Analysis

Even so, the contextual analysis provided suggestions concerning policy-making to validate modern multiracial color discrimination, based on racial legal precedent. Nonetheless, it must be considered that the following recommendations correspond with the document types, statuses, and demographics that formed the majority of the sample, presenting a limitation based on a restricted scope of sixteen samples.

XIII. Document Type

Although ‘acts’ as a document type (as opposed to court cases, executive orders, etc.) seemed the most socially relevant according to Google’s searchability, the Civil Rights Act proved largely responsible for these high results.

As the only other act in the sample, the Chinese Exclusion Act garnered approximately 3.5% of the Google results that the Civil Rights Act provided. Therefore, it is clear that acts as a document type may not generally be assumed to be the most effective. On the other hand, court cases garnered a mean value of 192,686 results but received a kurtosis value of 6.624. Although this high value suggests outliers, the standard deviation of search results between court cases (389,124.724) remains far less than the deviation between acts (4,996,595,202). Therefore, court cases are consistently more socially relevant, according to Google's searchability.

Expectedly, national legislation garnered the highest mean value of search results. Nevertheless, national legislation also held relatively high standard deviation, skew, and kurtosis values in comparison to the state values. This highlights the uneven distribution of data and occurrence of outliers. Simply put, a document's national status held varying degrees of social relevance, depicting that national legislation cannot be consistently expected to hold social significance.

Most surprisingly, the documents without a specifically defined demographic received the highest mean value searches of 1,526,950 results. This prevalence could suggest a greater societal focus toward the promotion of equality rather than equity, and also a preference towards a focus on American unity. Even so, it must be noted that the aforementioned mean included the extreme outlier of the Civil Rights Act. Without that, the mean value was 62,340, which would indicate that Black-centric documents (with 285,090) returned more search results. Moreover, Black-centric document search results held the relatively lowest kurtosis value, articulating a Black focus with fewer outliers in contrast to the other demographics examined. This result could be subject to the limitations of the researcher. As a 2022 AP U.S. History student, I predominantly focused on legislation learned throughout that curriculum. That said, this background knowledge guided the development of the selected time periods, largely according to the overarching "Black Civil Rights movement" that is taught within the AP U.S. History curriculum. In that regard, this begs questions concerning the Black-centrism of the current education curriculum that must be addressed in the future.

In contrast to Black-centric documents, established AAPI documents earned an average of 64,308 search results. Lastly, *Mendez v. Westminste*r served as the only Latinx sample, but even with only 14,100 search results for this case, it ranks far beneath the other demographics. Unfortunately, no samples that exclusively represented indigenous communities were selected, demonstrating an apparent limitation.

XIV. Future Directions

Concerning this lack of representation, future researchers must examine racial demographics more equally, allocating the samples according to minority demographics. For instance, Latinx individuals made up 18.9% of the U.S. population in 2022.[30] To correspond with U.S. racial demographics, Latinx individuals should be proportionally represented within the chosen sample. In the same way, Native American populations must be considered within the sample to truly gauge their quantity of references and the nature of their portrayal. This proportional representation would ensure an accurate characterization of how racial precedent may be correlated to current color legislation, thus producing the optimal suggestions for policy direction that would accurately validate all racial minorities and their experiences with color discrimination. However, to centralize around the portrayal of colorism, future research should focus on Period 4, limiting the scope of examined precedent to attain a more feasible method of determining the presence and prominence of the Black-White Paradigm in the modern era. Considering this paper sought to close the gap concerning the prevalence of the Black-White Paradigm in civil rights history as a whole, future steps should be made to isolate colorism. Even so, additional legislation that focuses on color discrimination must be enacted before Period 4 can be more thoroughly examined with a content analysis approach.

[30]U.S. Census Bureau, *Quick Facts. (n.d.).*, https://www.census.gov/quickfacts/fact/table/US/PST045221.

Lastly, a different methodological approach may be suggested. The assumption that Google search results can depict a clear picture of what is socially significant today cannot be made certain. As another frame of reference to complement Google search results, the feature "Google Trends" should be utilized in the future to determine the significance of a topic in contrast to other topics' popularities at that time. Depending on the time of interest, Google Trends provides a method to analyze the evolution of social significance according to search trends since 2004 and can even point toward regional popularity. To that extent, I suggest that future research look toward Google Trends to further corroborate the integrity of this paper.

XV. Discussion

Concerning the trend seen throughout the frequency analysis, White References produced the highest frequency, demonstrating a clearer focus on the White community. This finding strayed from my previous expectations, since civil rights documents would be expected to centralize around POC. In turn, a denotative focus on "White" could objectively evidence a "White supremacy" narrative. Even more, its predominant use was often associated with "White" being the legal and social ideal that POC should aspire for to reach equality, as demonstrated in the period analysis. This equalization of POC to White individuals inherently sets "White" as the maximized end goal, rather than actively and definitively uplifting the equity of all POC. Seeking equity would uphold the concept that POC do not have to exist within a framework that was built upon the hierarchy that places the White community at the top. In fact, the previous systematic content analysis could validate the idea that this hierarchy served as the backbone to historical civil rights legislation considering "White" was presented as the ideal, definitively and suggestively.

For that matter, this research concludes that the Black-White Paradigm, to a certain extent, remains subject to White supremacy. In and of itself, the emergence of a "Black-versus-White" narrative is likely a byproduct of inherent White Supremacy in U.S. legal precedent that compares all POC to the White race as the standard of equality. Even so, the research suggests that precedent has largely focused on racial and Black-centered civil rights. Firstly, "race" was the most frequently used word throughout the samples, clearly denoting its significance. "Color" was approximately recorded half of the times that "race" appeared, signaling an apparent historical focus on race. Secondly, the Black community served as the most prominent demographic when compared to other POC groups. Especially notable in Periods 2 and 3, greater stratification between non-Black POC and Black individuals was embedded throughout legislation, focusing on the propagation of Black civil rights and dismissing non-Black POC in the process. This evolution of the Black-White Paradigm has minimized non-Black POC throughout racial precedent, and that similar ignorance today translates into colorism—where lighter-skinned individuals hold greater opportunities than their darker-skinned counterparts, continuing the perpetuation of White supremacy through the Black-White Paradigm.

However, colorism also inherently subjects itself to White supremacy. Colorism essentially dictates that the more "white" someone is–by ancestry and/or skin color–the more privileges they may be afforded. Therefore, White supremacy intrinsically anchors both colorism and the Black-White Paradigm. By continuously asserting a "White ideal" by social and legal means, White supremacy is entrenched into the foundations of the U.S. Although this is not necessarily a revolutionary concept, the extent of its innate nature today may be depreciated. Even if Americans often make racism appear to be historical, the concept that "White" is exemplary cannot be erased, especially considering that it is still written across U.S. precedent in a way that transcends time.

XVI. Conclusion

The extent of the Black American focus in U.S. legal documents holds significance in the precedent that courts utilize in determining modern cases, which influences policy-making. Current precedent largely leans upon Black Americans with regard to civil rights legislation, resulting in the foundation for civil rights for all POC to be Black-centric. On the one hand, non-Black POC cannot as easily develop modern discrimination claims with precedent that specifies their capability to invoke it. Meanwhile, it cannot be discounted that Black Americans have largely paved the road for progressive policies and continue to do so. This can be exemplified by the Black Lives Matter Movement in June 2020, which also brought attention to the simultaneous Stop Asian American Pacific Islander Hate movement.

Likewise, the emergence of color discrimination has centered around Black Americans, overlooking colorism in non-Black POC communities. This can largely be seen in how the legalistic beginnings of colorism began with a case prosecuted by a Black individual. Therefore, it is more clearly defined according to legal precedent that darker-skinned Black individuals have an avenue to challenge color discrimination while lighter-skinned Black individuals have a similar opportunity. Even so, this Black-centric legal approach to colorism has not largely expanded its meaning toward other racial groups since they lack a clear model to follow, especially since significant colorism precedent has not been thoroughly established.

Although this paper predominantly sought to develop a deeper understanding surrounding colorism within the context of the Black-White Paradigm, an overarching theme of White supremacy superseded that initial aim. Logically, colorism already structures itself around the degree of "closeness" to White as a race and thus whiteness as a skin color. In a similar manner, the Black-White Paradigm precisely dictates a contrast of a Black-versus-White narrative, which also places the Black community exclusively in reference to the White community. In both frameworks, White individuals are viewed as the model or standard that POC can only aspire to reach. By placing the White community on this pedestal as the ideal mode of comparison, POC have become so inherently subjugated to the point that their secondary nature to the White community is imperceptible on the surface. To that point, this paper asserts that the Black-White Paradigm framework ultimately undermines progress inherently, clearly with regard to non-Black POC but also due to its systematic ties to White supremacy.

This innate White supremacy could largely be due to the "equality-based" mechanisms used to transition between each of the periods. Between Periods 1 and 2, anti-discriminatory legislation emerged. Namely, the 15th Amendment sought to legally mandate equality by abolishing slavery, thus nominally ensuring equality to a White ideal. Between Periods 2 and 3, a transition from exclusively legal equality to social equality materialized, seen especially through the Civil Rights Act of 1964. Even so, this legislation also only existed as a method of achieving an equal status to the White community. In this manner, these forms of legislation intended to forge unity through an idealized version of equality that failed to seek true equity for POC.

This forced unity was also noted through the joint perception of race and color. Rather than further divide POC communities, colorism discussions were set aside to initially focus on achieving racial equality, but they have yet to fully be brought forward in the modern era, which further legitimizes the Skin Color Paradox. In juxtaposition to this focus on equality though, non-Black POC were dehumanized to uplift the Black community. *Plessy v. Ferguson* especially highlighted this notion through the prosecution's argument that "there is a race so different from our own that we do not permit those belonging to it to become citizens of the United States… I allude to the Chinese race."[31] This advocacy for Black equality developed an approach that belittled other communities to uplift the Black community, furthering the idea that only one group could achieve the ideal. In that way, this continues to contribute to themes of White supremacy in how those that seek to remain at the top of the hierarchy must persistently demean other communities.

Even though legislation from the modern era seeks to combat this constant competitive cycle, it still remains far too unspecified. In an effort to ensure the inclusion of all people, policymakers have opted to vaguely discuss equality by ensuring it to "all people"[32] or "underrepresented communities."[33]

Without detailing the specific groups addressed, executives are given the authority to decide to whom and to what extent equality can be ensured while the definition of true equality remains open to interpretation. To that effect, colorism-based equity is nearly nonexistent within a legal sense, especially considering the last sample of Period 4 focuses exclusively on "racial equity."[34]

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[31]Plessy v. Ferguson, *supra* note 22.
[32]Civil Rights Act of 1964 § 7, (1964).
[33]Exec. Order No. 13985 3 C.F.R., *supra* note 28.
[34]Id.

In turn, this thought progression introduces questions concerning the proper attention necessitated toward race and color and if a new framework should be established to measure the extent of equality that exists apart from whiteness. Concerning the former, I acknowledge the need to direct attention toward racial equality considering the persistence of racism that remains prominent in the modern era. Even so, a clearer distinction must be defined to separate race from color, and color must be allowed to stand on its own as a discriminatory claim. Both objectives require the establishment of comprehensible precedent to distinguish the two so that legal actions may be properly taken. Answering the latter, equality cannot continue to serve as the desired result, especially as it exists in tandem to the perpetuation of a White ideal. Instead, equity should reshape our current civil rights legal framework so that POC communities may stand on their own without constant comparison to the White community.

To further corroborate this need for equity, Justice Sotomayor previously asserted that the intention of the Equal Protection Clause must be to "speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[35] Meaning, we must seek to break down barriers that detract from open conversations surrounding race and the extent to which it impacts our lives in the modern era, especially considering the permeation of White supremacy.

In that way, Sotomayor implied that equality cannot be the sole objective of policy-making, but it must be an active approach toward uplifting communities according to their specific needs. It is critical that we seek to address the minimization of colorism in non-Black POC communities and how that is likely due to the establishment of the Black-White Paradigm.

[35] Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), (2014).

However, we must currently focus on the structural roots of colorism and the Black-White Paradigm before combating their detrimental effects. Ultimately, we must seek to first acknowledge the extent to which White supremacy is legally and socially embedded within the U.S. so that we can act affirmatively in influencing policy-making and advocate for equity that uplifts all POC in a defined manner.

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Judgment Over Will: The Role of the Judiciary in Defining Unenumerated Rights

Kyle C. Jedlicka

In *Federalist 78,* Alexander Hamilton argued that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." However, Hamilton's assertion seems debatable in recent decades as the Supreme Court has played an instrumental role in addressing polarizing social and moral issues. This paper analyzes the writings and beliefs that were shared by the Framers of the Constitution to create an understanding of what was meant by judicial power and how this power has grown over time—perhaps deviating from Hamilton's understanding of the judiciary in *Federalist 78*. With recent Court decisions, like that of *Dobbs v. Jackson*, it is imperative to scrutinize our current understanding of judicial power to ensure that the Supreme Court is acting within their power as originally intended. An analysis of the Ninth, Tenth, and Fourteenth Amendments, along with writings related to the original intent of these amendments, reveals that judicial power has grown beyond its intended purpose. With several of the Framers advocating for an interpretation of the Due Process clause revolving around procedural rights, doubt is cast upon the ability of the Supreme Court to review social issues by means of a "Substantive Due Process" approach. Along with the Framers' view of Federalism, which favors state's rights, the Supreme Court may have grown beyond the power originally intended for the judiciary.

I. Introduction

"Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."[1]

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[1] Edwin Meese, *Speech Before The D.C. Chapter Of The Federalist Society Lawyers Division*, *in* ORIGINALISM: A QUARTER CENTURY OF DEBATE 71, 76 (Steven G. Calabresi ed., Regnery Publishing Inc. 2007).

Thomas Jefferson feared the capability of the Supreme Court to expand federal power through their interpretation and construction of the Constitution. Judicial activism has sparked discussions since the ratification of the Constitution but has recently been brought to the forefront of national debates. The Court has been used as a political tool for the last several decades—increasingly growing their power and influence over political issues. The overturning of the constitutional right to abortion in *Dobbs v. Jackson* creates concern over the extent of judicial power that the Court wields. It becomes imperative to scrutinize the original intent of judicial power to maintain that the Court remains the "least dangerous" branch.[2]

This essay aims to analyze how the judiciary has expanded their authority of unenumerated rights by first examining where judicial power derives and then by studying the original intent of the Ninth, Tenth, and Fourteenth Amendments. Through understanding the personal writings of the Founding Fathers and the political theories that were accepted at the time of the ratification of the Constitution, the Court can return to the Framers' intent of judicial power. To address this expansion of power, originalism—as a jurisprudence—allows for the Court to follow the intended purpose of the Framers' Constitution. By accepting an originalist perspective of judicial power, the Court will no longer be used as a political tool by either Democrats or Republicans. Originalism allows for states to retain authority to decide political questions, which is favorable to Republicans, while also preventing the current conservative dominated Court from nationalizing conservative policies, which is a current fear of the Democratic party.

II. Where Judicial Power Derives From

Before examining these amendments, it is important to consider the evolution of judicial power. The Court derives its authority from Article III of the United States Constitution,

[2] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

where both the Court is established and Congress is granted the ability to create inferior courts.[3] Allowing the Court to review "all Cases, in Law and Equity, arising under this Constitution[,]"[4] the Court has the authority to interpret and apply the laws of the United States as deemed appropriate. Two different forms of authority are also granted to the Court under Article III, original and appellate jurisdiction. Under original jurisdiction, a claim can be brought directly to the Court for review, while under the appellate jurisdiction, the Court acts as a last resort by reviewing appeals from inferior courts. A vast majority of cases heard by the Court come under their appellate jurisdiction, while only two cases a year, out of eighty on average that the Court hears, come under their original jurisdiction.[5] Typically, cases that are heard through appeal range from topics concerning social policies to the implementation of statutes, while cases arising from original jurisdiction commonly derive from boundary disputes between states.

The power and authority of the federal courts can be broken down into three components: justiciability, equitable authority, and judicial review.[6] First, justiciability is defined as "[a] matter appropriate for court review,"[7] and refers to those cases that the judiciary has the authority to resolve. With the clause "Law and Equity"[8] being subjective, the Court has often debated which types of cases the judiciary has the authority to review. Chief Justice John Marshall defined aspects of justiciability in *Marbury v. Madison* when the Court reviewed

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[3] U.S. CONST. art. III, §2.

[4] *Id.*

[5] SUPREME COURT OF THE UNITED STATES, *How Many Cases Are Appealed to the Court Each Year and How Many Cases Does the Court Hear?,* Answer to *Frequently Asked Questions* https://www.supremecourt.gov/about/faq_general.aspx (last visited Feb. 22, 2024).

[6] EDWIN MEESE, THE HERITAGE GUIDE TO THE CONSTITUTION 232 (Matthew Spalding & David Forte eds., Regnery Publishing Inc. 2005).

[7] Justiciable, BLACK'S LAW DICTIONARY (11th ed. 2019).

[8] U.S. CONST. art. III, §2.

the actions of a congressional act. First, Marshall and the Court looked at whether or not there had been a right that had been violated, and then if that violation had a constitutionally prescribed remedy.[9] Second, Marshall stated that if there is a prescribed remedy, that remedy needs to be judicially enforceable for the courts to take action.[10]

Additionally, the Court created the political question doctrine when the Court held that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[11] Marshall believed that the Court did not have the authority to rule on issues of a political nature, but rather should leave those issues to the state and the federal legislature. It is important to note that the Constitution was not written by the federal government as a grant of their power, but was written and ratified by the states as a declaration of which powers the states forfeit to a national government.[12] The states were meant to retain authority over political issues, except for those explicitly enumerated in the Constitution. The Court in *Marbury* was hesitant to extend authority over political issues to the Court when these political questions were meant for the state and federal legislatures.

Other justiciable factors that courts look at are whether a plaintiff has "standing to sue" on an issue, if an issue is "ripe," or if an issue is "moot".[13] In order to bring a legal claim, the Court has found that a plaintiff must have a sufficient stake in a controversy that can be judicially resolved.[14] Courts do not have

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[9] *Marbury v. Madison*, 5 U.S. 137, 154 (1803).

[10] *Id.* at 154.

[11] *Id.* at 170.

[12] JOHN TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 105 (James McClellan ed. 2001) (1823).

[13] MEESE, *supra* note 6, at 233.

[14] *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (holding when "the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal state in the outcome of the controversy' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in form historically viewed as capable of judicial resolution.").

jurisdiction to review a case if there is not proper and valid standing to sue present. Ripe and moot refer to the stage in which a controversy or case is presently at. A case is not ripe if the plaintiff has not suffered damages yet from the action. Likewise, a case is moot if the controversy cannot be judicially resolved in the time frame.

Second, equitable authority is the notion that superior federal courts can review the actions of lower courts.[15] Since the adjudicatory process requires courts to find and rely upon relevant and accurate facts, the judiciary claims equitable authority to review lower court decisions. In order to find facts for an adjudication, courts often contend that they have implied authority to maintain discovery, make evidentiary rulings and court proceedings, or even compel a witness to testify.[16] Since courts rely upon human judgment to adjudicate cases, it becomes necessary for superior courts to have the authority to review past cases in order to correct wrongful judgments.[17]

Finally, the concept of judicial review was cemented in case law through the Court's decision in *Marbury v. Madison*. The idea of judicial review was first expressed in *The Federalist Papers*, when Hamilton expressed that "[t]here is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid."[18] Hamilton further stated that,

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them in conclusive upon the other departments, it may be answered, that this cannot be the natural

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[15] MEESE, *supra* note 6, at 233.

[16] *Id.* at 233.

[17] *Id.*

[18] THE FEDERALIST NO. 78, at 467(Alexander Hamilton) (Clinton Rossiter ed., 1961).

presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts."[19]

Hamilton argued that it is the "the *proper* and peculiar province of the courts"[20] to interpret and apply the laws of the United States. Further, Hamilton reasoned the legislature cannot review laws since they enact them, and the executive also cannot review laws since they enforce them. This natural presumption would leave only the judiciary as the proper body to interpret the laws of the United States.

While it is clear that the courts have the authority to review laws, what becomes difficult is discerning how much authority they have over legislative acts. *The Federalist Papers* advocate for judicial review while at the same time advocating for judicial restraint arguing that "[t]he courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substation of their pleasure to that of the legislative body."[21] Courts have the authority to make judgments on what the law is or what the Constitution states, however it is not within their authority to exercise their own will over the laws. Hamilton argues that it is not the Court's role to decide the substance or morality of the law, but rather to fairly apply the law as it is written. Courts are meant to independently interpret the laws rather than make binding decisions upon morality which the various states and citizens must abide by.

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[19] *Id.*

[20] *Id.* (emphasis added).

[21] *Id.* at 469.

III. Judicial Activism

Since the ratification of the Constitution, judicial activism has been an issue of great concern. Judicial activism is a topic that both the Federalists and the Anti-Federalists agreed upon, believing that an active judiciary poses a threat to the structure of the Constitution. In reference to the judiciary, Anti-Federalists argued in *Brutus* that,

"They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and *spirit* of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or control their adjudication."[22]

Anti-Federalists were worried that judges would take into consideration their own personal opinions and values when interpreting the Constitution. They argued that judicial activism is worse than legislative activism since there is no remedy for judicial activism. The decisions that the Court reaches are final and binding; there is no relief a party can seek for an unfavorable decision by the Court. In response to *Brutus No. XI*, Hamilton wrote in *The Federalist* that "[i]n the first place, there is not a syllable in the plan under consideration, which directly empowers the national courts to construe the laws according to the *spirit* of the constitution."[23] While the courts have the authority to interpret laws, *The Federalist* dismisses Anti-Federalists claims by stating that the courts do not have the authority to construe laws based on the spirit of the constitution. *The Federalist* shows that courts are not meant to influence

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[22] BRUTUS, BRUTUS XI 295 (Ralph Ketcham ed., Penguin Grp. 2003) (1788).

[23] THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

social views or morals through their decisions, but rather leave political questions to the legislatures to decide. Additionally, Supreme Court Justice Neil Gorsuch noted that *The Federalist Papers* advocated for the removal of judges through their impeachment if judges do inject their morals into the law.[24]

Justice Gorsuch believes that it is not the job of the judiciary to update the Constitution to fit new moral or social beliefs, but rather to interpret the Constitution as it is written. The courts were not intended to be the guardians of morality. Instead, social, and moral issues, can be addressed through a democratically elected legislature. The courts are not representative of the American people; however, the legislature is representative and accountable to the people. Through elections, citizens can change legislation that may be deemed as immoral or wrong by electing new legislators. A judicially active court, that rules on the morality of laws, strips citizens of this right to a democratic form of government. James Bradly Thayer, a respected constitutional theorist, expressed this sentiment, arguing that "[i]t should be remembered that the exercise of it [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors."[25]

IV. The History of Judicial Power

The degree of judicial power has varied over time as different jurisprudences and political parties have controlled the Court. The transformation of judicial power can be broken down

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[24] NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 122 (Crown F. 2019).

[25] JAMES BRADLEY THAYER, JOHN MARSHALL (Houghton Mifflin 1901).

into four distinct eras, with the current Court transitioning into a possible fifth era.[26]

Christopher Wolfe, a political theorist, argues that the period between the Constitutional Convention and the Civil War was a period of judicial restraint. During this period, the Court often let congressional acts stand as constitutional and seldom used their power of judicial review. From the time that judicial review was established in 1803 in *Marbury v. Madison*, the Court refrained from ruling another congressional act as unconstitutional until 1857 in *Scott v. Sanford*. It is this era that many legal historians deem as the 'traditional' period of judicial review.[27]

Wolfe believed that the judiciary was successful in early American history because it was restrained and allowed for legislative deference. Wolfe said:

"Judicial Review 'won out' in early American history after genuine struggles, but the form in which it won was critical to its success. In a different form, it is likely that it would not have survived. The form it took was 'moderate' judicial review, and the major qualifying components it incorporated were inherent limits of judicial power, legislative deference, and the political questions doctrine."[28]

Those who framed and ratified the Constitution are the same political leaders who created and operated the earliest forms of the political branches, making it important to study how these institutions first operated. The idea of moderate judicial review, with a large emphasis on legislative deference, is a concept that can be seen throughout *The Federalist Papers* as well as in other early American writings. Emphasizing the importance of judges to refrain from acting on "*will* instead of

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[26] STEPHEN P. POWERS & STANLEY ROTHMAN, THE LEAST DANGEROUS BRANCH? CONSEQUENCES OF JUDICIAL ACTIVISM 18 (Praeger 2002).

[27] *Id.* at 19.

[28] CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 101 (Basic Books 1986).

judgment"[29] as well as to not "construe laws, according to the *spirit* of the constitution"[30] were major points of contention throughout the ratification process of the Constitution.

This was the prevailing jurisprudence for several decades after the time of ratification, only changing around the time of the Civil War. However, even after the Court began to exercise greater power and authority, several constitutional theorists still argued for the use of a traditionalist approach. Alexander Bickel, when speaking on the theories of James Bradly Thayer, noted that "[t]he power of review, says Thayer, must be conceived of strictly 'as a judicial one,' quite unlike, and distinct from, the functions of the political branches of government… 'when those who have the right to make laws have not merely made a mistake, but have made a very clear one, so clear that it is not open to rational question.'"[31] Wolfe makes a similar claim when he argues that judicial review was "not to be exercised in a 'doubtful case'. In cases which they had doubts about the proper interpretation of the Constitution, judges would defer to legislative opinions of constitutionality."[32]

For many constitutional theorists who follow a traditional view of judicial review, "[t]he Court's business was not to decide what laws were best for the nation, but to rule only in cases where the law seemed clearly to conflict with the constitutional provisions."[33] The Court was not intended to be a bulwark against immoral legislation, but rather to rule on questions of discrepancy in the law. It is the job of the duly elected legislatures to review the morality of laws, and those laws can be repealed by the people through the election of new representatives. As well, this use of judicial review as a

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[29] THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

[30] BRUTUS, *supra* note 22, at 295.

[31] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 35 (Yale U. Press 1962).

[32] WOLFE, *supra* note 28, at 104.

[33] POWERS, *supra* note 26, at 19.

protection against immoral legislation "is the reason a charge can be made that judicial review is undemocratic."[34]

Wolfe classifies the period between the Civil War and the New Deal court as a period focused on substantive due process and natural law.[35] During this period, the Court became more active in reviewing legislation and commonly struck down congressional acts as either violating an individual's right to due process or violating their natural rights. Often referred to as the Lochner era—from the case *Lochner v. New York*—the Court often struck down economic regulations as a violation of a business' right to due process of contract.[36] *Lochner* shows "its significance in American legal history is that it reflected a determination by the Supreme Court to use the power of judicial review to serve political ends."[37]

Next, Wolfe argues that the post New Deal court moved back to legislative deference and restraint.[38] Starting after the cases of *National Labor Relations Board v. Jones & Laughlin Steel Corp.* and *West Coast Hotel v. Parrish* in 1937, the Court allowed for a greater degree of legislative deference. In *Jones & Laughlin Steel Corp.*, the Court upheld the Wagner Act which regulated employees whose operations affected interstate commerce.[39] While in *West Coast Hotel*, the Court upheld the

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[34] BICKEL, *supra* note 31, at 17.

[35] POWERS, *supra* note 26, at 19.

[36] *Lochner v. New York*, 198 U.S. 45, 58 (1905) ("If this statue be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.").

[37] POWERS, *supra* note 26, at 22.

[38] *Id.* at 18.

[39] *Nat'l Lab. Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 39 (1937) ("The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.").

constitutionality of state minimum wage laws,[40] which expanded the court's influence over state policies and issues. The Court continued to uphold the constitutionality of legislative acts during this period which expanded the power and authority of the federal government over the state governments. The Court most notably expanded federal power by the upholding the Social Security program,[41] expanding Congress' ability to regulate commerce through the Commerce Clause,[42] and expanding the wartime powers of the Presidency.[43]

Finally, the last era of judicial power comes from the Warren and Burger courts which placed a large emphasis on the nationalization of civil rights and liberties.[44] During the Lochner era, the idea of substantive due process became commonplace for economic issues; however, the Warren and Burger courts expanded the substantive due process theory to social issues. During this time, the Court saw an increase in cases that relied upon the Due Process Clause of the Fourteenth Amendment to protect individuals from infringements from state governments into what were perceived as natural rights.

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[40] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) ("[I]f such laws 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirement of due process are satisfied'").

[41] *Helvering v. Davis*, 301 U.S. 619, 641 (1937) ("Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation.").

[42] *United States v. Darby*, 312 U.S. 100, 115 (1941) ("Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.").

[43] *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) ("The power of the national government is 'the power to wage war successfully'. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.").

[44] POWERS, *supra* note 26, at 19.

Legal historians note that in the early twentieth century the Court entered a period of legal realism,[45] aimed at correcting what were perceived as "essentially unjust status quo".[46] During this period, the Court began to disregard the use of common law jurisprudence in favor of extralegal information that they deemed to be relevant to the case. Common law was utilized under the British legal system and allowed for legal customs and rights to be defined over time. Legal historian John Johnson has found a massive decline in the use of common law beginning in the late nineteenth century. For example, 40% of Supreme Court decisions focused on common law jurisprudence in 1875 while only 10% did in 1960.[47] Johnson also found that the number of individual opinions of the Justices rose from 20% in the 1930s to nearly 60% in the 1970s.[48] Powers and Rothman argued that "[i]f one takes these developments into account, it is understandable that in the course of interpreting the meaning of statutes or the Constitution, judges would be more likely to render novel decisions that broke free from existing precedent. Whereas the common law had been the vehicle for episodic judicial innovation in the nineteenth century, statutory and constitutional interpretation became the more common means in the twentieth century."[49] The declining use of common law and growing reliance on extralegal information has been a major factor in the rise of judicial power throughout the twentieth century. Without the use of Common Law, the Court began to rely upon their own perception of morality to reach decisions on cases. Additionally, the twentieth century saw the Court gain power by using the Fourteenth Amendment to protect unenumerated personal rights.

Currently, the Court could be entering a fifth era of judicial power under the Roberts Court. The Court overturned

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[45] POWERS, *supra* note 26, at 22.

[46] *Id.*

[47] *Id.* at 23.

[48] *Id.*

[49] *Id.*

Roe v. Wade and returned the question of abortion back to the states in its decision of *Dobbs v. Jackson*, showing that the Court could potentially revert back to an era of prioritizing states rights, rather than a continuation of nationalized personal rights.[50]

V. Original Meaning of The Ninth Amendment

The Ninth Amendment reads: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[51] Often referred to as the Unenumerated Clause, the Ninth Amendment guarantees rights to the people that are not specifically enumerated within the Constitution. This amendment, along with the rest of the Bill of Rights, was a contentious issue within the ratification process of the Constitution. Many Anti-Federalists called for the inclusion of a Bill of Rights to limit the powers of the federal government while the Federalists feared that the enumeration of such rights would lead to the exclusion of all other rights not enumerated.

When speaking before the House of Representatives, on behalf of the inclusion of the Ninth Amendment, James Madison said:

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

[50] *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 216 (2022) ("Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion.").

[51] U.S. CONST. amend. IX.

heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against."[52]

James Madison argued on the legal philosophy of *inclusio unius est exclusio alterius*, a Latin term which maintains that the very inclusion of specific rights implies the general grant of all other authority to a legislative body.[53] However, while Madison believed that the inclusion of a Bill of Rights would endanger the protections of other rights that were not enumerated, Madison agreed to support the Bill of Rights in a compromise to gain support for the ratification of the Constitution from Anti-Federalists. In order to properly protect unenumerated rights under the Bill of Rights, Madison believed that procedural safeguards could be implemented to prevent a general grant of authority to the national government.

Edmund Randolph, a Virginia Delegate to Constitutional Convention and member of the Virginia House of Delegates, questioned the phrasing of the Ninth Amendment during the consideration of the amendment at the Virginia assembly. Randolph believed the amendment would be better with "a provision against extending the powers of Congress" rather than a provision for the "protection to rights reducible to no definitive certainty."[54] In response to these suggestions, Madison wrote to George Washington that distinguishing between the need to prevent the expansion of enumerated powers and against the protection of unenumerated rights was illogical.[55] Madison believed both protected against the same expansions of legislative power and there was no need to distinguish between the two. Madison continued by arguing that "[i]f a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured

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[52] MEESE, *supra* note 6, at 367.

[53] *Id.*

[54] *Id.* at 368.

[55] *Id.*

by declaring that they shall not be abridged, or that the former shall not be extended."[56]

While Randolph's objections to the amendment focused upon the amendment protecting rights and not limiting congressional power, an understanding of the purpose of the Ninth Amendment shows that Madison's assertion to Washington was correct. The Ninth Amendment was crafted for two main reasons; first to protect against the expansion of federal powers through the Necessary and Proper Clause, and second, to limit the judicial nature of the Court. Anti-Federalists feared that Congress would expand their authority through the Necessary and Proper Clause and that the Court would allow this expansion, forcing Federalists to draft the Ninth and Tenth Amendments to ensure a limited federal government. Madison drafted the Tenth Amendment to reaffirm that all powers not enumerated to the federal government were reserved to the various state governments. However, Anti-Federalists feared that the Tenth Amendment would be ineffective if the Court construed Congress's authority broadly to mandate the recognition of certain rights.[57] So, the Ninth Amendment was created to narrowly limit congressional authority to only the enumerated powers by mandating "that the delegated powers of Congress not be given a latitudinarian interpretation to the prejudice of the states."[58]

St. George Tucker shared a similar opinion of the Ninth Amendment and its purpose in protecting against the federal government usurping power. While Tucker was not a Framer of the Constitution, he was a respected lawyer who was later appointed by President Madison to be the District Court Judge of Virginia. Tucker's work, which includes the *View of the Constitution of the United States*, became a valuable reference for legal scholars in the nineteenth century. In Tucker's commentaries, he stated the Necessary and Proper Clause

[56] *Id.*
[57] *Id.* at 369.
[58] *Id.*

"neither enlarges any power specifically granted, nor is it a grant of new powers to congress, but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those otherwise granted, are included in the grant."[59]

After various revisions to the language of the Ninth Amendment, Edmund Randolph once again objected to its adoption before the Virginia House of Representatives. Similarly, he argued that the Ninth Amendment should prevent the expansion of Congressional power rather than protect rights that are retained by the people.[60] However, Madison saw no distinction between each phrase and affirmed that the purpose of the Ninth Amendment was not to allow the Court to discover new unenumerated rights, but rather to limit Congress' legislative authority.[61] Madison even continued to maintain that this was the central meaning of the Ninth Amendment for the duration of his life—a view that is seconded by most commentators of the time.[62]

VI. Originalist Interpretations of the Ninth Amendment

The Court has interpreted different meanings for the Ninth Amendment throughout the history of the United States. However, the traditional interpretation of the Ninth Amendment lends itself to align with the beliefs shared in the era of traditional judicial power. From the time of the ratification of the Constitution to the Civil War period, the Ninth Amendment played little role in judicial enforcement of rights, often leaving the question to the legislative branch.

However, modern theories often advocate for a libertarian approach, claiming that the Ninth Amendment was intended to protect natural rights. While this approach is held by many modern constitutional theorists, the theory is criticized

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[59] GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 227 (Liberty Fund 1999) (1803).

[60] MEESE, *supra* note 6, at 370.

[61] *Id.*

[62] *Id.*

when considering early interpretations of the Ninth Amendment. Legal scholar, John Hart Ely, argued that interpreting the Ninth Amendment to include natural rights "do not lend themselves to principled judicial enforcement."[63] Likewise, originalist libertarians reject the premise that unenumerated rights are judicially enforceable, often contending that it is left to the legislatures to determine the scope of natural law.[64] Nevertheless, modern theories of the Ninth Amendment have influenced even the decisions of Supreme Court Justice Clarence Thomas, who believes that Natural Law provides the context in which the Constitution was written and should be interpreted.[65]

Georgetown University Law School Professor and legal scholar, Randy Barnett, argues that there are five different originalist models of interpretation for the Ninth Amendment: the State Law Rights Model, the Residual Rights Model, the Individual Natural Rights Model, the Collective Rights Model, and the Federalism Model.[66] Upon examining the traditional interpretation of the Ninth Amendment, the Individual Natural Rights Model and the Federalism Model are the most appropriate forms of Ninth Amendment jurisprudence in relation to the Framers' original intent.

The States Law Rights Model argues that the Ninth Amendment protected state constitutional and common law rights.[67] Under this model, constitutional theorist Russell Caplan argued that it was within the power of different states to enact laws and change their own interpretations of common law. Caplan believed "[the amendment] simply provides that the individual rights contained in state law are to continue in force

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[63] LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMER'S CONSTITUTION 279 (Macmillan Publishing Co. 1988).

[64] MEESE, *supra* note 6, at 369.

[65] SCOTT GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 43 (N.Y.U. Press 2002).

[66] Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 Tex. L. Rev 1, 10–21 (2006) (discussing the various originalist approaches to interpreting the Ninth Amendment).

[67] *Id.* at 11.

under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality."[68]

However, James Madison's speech concerning the Bill of Rights demonstrates that this claim is not true in terms of original intent. Madison addresses two primary concerns regarding the Bill of Rights; first that enumeration of certain rights is important to counteract the enumeration of certain powers, and second, that the enumeration of such rights poses a danger that one may assume all other rights not enumerated are not protected.[69] To the first issue, Madison argues the existence of the Necessary and Proper Clause in the federal Constitution poses a threat to a limited form of government—stating that federal power needs to be limited to what it was granted. Second, on speaking to the issue that enumerated rights infers greater legislative power, Madison asserted: "but, I conceive, that may be guarded against. I have attempted it, as gentleman may see by turning to the last clause of the 4th resolution."[70] Here, Madison was referring to the clause that became the precursor to the Ninth Amendment, which read "[t]he exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."[71] Madison's intention was not to protect states' rights, but rather to limit legislative restrictions on personal rights. Madison aimed to ensure that Congress would not expand their authority through the Necessary and Proper Clause to regulate issues that were not expressly protected through enumeration. While the Ninth Amendment could still protect state constitutional or

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[68] *Id.*

[69] *Id.* at 25.

[70] *Id.*

[71] *Id.*

common law rights, there is little proof that was the primary intention of the Ninth Amendment.

In contrast, the Residual Rights Model argues "the rights of the people are defined residually by what remains after the delegation of federal powers and these rights play no role whatsoever in the definition or limitation of those powers."[72] Based on the Framers' intent, the Residual Rights Model improperly separates the idea of unenumerated rights from enumerated powers. Under this theory, the two distinctions stay separate, and the theory does not take into account that unenumerated rights and enumerated powers can dictate the other. Justice Reed stated that "[t]he powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when an objection is made that the exercise of federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken."[73] Justice Reed takes a rights-powers approach to the Ninth Amendment, claiming that the rights that people retain are directly relational to the enumerated powers of Congress.

A future Supreme Court Justice, James Iredell, argues before the North Carolina ratifying convention that:

"It would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let anyone make what collection or

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[72] *Id.* at 28.

[73] *United Pub. Workers v. Mitchell*, 330 U.S. 75, 95-6 (1947) (further finding that "[i]f granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.").

enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."[74]

As Justice Iredell and other Federalists argue, the people still retain several rights that are not within the authority of the national government to infringe upon. The danger of enumeration is that it implies all unenumerated rights are within the authority of the legislature to regulate. However, this is not the case, as there are still several unenumerated rights in which the federal government is not given enumerated power to limit. Hamilton argued "[h]ere, in strictness, the people surrender nothing; and as they retain everything they have no need for particular reservations. … Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" [75] Many Federalists argued that even before the Bill of Rights were ratified, the federal government did not have the authority to limit several rights, like the right to free speech or the press, since the federal government was never granted authority to do so under the original Constitution.[76] Hamilton again employs a rights-powers approach to the Ninth Amendment where the enumerated powers, or in this instance the lack of enumerated powers, helps to create a framework for which unenumerated rights are protected.

The Collective Rights Model argues that the rights referred to in the Ninth Amendment are collective rights rather than individual rights.[77] While Randy Barnett asserts that no constitutional theorist claims this model as the exclusive purpose of the Ninth Amendment, the theory is starting to gain attention from other theorists. For instance, Akhil Amar and Kurt Lash argue that the phrasing "the people" seen in the Ninth Amendment, should be treated the same as that phrase is used in

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[74] Barnett, *supra* note 66, at 28.

[75] THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[76] Barnett, *supra* note 66, at 28.

[77] *Id.* at 15.

the Tenth Amendment, in which "the people" refers to the collective body of the United States. Yet again, if we look to Madison's and other Federalist intentions for the Ninth Amendment, it is evident that this is not the case. Federalists feared the possibility that enumeration of some rights would disparage the other rights which were unenumerated. Many of these early rights were individual rights that Madison and other drafters were aiming to protect. While it is possible that some collective rights exist within the Ninth Amendment, the more logical conclusion is that collective rights were not the intent of the Framers.

Finally, both the Individual Natural Rights Model and the Federalism Model reflect ideas shared by the Framers. The Federalism Model argues that the intent of the Ninth Amendment was to uphold the separation of powers between the federal and state governments.[78] Proponents of this model state the Ninth Amendment "justifies a narrow or strict construction of enumerated federal powers, especially powers implied under the Necessary and Proper Clause."[79] This aligns with Federalist efforts to mitigate Anti-Federalist objections to the expansion of federal powers through the Necessary and Proper Clause. Anti-Federalists feared the ability of the Court to expand federal powers and insisted upon a safeguard to this expansion. For this reason, traditional views of the Ninth Amendment have often stated that the Ninth and Tenth Amendments are "complementary but not redundant."[80]

The Individual Natural Rights Model argues that the Ninth Amendment protects natural rights that were accepted before the enumeration of rights in the Bill of Rights.[81] Professor Barnett believes that natural rights—like that of free speech, the free exercise of religion, and the right to bear arms—were all protected prior to their enumeration in the Bill of Rights. Under

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[78] *Id.* at 18.

[79] *Id.*

[80] MEESE, supra note 6, at 366.

[81] Barnett, *supra* note 66, at 13.

this model, the intention of the Ninth Amendment was to ensure that accepted natural rights were protected through their enumeration to the Constitution. This model distinguishes between natural and positive rights, where natural rights are believed to be fundamental human rights and positive rights are non-fundamental.[82] These natural rights existed prior to the Constitution and were enumerated, in Madison's words, "for greater caution"[83] while these positive rights were enumerated as an "actual limitation"[84] upon federal power.

The Individual Natural Rights Model also argues that the Ninth Amendment equally protects enumerated and unenumerated natural rights. While the Ninth Amendment may protect unenumerated natural rights, it does not justify the notion that these rights are judicially discoverable. Rather, the theory states that the burden lies on the government to prove why a restriction of the unenumerated rights is valid, similar to how the Court judges the infringements upon enumerated rights. The Court does not apply a literal interpretation to enumerated rights and allows deference in their regulations; likewise, with the unenumerated rights, all that is needed for the restriction of rights is a valid and legitimate reason. This model correctly articulates that "[a] proper regulation is not a prohibition, but instead prescribes the manner by which a particular liberty is to be exercised to protect the rights of others."[85]

In his speech to the House of Representatives, Madison said "the enumerated rights were individual in nature, one may also reasonably conclude that so too would be the unenumerated rights retained by the people."[86] Madison's arguments show two points: first, that the Ninth Amendment does protect unenumerated rights, and second, that these unenumerated rights are individual in nature, further disprovings the Collective

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[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 14.
[86] *Id.* at 26.

Rights Model. In a speech meant to defend the Constitution made by James Wilson, a Pennsylvania delegate to the constitutional convention and a future Supreme Court Justice Wilson said that "enumerating a right did not somehow elevate its legal status and thereby diminish the just importance, or deny or disparage, the others not enumerated." [87] The enumeration of such rights did not enhance the status of enumerated rights, but rather protected unenumerated rights to the same degree. It is clear that the Ninth Amendment was intended to protect natural rights; however, determining the extent of judicial intervention into natural rights can become difficult.

VII. The Court's Role In Unenumerated Rights

Madison, when speaking to the House of Representatives, stated that the courts will become "the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights *expressly* stipulated for in the constitution by the declaration of rights."[88] Madison's statements lead to two possible interpretations; first, that Madison did not intend the courts to use judicial review in cases of unenumerated rights, or second, Madison opposed the use of the judiciary in reviewing unenumerated rights. Either shows that while the courts have a role in protecting natural rights, the role of defining natural law is given to the legislature. The perception of natural law changes over time and seldom has fixed standards. In response to the Court's decision in *Calder v. Bull*, Justice Iredell stated:

"It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess the power to declare it so. … The ideas of

[87] *Id.* at 29.

[88] LEVY, supra note 63, at 282

natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject. …"[89]

Public perception of natural law changes over time and the courts were not created to define these rights. Legal historian Leonard Levy noted that "[t]o say that the Framers did not intend the Court to act as a constitutional convention or to shape public policies by interpreting the Constitution is, again, to assert historical truth."[90]

The Ninth Amendment was created to protect individual rights from the expansion of federal power through the Necessary and Proper Clause. Speeches by Madison show the Ninth Amendment protects enumerated and unenumerated rights equally and prevents the government from infringing upon unenumerated rights more than that of enumerated rights. While the judiciary was not intended to discover or create rights, the judiciary can protect those rights from unnecessary governmental infringement. However, without the inclusion of the Tenth Amendment, many Anti-Federalists believed the Ninth Amendment would not adequately protect against the expansion of federal power.

VIII. Original Meaning of The Tenth Amendment

The Tenth Amendment reads: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[91] The Reservation Clause of the Tenth Amendment guarantees that all powers not enumerated to the federal government remain in the authority of the states. The Ninth Amendment was intended to prevent the federal government from employing an expansive interpretation of broad enumerated powers, while the Tenth Amendment guarantees that all powers not enumerated to the federal government are

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[89] *Calder v. Bull*, 3 U.S. 386, 398–99 (1798).

[90] LEVY, supra note 63, at 269.

[91] U.S. CONST. amend. X.

retained by the states. For this reason, the Ninth and Tenth Amendments are "complementary but not redundant."[92]

Anti-Federalists feared that the federal government would usurp unenumerated power and restrict the rights of individuals; Federalists believed that states posed a greater danger to an individual's rights. The Constitution grants Congress limited and enumerated powers, while the various state constitutions grant their legislatures general authority. States hold power in all manners in which the federal constitution does not either prohibit the states from possessing that power or in situations when the power is expressly enumerated to the federal government. Federalists insisted that state constitutions should be regulated more than the federal constitution, but in an effort to ratify the Constitution, they instead agreed to create a federal Bill of Rights. The Tenth Amendment served two main purposes when it was ratified: it was first crucial to affirm the federal nature of the proposed government by dividing power between the federal government and the state governments, and second, the amendment was crucial to the construction of the Constitution by ensuring that Congress would not legislate issues that were not enumerated to the federal government .[93]

IX. Debate Between a Federal or National Government

A point of contention during the drafting process of the Constitution was whether to have the proposed government be either a federal[94] or a national[95] system. Ultimately, the Framers

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[92] MEESE, supra note 6, at 366.

[93] *Id.* at 371.

[94] Government, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining a federal government as "[a] national government that exercises some degree of control over smaller political units that have surrendered some degree of power in exchange for the right to participate in national political matters.").

[95] National Government, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The government of an entire country, as distinguished from that of a province, state, subdivision, or territory of the country and as distinguished from an international organization.").

created a federal system in which power can be divided between both the federal and state governments.

"The next relation is, to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of each particular state. So far the government is national and not federal. The Senate, on the other hand, will derive its powers from the states, as political and co-equal societies. So far the government is federal and not national. From this aspect of the government it appears to be of a mixed character, presenting at least as many federal as national features. The local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain limited objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects."[96]

Madison outlines the distinctions of a national and federal government and concludes that the proposed government structure is a federal system. However, Madison agrees that there are aspects of system which have a national aspect:

"The proposed constitution therefore, even when tested by the rules laid down by its antagonists, is in strictness, neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally, in the authoritative mode of

[96] TAYLOR, *supra* note 12, at 100.

introducing amendments, it is neither wholly federal, nor wholly national."[97]

Madison also makes an important distinction: the government is not primarily federal but has national aspects to it. The proposed government was structured to act like a federal system through the separation of powers at both the federal and state levels, while also acting as a national government through the Supremacy Clause. For the powers that are expressly enumerated to the federal government, they have supreme authority over the states. However, these enumerated powers are limited and defined, with the remaining powers reserved to the states. The distinction between federal and national forms of government becomes important when discerning the extent of power a government is afforded. A federal government maintains only the authority that is delegated to it, while a national government maintains both absolute and general authority over issues. Since the proposed form of government is federal and not national in structure, Madison maintains that the government is limited in the powers that it possesses.

The Ninth and Tenth Amendments were created to work together and ratified to complement one another. When speaking before the House of Representatives on behalf of the Ninth Amendment, Madison stated there were two reasons for the Amendment. The first of which was to limit the expansion of federal power by means of the Necessary and Proper Clause, while the second was to limit the judicial nature of the Court.[98] Madison stated the Ninth Amendment, which prevents the expansion of enumerated federal power, would allow for the Tenth Amendment to guarantee a reservation of all other powers to the state governments.

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[97] THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

[98] Barnett, *supra* note 66, at 25.

X. Powers Given To The Federal Government

In *The Federalist Papers*, Madison wrote:

> "The powers delegated by the proposed Constitution for the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace negotiations and foreign commerce;…The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the state."[99]

Madison outlines the powers in which the federal government retains authority and which powers are reserved to the several states. Madison stated that the federal government has the authority to regulate foreign affairs and commerce, while the states have the authority to make laws regarding the "ordinary course of affairs"[100] of one's life. The states, but not the federal government, are given the authority to make laws regarding issues which may infringe upon an individual's liberty. St. George Tucker shared a similar view in his commentary of the Constitution, stating, "the connections, intercourse and commerce of the confederate republic, with foreign states and nations; and with each other's, as sovereign and independent states, naturally fall under the jurisdiction of the federal government, whilst the admiration of all their other concerns, whatsoever, as naturally, remains with the states forming the confederacy." [101]

Tucker also agrees with Madison's assertion that the federal government is given authority to deal with foreign issues while the states retain the authority to regulate personal rights

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[99] THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961).

[100] *Id.* at 293.

[101] TUCKER, *supra* note 59, at 127.

and liberties. Tucker articulates that there is a clear distinction between the role of the federal and state governments.

"As federal it is to be construed strictly, in all cases where the *antecedent rights of a state* may be drawn into question; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty, or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government."[102]

Tucker reiterates the idea that the federal government is only granted authority to restrict individual rights and liberties in which instances they have enumerated authority to do so. It is important to remember that the "[federal] constitution was to result from the *unanimous assent of the several states that are parties to it*, expressed*, not by the legislative authority, but by the people themselves.* … As proof of this, the constitution may be altered by the assent of state legislatures, because they represent the state nations who assented to it."[103] John Taylor, who published a commentary on the Constitution in 1823, and St. George Tucker both point to the fact that the federal government only maintains authority in which issues that the *states* relinquished authority.

Tucker makes an interesting observation when he argues that the federal government must be cautious exercising their powers when those actions call into question the "antecedent rights of a state."[104] Tucker reiterates that all powers are antecedently vested in the states except for which powers are relinquished to the federal government. Tucker differentiates the

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[102] *Id.* at 102 (emphasis added).

[103] TAYLOR, *supra* note 12, at 105 (emphasis added).

[104] TUCKER, *supra* note 59, at 101.

conception that states retained power antecedently rather than gained that power residually. This distinction, while small, is important to remember when analyzing the extent of federal power. Since the states retain all authority over powers and rights not enumerated to the federal government, they have the power to define those rights not protected by the federal constitution. The federal government is granted no authority other than that is surrendered to them by the several states. The federal government is not an unlimited cornucopia of powers, but rather subject to the control of the various states. This is why Federalists feared unregulated state governments, since it is the states who retain authority over the federal government.

Tucker argues that individuals should seek damages for injuries through the state courts rather than the federal courts.

"Whoever knowingly departs from any of these maxims is guilty of a crime against the community, as well as against the person injured; and though both the letter and spirit of our federal constitution wisely prohibit the congress of the United States from making any laws, by which the freedom of speech, or of the press, may be exposed to restraint or persecution under the authority of the federal government, yet for injuries done the reputation of any person, as an individual, the state-courts are always open, and may afford ample, and competent redress, as the records of the court of this commonwealth abundantly testify."[105]

Tucker argues that it is the states who are meant to regulate federal actions and federal encroachments upon personal liberties. "Tucker's response is that the federal government is not the judge of its own powers and may be restrained by the people of the states."[106] The Constitution "was to result from the *unanimous assent of the several states that are parties to it*"[107] and as such restricted the federal government to

[105] *Id.* at 394.

[106] *Id.* at 371.

[107] TAYLOR, *supra* note 12, at 105 (emphasis added).

possess only the authority that the states forfeited. Tucker shows that the federal government cannot rule in matters of their own power and authority since federal power derives from which powers the states allow the federal government to possess.

Tucker further explained the types of liberties in which a state can regulate, such as "the power of regulating the course in which property may be transmitted by deed, will, or inheritance; the manner in which debts may be recovered, or injuries redressed; the right of defining and punishing offenses against the society, other than such as fall under the express jurisdiction of the federal government; all which, and all others of a similar nature are reserved to, and may be exercised by the state governments."[108] Tucker argues it is within the power of the states to determine property rights, criminal punishments, and all other actions of a similar nature.

The actions Tucker outlines that are within the authority of the states to regulate are issues that involve the most personal of liberties. In situations affecting the personal liberties, the Framers gave that authority to the state governments, rather than the federal government. Tucker goes further by stating that "it ought to be remembered that no case of municipal law can arise under the constitution of the United States, except such as are expressly comprehended in that instrument."[109]

Tucker does not end by saying that municipal law is left to the states to define but argues that the federal constitution does not prohibit states from enacting differing municipal law. "For the *municipal* law of one state or nation has no force or obligation in any other nation; and when several states, or nations unite themselves together by a federal compact, each retains its own municipal laws, without admitting or adopting those of any other member of the union, unless there be an article expressly to that effect."[110] Tucker believes it is within the

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[108] Barnett, *supra* note 66, at 71.

[109] TUCKER, *supra* note 59, at 102.

[110] *Id*. at 102 (emphasis added).

authority of the states to define municipal law, including the rights in which an individual receives.

Tucker's commentary shows that states could enact differing municipal laws without violating the Tenth Amendment, thereby refuting the notion of judicially enforceable natural rights in the Ninth Amendment.

"The municipal laws of the several American states differ essentially from each other; and as neither is entitled to a preference over the other, on the score of intrinsic superiority, or obligation, and as there is no article in the compact which bestows any such preference upon any, it follows, *that the municipal law of no one state can be restored to as general rule for the rest*. And as the states, and their respective legislatures are absolutely independent of each other, so neither can any common rule be extracted from their several municipal codes. For, although concurrent laws, or rules may perhaps be met within their codes, yet it is in the power of their legislatures, respectively, to destroy that concurrence at any time."[111]

The federal government does not have the authority to create a unified or national law in relation to personal rights, as only states can create or destroy that concurrence. As Madison argued before the House of Representatives, the Ninth and Tenth Amendments are intertwined and intended to compliment one another. Tucker's outline of the Tenth Amendment favors states rights and the ability for states to create and outline their own rights. If the Tenth Amendment does not grant the federal power to judicially discover unenumerated rights, then the Ninth Amendment does not either.

While the states retain general authority over matters not enumerated to the federal government, there are matters which the states do not have authority to legislate over. Tucker states "there are powers, exercised by most other government, which in the United States are withheld by the people, both from the

[111] *Id*. (emphasis added).

federal government and from the state governments: for instance, a tax on exports can be laid by no constitutional authority whatever, whether of the United States, or of any state; no bill of attainder, or *ex post facto* law can be passed by either; no title of nobility can be granted by either."[112] Tucker's commentary shows few exceptions to the general authority of state legislatures, all of which are enumerated within the Constitution. Yet, Tucker continues listing the states' restrictions by claiming "[m]any other powers of government are neither delegated to the federal government, nor prohibited to the states, either by the federal or state constitutions."[113] Though states retain a general authority over legislative acts and are meant to possess a great autonomy over their own authority, states have the responsibility to respect and protect the rights of their citizens; however, Tucker states it is the states' responsibility to safeguard these rights and does not give the federal government authority to protect state infringements upon personal rights.

In *Marbury v. Madison*, Chief Justice Marshall held that "the powers of the [national] legislature are defined, and limited; and that those limits may not be mistaken or forgotten, the constitution is written."[114] *Marbury* was the first case in which the Court reviewed legislative power and held a legislative act as unconstitutional. Marshall reaffirmed the idea that the federal government has limited and defined authority, and any expansion upon that power is a violation of the Constitution. *Marbury* shows that the Tenth Amendment limited federal power for the first half of the nineteenth century. Yet over time, the Court has expanded the authority of the federal government.[115]

In 1819, the Court had the opportunity to use the Tenth Amendment as a tool to narrowly define federal power but

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[112] *Id.* at 246–47.
[113] *Id.* at 247.
[114] *Marbury v. Madison*, 5 U.S. 137, 176 (1803).
[115] *Id.*

instead ruled to allow the grant of implied powers. In *McCulloch v. Maryland*, the Court construed federal power to allow for a broad definition which authorized Congress to enact policies to properly utilize their enumerated powers.[116] While this approach does fit Tucker's definition of the Necessary and Proper Clause, the lenient approach to legislative power allowed for the federal government to assume more power going forward. With the modern Court jurisprudence recognizing "few limits to the scope of Congress's enumerated powers…Congress may regulate, among other things, manufacturing, agriculture, labor relations, and many other purely intrastate activities and transactions,"[117] and "state government employment regulations, federal use of state officials to enforce federal regulatory regimes, direct federal commands to state agencies or legislatures, and extensive control of state policy through conditions on federal spending for states."[118]

Recently, the Court has shown that the Tenth Amendment contains a substantive element. The Court in *National League of Cities v. Usery* deemed that the federal government is barred from transgressing upon the "functions essential to a state's separate and independent existence."[119] The

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[116] *McCulloch v. Maryland*, 17 U.S. 316, 324–25 (1819) ("Congress is authorized to pass all laws 'necessary and proper' to carry into execution the powers conferred on it. These words, 'necessary and proper', in such an instrument, are probably to be considered as synonymous. Necessarily, powers must here intend such powers as are suitable and fitted to the object; such as the best and most useful in relation to the end proposed. If this be not so, and if congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation.").

[117] MEESE, *supra* note 6, at 373.

[118] *Id.*

[119] *Nat'l League of Cities v. Usery*, 426 U.S. 833, 845 (1976) ("It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the

Court used the Tenth Amendment to prevent aspects of the Fair Labor Standards Act from applying to state employees.[120] However, *Usery* did not last for long and was overturned nine years later in the case *Garcia v. San Antonio Metropolitan Transit Authority,*[121] which left some to believe the Court had abandoned states' rights claims.

In recent years, the Court has protected state sovereignty by ruling that states cannot be forced to deal with the ramifications of federal actions,[122] prohibited the federal regulation of state judges,[123] and barred the federal government from mandating states to complete federal tasks and programs.[124] Decisions like *Dobbs v. Jackson* and the Court's consideration of the independent state legislature theory in

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matter, but because the Constitution prohibits it from exercising the authority in that manner.").

[120] *Id.*

[121] *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) ("Our examination of the "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditionally governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.").

[122] *New York v. United States*, 505 U.S. 144, 166 (1992) ("In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

[123] *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers.").

[124] *Printz v. United States*, 521 U.S. 898, 935 (1997) ("We held in [*New York v. United States*] that Congress cannot compel the States to enact or enforce a federal regulatory program. Today, we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involve, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

Harper v. Moore demonstrate that the Court has taken a new interest in states' rights, which could lead to more authority and power being given back to the states in coming years.

The Tenth Amendment was ratified in an effort to uphold the federal structure of the government. The distinguishing between federal and national forms of government plays a crucial role in discerning the limits of power and authority a government possesses. Additionally, Madison, Tucker, and Taylor all show that state governments were intended to retain authority in defining personal rights and liberties. While the Court has recently taken a more active approach in recognizing states' rights, the substantive due process approach has led to a nationalization of personal rights and liberties.

XI. Original Meaning of The Fourteenth Amendment

The Fourteenth Amendment reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[125]

Having created the Privileges and Immunities Clause, Due Process Clause, and Equal Protection Clause, the Fourteenth Amendment has often been used as the Court's primary vehicle for judicial activism. The Fourteenth Amendment was ratified in 1868 as one of the Reconstruction Amendments to provide greater protections for freed slaves and has led to the incorporation of certain personal rights and liberties for state protection.

[125] U.S. CONST. amend. XIV.

The idea of due process of law first arose under the Fifth Amendment, which protected individuals' rights against the deprivation of "life, liberty, or property, without due process of law."[126] The first main test of the Fifth Amendment came in 1833 through the case *Barron v. Baltimore*. The city of Baltimore—through the course of street construction—diverted several streams into the Baltimore harbor. These new streams pushed large amounts of sediment and silt to the bottom of the harbor in the vicinity of Barron's wharf, which made it impossible for large ships to dock. Barron sued the city of Baltimore, citing the Fifth Amendment, by arguing Baltimore deprived Barron of his property for public works without just compensation or due process. However, the Court held that Barron could not receive relief since the federal constitution did not apply to the states. Chief Justice Marshall, wrote that "[t]he provision in the Fifth Amendment to the Constitution of the United States declaring that private property shall not be taken for public use without just compensation is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States."[127] Further, the Court held that "[t]he Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of individual states."[128]

Through *Barron*, the Court created the concept of dual citizenship in which an individual is both a citizen of the federal government and the state in which they reside. For most of early American history, the Bill of Rights and the freedoms protected by the Constitution did not apply to the several states. After *Barron*, several cases were brought before the Court as an attempt to find a provision of the Constitution which would allow for the incorporation of personal rights and liberties to the

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[126] U.S. CONST. amend. V.

[127] *Barron v. Baltimore*, 32 U.S. 243 (1833) (establishing the precedent of dual citizenship between the federal government and the state governments).

[128] *Id.* at 248.

states. It was not until the ratification of the Fourteenth Amendment that the Court held that certain rights are incorporated to the states through the Due Process Clause.

The Court originally held that the Fourteenth Amendment did not allow for the incorporation of rights under the decision of *Hurtado v. California* in 1884. In *Hurtado*, the Court held that "[t]ried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."[129] The Court in *Hurtado* first ruled that the Due Process Clause does not incorporate the right of a Grand Jury; and second, held that the Due Process Clause is only a small part of the Bill of Rights and does not justify the inclusion of all amendments because "[t]he Fourteenth Amendment [as was said by Mr. Justice Bradley in Missouri v. Lewis, 101 U.S. 22-31] does not profess to secure to all persons in the United States the benefit of the same law and the same remedies."[130]

Palko v. Connecticut, another pivotal case in the incorporation of rights to the states, held thatDouble Jeopardy is not protected by the Fourteenth Amendment but other rights can be incorporated to the states through the Fourteenth Amendment.[131] *Hurtado* and *Palko* both failed to incorporate the entirety of the Bill of Rights, but instead created the precedent of selective incorporation which is the process the Court reviews issues on a case-by-case basis to determine which rights are

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[129] *Hurtado v. California*, 110 U.S. 516, 538 (1884).

[130] *Id.*

[131] *Palko v. Connecticut*, 302 U.S. 319, 323 (1937) ("We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by states. There is no such general rule.").

protected by the Fourteenth Amendment. While the Court has recently allowed for the incorporation of rights through the Due Process Clause, both the Privileges and Immunities Clause and Equal Protection Clause have since remained dormant in the matter of jurisprudence for personal rights.

XII. Privileges and Immunities Clause

Does the Privileges and Immunities Clause create an equality or substantive argument to rights? Some scholars argue for an equality-focused reading of the Privileges and Immunities Clause, where the clause makes no pronouncements on the types of laws in which a state can enact but rather asserts that the law must be applied equally to all citizens.[132] Conversely, a substantive reading of the clause would mandate certain substantive rights that all states must protect.[133] The substantive view is divided into two main competing versions of how to interpret the Privileges and Immunities Clause. One view holds that the clause refers to the rights which are enumerated and stipulated for within the Constitution. This view essentially would incorporate the entirety of the Bill of Rights to the various states. Another view argues the clause is created to protect states from violating an individuals' natural rights.[134] Under this view, the Court would have the authority to review state actions and judicially discover natural rights, thus completely contradicting the purposes of the Ninth and Tenth Amendments.

A large focus of the Thirty-ninth Congress, the body which drafted the Fourteenth Amendment, was the creation of the Civil Rights Act of 1866. Many members of Congress feared that southern states would subject the newly emancipated slaves to 'Black Codes' and other various forms of restrictions. The Civil Rights Act took the first steps in protecting the rights of emancipated slaves from discrimination based on race, yet there was debate over whether Congress had the authority to enact

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[132] MEESE, *supra* note 6, at 390.

[133] *Id.*

[134] *Id.*

such legislation. In response, John Bingham of Ohio drafted an amendment which granted the federal government authority to regulate discrimination from various state legislatures. Bingham's first draft gave Congress authority to ensure that "no state Shall discriminate between its citizens and give one class of citizens greater rights than it confers upon another."[135]

Former United States Attorney General Edwin Meese argues in favor of five historical reasons that justify why the Privileges and Immunities Clause holds an equality rather than substantive meaning. First, directly preceding the Privileges and Immunities Clause is a definition of both federal and state citizenship. The defining of both federal and state citizenships shows that citizens are protected equally under both governments.[136] Second, Meese notes that the Due Process and Equal Protection clauses both protect against individuals residing in a state, while the Privileges and Immunities Clause protects specifically citizens.[137] Meese takes this distinction to show that the Privileges and Immunities Clause protects a class of people rather than to protect certain individual natural rights. Third, the Thirty-ninth Congress classified the abridgment of an individual's privileges and immunities as "[state] legislation discriminating against classes of citizens"[138] which gave "one man…more rights upon the face of the laws than another man."[139] Fourth, the Framers understood that in Article IV, Section 2 of the United State Constitution, privileges and immunities referred to states protecting the rights of citizens from another state.[140] Finally, when debating the Civil Rights Act of 1875, Congress grounded the provision which forbade racial discrimination in the Privileges and Immunities Clause. When considering John Bingham's early versions of the

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[135] *Id.* at 391.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*

Privileges and Immunities Clause in relation to historical events of the time, it becomes evident that the clause was solely intended to prevent states from withholding rights from certain classes of individuals based on race.

Judge Bushrod Washington wrote in dicta for *Corfield v. Coryell* that "those privileges and immunities which are, in their nature, fundamental; which belong, or right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states… from the time of their becoming free, independent, and sovereign."[141] *Corfield* was not a Supreme Court case, but as an Appellate Court case still held weight in its decision. Washington's remarks never created a binding national precedent, but they opened the door for future case law which protected natural rights through the Privileges and Immunities Clause. Despite these advancements, all hope for a substantive approach to the Privileges and Immunities Clause was lost after the *Slaughterhouse Cases*.

In the *Slaughterhouse Cases*, the Court held the clause protects rights which "owe their existence to the Federal government, its National character, its Constitution, or its laws."[142] The Court went on to detail the rights protected, which generally included rights to contracts and other enumerated rights. The rights that were notably absent from this list were the natural rights which *Corfield* stated the clause protected. In response to the Court's opinion, Robert Bork, former United States Solicitor General and judge on the D.C. Circuit Court of Appeals, noted that the Court interpreted "privileges and immunities as referring to rights already protected elsewhere in the Constitution and thus, in effect, adding nothing."[143] The Court held that the Privileges and Immunities Clause does not include substantive rights, and their inclusion "would constitute

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[141] *Corfield v. Coryell*, 6 F.Cas. 546, 551 (E.D. Pa. 1823).

[142] *Butchers' Benevolent Ass'n v. Crescent City*, 83 U.S. 36, 79 (1873).

[143] ROBERT H. BORK, THE POLITICAL TEMPTING OF AMERICA 37 (The Free Press 1990).

this court a perpetual censor upon all legislation of the States,"[144] in which the Court was "convinced that no such results were intended."[145]

XIII. Equal Protection Clause

The Equal Protection Clause, like the Privileges and Immunities Clause, must be considered in the context of the Reconstruction period. While the Privileges and Immunities Clause mandates that every right is applied to each class of individuals, the Equal Protection Clause requires states to afford every individual the same degree of that right. Under the Equal Protection Clause, states cannot create varying degrees of a right that apply to different class groups. It was this premise that the Court used to invalidate the 'Separate but Equal' doctrine when *Brown v. Board of Education of Topeka* was decided.[146]

While there was little debate over the Equal Protection Clause in the Thirty-Ninth Congress; most commentators agree that the clause was intended to carry a narrow scope to protect emancipated slaves.[147] The Thirty-Ninth Congress created the Civil Rights Act of 1866 in response to fears of Southern oppression of emancipated slaves. Since the Fourteenth Amendment was created to give Congress the constitutional authority to enact the Civil Rights Act, it follows logically that the Equal Protection Clause was intended to prevent race-based discrimination.

After the Court ruled that Privileges and Immunities Clause does not contain a substantive element in the *Slaughterhouse Cases*, the focus turned to the Equal Protection

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[144] *Butchers' Benevolent*, 83 U.S. at 78.

[145] *Id.*

[146] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiff's and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

[147] *Meese, supra note 6, at 399.*

Clause in an attempt to incorporate natural rights to the states. For many years after the *Slaughterhouse* decision, the Equal Protection Clause became the bulwark that protected the Civil Rights Act.[148] However, while early interpretations show that while the Equal Protection Clause was used to validate the Civil Rights Act, the clause itself does not contain substantive value. For "[t]he clause on its face required a fair process, not a fair substance,"[149] with early Fourteenth Amendment jurisprudence relating the Equal Protection Clause solely protected emancipated slaves. When the Court began to review a substantive value, Justice Holms remarked that for substantive natural rights, the Equal Protection Clause is "the usual last resort of constitutional arguments."[150] While some modern commentators argue that the clause was meant to hold substantive value, the Equal Protection Clause has seldom been used in civil rights cases since the adoption of the substantive due process approach.

XIV. Due Process Clause

The idea of due process had existed prior to the Fourteenth Amendment, because of the Fifth Amendment's right to due process on the federal level. Before the Court decided *Scott v. Sandford* in 1857, the idea of due process was seldom the cause of serious constitutional debates.[151] While *Sandford* utilized the substantive due process model, the Court used the clause in a narrow and strict manner, which did not cause a radical shift in the jurisprudence regarding due process. The Court drafted a cryptic opinion that held that a statute which freed any slave brought to a free state by their master "could hardly be dignified with the name of due process of law."[152]

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[148] *Id.* at 400.

[149] BORK, *supra* note 143, at 64.

[150] *Buck v. Bell, 274 U.S. 200, 208 (1927*).

[151] MEESE, *supra* note 6, at 395.

[152] *Scott v. Sandford*, 60 U.S. 393, 450 (1857) (holding "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the

While *Sandford* utilized the Due Process Clause to invalidate the Missouri Compromise, the Court did not extend substantive value to other rights at the time.

While *Sandford* opened the door for a broader use of substantive due process, the Court rejected this model in 1884 when the Court held in *Hurtado* that the Fourteenth Amendment's Due Process Clause held no substantive value.[153] The Court maintained this precedent until the beginning of the Lochner Era in 1905. In *Lochner*, the Court held that "[t]he general right to make a contract in relation to [an individual's] business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[154] The Lochner Era saw the Court use substantive due process to protect economic interests from government infringement. While *Lochner* was not used to protect substantive personal rights, the Court used the Due Process Clause to invalidate legislation that was viewed as a restriction on an individual's economic liberty. The Court once again rejected the notion of substantive due process for personal rights and liberties in 1937 when *Palko* failed to incorporate the entirety of the Bill of Rights to the states.

United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.").

[153] *Hurtado v. California*, 110 U.S. 516, 535 (1884) ("Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon congress by the constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the fourteenth amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The fourteenth amendment,' as was said by Mr. Justice BRADLEY in *Missouri v. Lewis*, 101 U.S. 22-31, 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding.'").

[154] *Lochner v. New York*, 198 U.S. 45, 53 (1905).

However, in 1938 the Court took a radical shift in Fourteenth Amendment jurisprudence by fully accepting a view of substantive due process to protect the personal rights and liberties of individuals. In considering the ability of the Due Process clause to protect substantive rights, the Court held that " prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[155] The Court in *Carolene's* famous Footnote 4 established the precedent of using the Due Process Clause to protect the rights of minorities that have been infringed upon by the legislatures. However, Robert Bork's comments on *Carolene* and the dangers that it possesses to a democracy shows that it is improper for the judiciary to review the prejudicial acts against a minority. Bork argues that the Court cannot know when an act is truly prejudicial and when an act is created out of reason and morality.[156] Bork believes that "Stone's formulation in Footnote four means nothing more than that the Justices will read into the Constitution their own subjective sympathies and social preferences."[157]

Bork's fears of judicial activism remain pertinent, with the Court in recent years expanding upon the Due Process Clause to protect a multitude of personal rights. After the Warren and Burger courts, the Court has seen a rapid shift towards the nationalization of personal rights stemming from the adoption of the substantive due process model. When speaking on this model, it is noted that "[t]he fundamental-rights notion reflects once again the incessant quest for the judicial holy grail; perhaps at long last we have discovered a clause that lets us strike down any law we do not like."[158] In recent decades, the

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[155] *United States v. Carolene Products Company*, 304 U.S. 144, 155 (1938).

[156] BORK, *supra* note 143, at 60.

[157] *Id.* at 61.

[158] *Id.* at 39.

Court has increasingly struck down legislation that they find to be prejudicial or without valid reason. This expansion of judicial authority into substantive rights ends the legislature's deference in creating policy by usurping the legislative will with that of judicial despotism. For "[t]he truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else."[159]

Arguably, the largest modern use of the substantive due process model came from *Griswold v. Connecticut*, in which the Court used the Due Process Clause to justify the existence of the unenumerated right to privacy.[160] *Griswold* was later used as justification for the Court's decision in *Roe v. Wade*, in which the Court created an individual's constitutional right to an abortion.[161] While the Court has recently allowed for the Due Process Clause to hold substantive protections, the Framers intended a clause in which protected only procedural rights.

In 1787, Alexander Hamilton gave a speech to the New York General Assembly, where he argued that "[n]o man shall be disenfranchised or deprived of any right, but by 'due process of law', or the judgment of his peers. The words 'due process of law' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can

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[159] ROBERT H. BORK, TRADITIONS AND MORALITY IN CONSTITUTIONAL LAW (AEI Press 1984).

[160] *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be seizure in their persons, house, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'").

[161] *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right to personal privacy includes the abortion decision…).

never be referred to an act of legislature."[162] To Hamilton, the term 'due process' implied a strict technical interpretation that was solely intended to protect court proceedings. Hamilton argued persuasively that the term 'due process' would remove any doubt that the provision was meant to address the proceedings of the courts.[163] Hamilton greatly influenced the views of Madison and the other Framers, as Hamilton's view of the Due Process Clause became the accepted view at the time of ratification.[164]

The Framers' view of the Due Process Clause derives from common law understandings of due process. The idea of due process "descended from the Magna Carta's guarantee that no freeman should be deprived of his liberty except by the law of the land."[165] It was therefore believed that due process was satisfied when the government proceeded "according to written constitutional and statutory provisions as interpreted by court decisions."[166]

Early common law understandings of due process derived from the Magna Carta, and its application to British law was greatly influenced by the work of Sir Edward Coke. Coke was a respected lawyer and served as the Chief Justice of the Court of Common Pleas, where he became the most influential legal theorist in England. Coke's views were those accepted by the Framers at the time of ratification. Coke believed that "due process of law meant accordance with regularized common law procedures,"[167] meaning that the focal point of due process was in regard to the process of court proceedings. George Tucker additionally noted that "[d]ue process of law as described by Sir Edward Coke, is by indictment of presentment of good and

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[162] THE PAPERS OF ALEXANDER HAMILTON 34-37 (Harold C. Syrett ed., Columbia U. Press 4th vol. 1961).

[163] PETER G. RENSTROM, THE CONSTITUTIONAL RIGHTS SOURCEBOOK 266 (ABC-CLIO Inc. 1999).

[164] *Id.* at 266.

[165] BORK, *supra* note 143, at 32.

[166] *Id.* at 32.

[167] LEVY, *supra* note 63, at 273.

lawful men, where such deeds be done in due manner, or by writ original of common law."[168]

Both Tucker and Coke maintain that due process guarantees that the legal process must be established and applied equally to everyone. The Due Process Clause by—Coke's definition—does not afford substantive rights, but protects individuals from the government ignoring established legal standards. Former Supreme Court Justice Antonin Scalia argued for a view of the Due Process Clause that conforms to the views of Coke and Tucker. For Scalia,

"[I]t may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the process that our traditions require-notably, a validly enacted law and a fair trial."[169]

Scalia also correctly points out that the government can take and deprive citizens of their property, liberty, and their life as long as the government follows the due process of law.

This view of due process was the accepted view in 1868 when the Fourteenth Amendment was drafted and ratified. On the floor of the Thirty-Ninth Congress, John Bingham was questioned about the principle meaning of 'due process of law'. Bingham responded by stating that "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions."[170] Prior to the creation of the Fourteenth Amendment, the Court only reviewed the concept of due process on two occasions. While *Sandford* temporarily allowed for a

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[168] TUCKER, *supra* note 59, at 148.

[169] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24-25 (Princeton U. Press 1998).

[170] Michael W. McConnell, *Panel on Originalism and Unenumerated Constitutional Rights*, *in* ORIGINALISM: A QUARTER CENTURY OF DEBATE 113, 133 (Steven G. Calabresi ed., Regnery Publishing Inc. 2007).

substantive reading of due process, previous case law awarded no substantive value to the Fifth Amendment's Due Process Clause and was accepted as the true interpretation of due process by Bingham. In 1856 the Court heard the case *Murray's Lessee v. Hoboken Land* and defined aspects of due process. In *Murray's Lessee* the Court determined that due process refers to the process or "modes of proceeding" of a legal case.[171] Judge Michael McConnell observed that *Murray's Lessee* established that due process is established first by the constitutional language, and second by the "settled usages and modes of proceeding."[172] *Murray's Lessee* established that due process was intended to protect an individual from unfair judicial processes. This interpretation of due process was additionally accepted in *Hurtado*, when the Court claimed "[t]he better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice."[173]

Since *Barron v. Baltimore*, the question of whether or not the Constitution protected unenumerated substantive rights has been challenged and reviewed by the Court. Early interpretations of the Privileges and Immunities Clause and the Equal Protection Clause both failed to provide substantive rights to the residents of the several states. Both clauses were interpreted and created to ensure that individuals were not treated differently under the law and that every citizen was afforded the same degree of a right. Likewise, Common Law understandings of due process at the time of the ratification of the Constitution and the Fourteenth Amendment show that due process protects legal proceedings and not an individual's substantive rights. Both George Tucker and Sir Edward Coke acknowledge that due process protects the "modes of

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[171] *Murray's Lessee v. Hoboken Land and Improvement Company*, 59 U.S. 272, 277 (1856) ("We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England…").

[172] McConnell, *supra* note 170, at 134.

[173] *Hurtado v. California*, 110 U.S. 516, 527 (1884).

proceedings" of a judicial case.[174] However, the understanding of due process that was accepted by the Framers has rapidly changed in the last several decades to contain substantive rights that the Due Process Clause was not intended to protect.

XV. Conclusion

In recent decades, the Supreme Court has expanded their authority over unenumerated rights beyond the scope of the original intent of judicial power. This essay aimed to analyze how the judiciary has expanded their authority by first examining where judicial power derives, and then by studying the original intent of the Ninth, Tenth, and Fourteenth Amendments. By analyzing the writings of the Founding Fathers, the original intent of Judicial Power can be determined to be more limited than is currently accepted by the Court.

The traditional view of judicial authority focused on legislative deference and the removal of the judiciary from political questions. Chief Justice Marshall cautioned the Court against becoming a political entity that ruled upon questions of morality and ethics. Likewise, the traditional view of the Ninth Amendment favored the state governments' ability in regulating natural law. The Ninth Amendment was drafted to limit the scope of the federal government by preventing Congress from assuming unenumerated power through the Necessary and Proper Clause. Madison maintained this as the purpose of the Ninth Amendment and never advocated for the ability of the Court to judicially discover unenumerated natural rights.

Likewise, the Tenth Amendment was drafted to compliment the Ninth Amendment. While the Ninth Amendment ensured that the federal government cannot assume unenumerated power, the Tenth Amendment ensures that all powers not enumerated to the federal government are retained

[174] *Murray's Lessee*, 59 U.S. at 276–77 ("The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

by the various states. The writings of George Tucker and the Framers show the states retained authority to define personal rights and liberties. Even though the Warren and Burger courts have nationalized personal rights and liberties in recent decades, the Framers intended for the states to retain authority to define and regulate rights.

Since the Court in *Barron v. Baltimore* created the precedent of dual citizenship, the Court had continuously reviewed cases with the intent to incorporate the Bill of Rights to the states. After the ratification of the Fourteenth Amendment, the Privileges and Immunities Clause, Due Process Clause, and Equal Protection Clauses were all reviewed for substantive protections. Both the Privileges and Immunities Clause and the Equal Protection Clause were created to ensure that all individuals received the same protections of their rights, and that the government did not afford less protections to certain classes of citizens. Similarly, the Due Process Clause was intended to protect the judicial process and court proceedings. However, the emergence of the substantive due process model in the 1930s has allowed the Court to become the primary political actor in defining and discovering personal rights and liberties.

The Court has expanded far beyond its original authority and has taken an active role in resolving political issues within our society. Whether or not these substantive rights should be protected, there is danger in allowing the Court to create them. In a republic, the power to create policies is meant to be left to the people to vote upon and to allow the public to repeal policies that are no longer favorable. Through judicial activism, our society is no longer controlled by the democratic will of the legislature, but rather subjected to judicial despotism. John Marshall warned against the Court expanding their power into political issues when he warned that the Court "must never forget that it is a constitution we are expounding."[175]

[175] *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

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